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CALIFORNIA REPORTER

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SERVICE et al. v. BEDROS. (Sac. 2738.)

(Supreme Court of California. June 9, 1919.)

1. APPEAL AND ERROR 🔑901—BURDEN TO SHOW ERROR.

The burden is upon appellant to show that there has been a miscarriage of justice to justify a reversal.

2. PRINCIPAL AND AGENT 🔑129—CONTRACT BY AGENTS—IRRIGATION DITCH.

Where two plaintiffs verbally agreed with defendant's predecessor and with other plaintiffs that a ditch should be constructed through defendant's land, through that of the other plaintiffs, and through that of the two plaintiffs, in order, defendant cannot interfere with the ditch on the ground that the agreement was made by defendant's predecessor with the two plaintiffs first specified, and not with the other plaintiffs; the first two plaintiffs having acted as agents for all in securing from defendant's predecessor the right to construct the ditch.

Department 2.

Appeal from Superior Court, Stanislaus County; W. H. Langdon, Judge.

Action by John Service and others against K. Bedros. From judgment for plaintiffs, defendant appeals. Affirmed.

Joseph M. Cross and Francis O. Hoover, both of Modesto, for appellant.

Hawkins & Hawkins, of Modesto, for respondents.

WILBUR, J. Respondents brought an action against the appellant to prevent him from interfering with a certain ditch furnishing water for irrigation of respondents' land, which ditch runs through the appellant's land. This ditch, about 10 feet wide at the bottom and 5 feet deep, had been constructed by Maze and Wren about 15 years before this action was brought, for the purpose of conducting water from lateral No. 3 of the Turlock irrigation district to a colony tract belonging to Maze and Wren, and ran through the land of the several respondents. In order to procure rights of way for said ditch, Maze and Wren entered into a verbal agreement with appellant's predecessor and with the several respondents. The respondents gave the right of way for said ditch through their property below the lands of the appellant and above the lands of Maze and Wren, and co-operated in the construction of the ditch, upon consideration of their being allowed to use the ditch for the purpose of conducting irrigating water to and upon their own lands. Maze and Wren paid Mollard, the then owner of the Bedros land, $120 for the right of way and in consideration of Mollard enlarging the ditch and extending the same about 100 feet. In pursuance of this arrangement the ditch was constructed, and for more than 15 years the water has flowed across the land of the appellant to and through and sometimes upon the lands of the various respondents.

Respondents base their claim to the ditch upon the executed oral agreement. Mollard, it should be noted, after having sold the land now owned by Bedros, title to which has vested in the latter by mesne conveyances, purchased or theretofore owned one of the pieces of property below the Bedros land irrigated from the ditch in question. Appellant contends that the agreement made by Mollard does not make the tenement owned by him a servient one, for the reason that in the agreement in question no dominant estate is pointed out, and that Bedros, at the time he purchased, had no notice or knowledge of the rights of the respondents. The portion of the record printed by the appellant in his brief is very meager. In the opening brief, while in the statement of facts appellant inserts frequent parenthetical references to the typewritten transcript, only one short excerpt of 25 lines from the testimony is printed, and this consists of quotations from the testimony of Mollard with relation to his agreement with Maze and Wren.

The quotation, taken alone, is unintelligible, as there is nothing to show the connection of Maze and Wren with the various parties to the transaction. No portion of the pleadings, findings, or judgment is printed in the opening brief, and in appellant's reply brief, after his attention had been called by respondents to the statutory requirement that parties must print in their briefs "such portions of the record as they desire to call to the attention of the court" (section 953c, Code Civ. Proc.), he contents himself, so far as the judgment roll is concerned, with the following quotation from the findings:

> "That the plaintiffs were at all times mentioned in the complaint and are now the owners of a certain irrigating ditch and the right of way therefor situated," etc.

In the reply brief appellant also prints testimony indicating that Foster had never used any water from the ditch except for watering stock; that Service never used any of the water to irrigate with; that Carter never used any water from the ditch on his land; that Mollard never used any of the water to irrigate his land east of the ditch; and that Farr never used any of the water for irrigation purposes. The typewritten transcript contains 176 pages.

[1] The burden is upon the appellant to show that there has been a miscarriage of justice, in order to justify a reversal of this case. Instead of that, it is fairly apparent that he is seeking to take advantage of the fact that the parties wrote their agreement on the ground instead of on paper.

[2] The principal contention of the appellant is that the agreement relied upon by respondents was made by the appellant's predecessors with Maze and Wren, and not with respondents. That portion of the record printed in the briefs does not make the situation clear, but an inspection of the typewritten transcript, the findings and opinion of the trial court, discloses the fact that Maze and Wren, so far as the rights of the parties to this case are concerned, were the agents of all of the parties, securing from Mollard the right to construct the ditch and to supply water to the lands below, and communicated that consent to the owners of the lands below, who, for the purpose of securing the benefits promised by Mollard, joined in the construction of the ditch and gave the right of way through their respective premises. There is nothing in the proposition advanced by appellant that the dominant estate was not sufficiently indicated by the agreement, for Mollard testified that it was his understanding that the water was to be used upon the particular parcels of land then owned by the respondents or their predecessors. These lands were identified at that time merely by the names of the owners, their contiguity to the ditch, and their location below the land of Bedros. They are, however, identified in the complaint, findings, and judgment by complete description. The court does not specifically find that Maze and Wren were the agents of the various parties for the purpose of securing the rights of way and constructing this ditch, but in finding 7 the relation of Maze and Wren to the parties to the transaction is fully set forth. This finding is not printed in the briefs, and we need not incorporate it here, but it is fully justified by the evidence. There is no merit in the point that Bedros had no notice of the rights of the respondents. Pollard v. Rebman, 162 Cal. 633, 124 Pac. 235.

We agree with the statement of the trial judge contained in his opinion set out in the typewritten transcript, as follows:

> "It would be an exceedingly technical construction of the law that would deprive Service, Foster, and others of the use of this ditch under the circumstances of this case."

While we would be justified in affirming the judgment of the trial court on the ground that, by the meager and confusing portions of the evidence and record in the briefs, appellant has failed to show any miscarriage of justice, we are satisfied from an examination of the typewritten transcript that there has been no miscarriage of justice.

The judgment is affirmed.

We concur: LENNON, J.; MELVIN, J.

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180 Cal. 523

CHRISTERSON v. FRENCH. (L. A. 4782.)

(Supreme Court of California. June 9, 1919.)

1. Pleading 🔑199, 360(2) — Demurrer — Motion to Strike—Time for Filing—Default.

In action for damages for breach of covenant where default was entered upon defendant's failure to answer within required time, the filing of demurrer and motion to strike subsequent to entry of default and prior to entry of judgment did not affect clerk's ministerial duty to enter judgment; he having no discretion in the matter and having duty under Code Civ. Proc. § 585, subd. 1, of entering judgment immediately after default.

2. Judgment 🔑111 — Default — Effect.

A defendant against whom a default is entered is out of court and is not entitled to take any further steps in the cause affecting plaintiff's right of action.

3. Judgment 🔑18(2)—Validity of Judgment—Sufficiency of Complaint.

A judgment is not void if the court has jurisdiction of the parties and the subject-matter, irrespective of whether the complaint states a cause of action, so long as it apprises defendant of the nature of plaintiff's demand.

4. Executors and Administrators 🔑222(2) — Claims Against Estate — Vacated Judgment.

Where judgment against defendant was erroneously set aside, plaintiff was not required, upon defendant's death, to present claim to estate for allowance under Code Civ. Proc. § 1502; the action not pending at such time, and plaintiff's rights being covered by section 1505.

5. Judgment 🔑174 — Default — Erroneous Vacation—Effect.

Where default judgment was erroneously vacated and set aside, the case, as far as plaintiff's rights are concerned, stands as if judgment had never been disturbed; for, unless default is set aside in a proper proceeding, it is the court's duty to immediately render another judgment of like effect.

Department 1.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by J. E. Christerson against William D. French, as administrator of the estate of L. B. French, deceased. From an order setting aside a judgment entered by default against L. B. French, plaintiff appeals.

Reversed, with directions to re-enter judgment.

Frank C. Hoyt, Henry Wetherhorn, and Charles J. Kelly, all of Los Angeles, for appellant.

Haas & Dunnigan, Robert T. Linney, and Gordon L. Finley, all of Los Angeles, for respondent.

LAWLOR, J. This is an appeal by the plaintiff from an order setting aside a judgment entered by default against L. B. French. The plaintiff agreed to purchase, and L. B. French agreed to sell, a certain tract of land in Los Angeles county. French covenanted to pipe water to the said land for domestic and irrigating purposes. This, it was alleged, he failed to do, and upon the breach of the covenant this action was brought by the plaintiff to recover damages in the sum of $5,800, together with costs.

On July 17, 1915, L. B. French (who died on May 17, 1916) was personally served with complaint and summons. On July 28, 1915, at 10 a. m., upon the failure of the defendant to answer, and the time within which to answer having expired, the clerk of the court, upon the application of the plaintiff, entered the default of the defendant, and on August 2, 1915, entered judgment in accordance with the prayer of the complaint. Between the entry of the default and the entry of the judgment, namely, on July 28, 1915, at about 11 a. m., the defendant served and filed in the clerk's office a demurrer and notice of motion to strike out.

On March 14, 1916, the defendant served and filed his notice of motion to vacate the default and to set aside the judgment. The court refused to vacate the default, but did set aside the judgment upon the ground that—

> "The clerk did not have any jurisdiction on the 2d day of August, 1915, to enter the said judgment because of the fact that said demurrer and said motion to strike out were on file in said action and undisposed of."

1. Respondent contends that the judgment is void because the clerk had no authority to enter it. Subdivision 1 of section 585, Code of Civil Procedure, provides:

> "In an action arising upon contract for the recovery of money or damages only, if the defendant has been personally served and no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount demanded in the complaint, including the costs, against the defendant, or against one or more of several defendants, in the cases provided for in section four hundred and fourteen."

[1] This being an action based on contract for the recovery of damages only, the case comes clearly within the provisions of this subdivision. The respondent does not question this; but, admitting that the default was entered before his demurrer and motion to strike out were filed, he urges that the filing of the demurrer and motion to strike out raised a question of law for the court to decide, and that the clerk, therefore, had no authority to enter the judgment. This contention is without merit. In the matter of entering judgment the clerk had no discretion; but, having entered the default, he was bound under the said subdivision to enter judgment "immediately thereafter." The fact that he did not enter judgment "immediately thereafter" in no way prejudiced the rights of the plaintiff and conferred no right on the defendant, whose default had been regularly entered. Edwards v. Hellings, 103 Cal. 204, 37 Pac. 218; Beck v. Pasadena Water Co., 130 Cal. 50, 62 Pac. 219.

[2] A defendant against whom a default is entered is out of court and is not entitled to take any further steps in the cause affecting plaintiff's right of action. Drake v. Duvenick, 45 Cal. 456; Lunnun v. Morris, 7 Cal. App. 710, 95 Pac. 907; Bowers v. Dickerson, 18 Cal. 420; Title Ins. Co. v. King, 162 Cal. 44, 120 Pac. 1066; Green v. Rogers, 18 Cal. App. 572, 123 Pac. 974. It follows then that the filing of the demurrer and the motion to strike out after the default had been entered did not suspend the ministerial duty of the clerk to enter the judgment. The clerk was bound to receive and file these pleadings, although they could have no legal effect.

[3] 2. The respondent contends further that the judgment is void because the complaint fails to state a cause of action. It is well established that a judgment is not void if the court has jurisdiction of the parties and of the subject-matter, irrespective of whether the complaint states a cause of action or not, so long as it apprises the defendant of the nature of the plaintiff's demand. Blondeau v. Snyder, 95 Cal. 521, 31 Pac. 591; Mayo v. Ah Loy, 32 Cal. 477, 91 Am. Dec. 595; In re James, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60; Canadian, etc., Co. v. Carlita, etc., Co., 140 Cal. 672, 74 Pac. 301; Brush v. Smith, 141 Cal. 466, 75 Pac. 55; Crouch v. Miller, 169 Cal. 341, 146 Pac. 880; Gillespie v. Fender, 180 Pac. 332; Cal. Casket Co. v. McGinn, 10 Cal. App. 5, 109 Pac. 1077, 1079. We think the complaint herein sufficiently states a cause of action to inform the defendant of the nature of the claim against him and to give the court jurisdiction of the cause.

[4, 5] 3. The respondent makes a further objection that no judgment can be entered or reinstated in this case because the plaintiff's claim was not presented to the estate for allowance. It is his position that,

the judgment having been set aside, the action is still pending within the meaning of section 1502 of the Code of Civil Procedure, and that, as the appellant did not file his claim against the estate, no judgment can be rendered or re-entered in his favor. The appellant contends, on the other hand, that this is not an action pending at the time of the death of the decedent, but that the judgment had been rendered in the action during his lifetime, and that no claim could be presented to the estate of a person while he himself was in esse, and that this brings the case within the provisions of section 1505 of the Code of Civil Procedure. In our view, the fact that the judgment having been rendered in the lifetime of the decedent the case comes within the provisions of section 1505. The judgment was erroneously vacated and set aside, and, so far as the rights of the appellant are concerned, the case stands as if it had never been disturbed; for until the default is set aside in a proper proceeding it is "the duty of the court immediately to render another judgment of like effect." Title Ins. Co. v. King, supra.

The order appealed from is reversed, with directions to the court to re-enter the judgment.

We concur: SHAW, J.; OLNEY, J.

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180 Cal. 546

WILLIAMS v. MacDONALD et al.
(L. A. 6075.)

(Supreme Court of California. June 12, 1919.)

1. JUDGMENT ⚷562—BAR—MERITS.

A judgment to operate strictly as a bar to a subsequent action must have gone to the merits of the subsequent action.

2. JUDGMENT ⚷587 — CONCLUSIVENESS — ISSUES DECIDED—FORM OF ACTION.

Where, in an action on an express contract for dental services defended on ground that work was not done at her request or that it was of any value, court adjudged that work was done so carelessly as to be worthless, such judgment was a bar to an action for reasonable value of such services.

In Bank.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Frank A. Williams against Annie MacDonald and another. Judgment for defendant named, and plaintiff appeals. Affirmed.

J. W. Hocker and Robert E. Austin, both of Los Angeles, for appellant.

Anderson & Anderson and T. G. Anderson, all of Los Angeles, for respondent.

OLNEY, J. This is an action to recover the reasonable value of dental services rendered the defendant by the plaintiff.

The complaint alleges in brief that the plaintiff is a licensed and practicing dentist, that at the request of the defendant and upon her promise to pay the reasonable value thereof, he performed certain dental work for her, that such work was of the reasonable value of $550, and that plaintiff has not been paid.

The answer of the defendant denied that the work was done at her request or that it was of any value. It also set up that the plaintiff had brought a previous action against the defendant on the same demand, and that after trial final judgment had gone against the plaintiff.

On the trial in this action the judgment roll in the former action between the parties was introduced in evidence. It showed that the plaintiff had commenced an action to recover, not the reasonable value of, but the agreed price for the same dental work, that the defendant answered, denying that any contract was made or that the work was of any value, that a trial was had, and that judgment was rendered in favor of the defendant.

Upon this showing and without evidence other than the judgment, the lower court directed judgment for the defendant in the present action. From this judgment the plaintiff appeals.

The plaintiff contends that the first action was one upon a contract for an agreed price, that the second and present one is upon a contract for the reasonable value of the work, that the two causes of action are not the same, and that the judgment against the plaintiff in the first is not a bar to the maintenance of the second. This is the plaintiff's sole contention.

[1] If the fact were that judgment went against the plaintiff in the first action on the sole ground that there was no contract for the work at an agreed price, or even if the fact were that the judgment might have gone against him on that ground alone and the judgment roll did not show the contrary, it might well be that the plaintiff's contention would be correct. A judgment in order to operate strictly as a bar to a subsequent action must have gone to the merits of the subsequent action. This is the full extent of the doctrine of such cases as Taylor v. Castle, 42 Cal. 367; South San Bernardino, etc., Co. v. San Bernardino Bank, 127 Cal. 245, 59 Pac. 699, and Heilig v. Parlin, 134 Cal. 99, 66 Pac. 186, cited on behalf of the plaintiff. If, for example, the plaintiff has mistaken his legal remedy or the proper form of action, and judgment goes against him for that reason, the judgment is no bar to a second action rightly brought.

On the other hand, if the judgment roll shows that the judgment did go to the merits of the second action, either in regard to some matter which the plaintiff must make out in order to entitle him to a recovery, or in regard to some affirmative defense, which is a defense to the second action as well as to the first, then the judgment is a bar. Toomy v. Hale, 100 Cal. 172, 34 Pac. 644; Reed v. Cross, 116 Cal. 473, 485, 48 Pac. 491; Green v. Thornton, 130 Cal. 482, 62 Pac. 750; Lamb v. Wahlenmaier, 144 Cal. 91, 77 Pac. 765, 103 Am. St. Rep. 66; Koehler v. Holt, etc., Co., 146 Cal. 335, 80 Pac. 73; Estate of Harrington, 147 Cal. 124, 81 Pac. 546, 109 Am. St. Rep. 118.

[2] In the present case the judgment roll in the first action shows that a defense, good as to the second action as well as to the first, was presented by the pleadings in both actions, passed upon by the court in the first, and there determined in favor of the defendant and against the plaintiff. In response to a defense specially pleaded, the court found that the plaintiff's work had been done in so careless and negligent a manner as to be worthless to her. This fact, if true, was a good defense, not only to the first, but to the second action, and its truth having been established as a finality between the parties, the judgment so establishing it is a bar to the second action, or, possibly putting it more accurately, although the difference is here immaterial, is a final and conclusive defense to the second action.

Plaintiff's counsel in support of his position quotes the following from Phelan v. Quinn, 130 Cal. 374, 378, 62 Pac. 623, 624:

> "Respondent correctly states the rule that in order to constitute matter res judicata there must be certain enumerated existing identities. Mr. Freeman is cited to the effect that a judgment is conclusive only upon the issues tendered by the plaintiff's complaint. Freeman on Judgments (4th Ed.) § 249; 2 Black on Judgments, §§ 731–733; Lillis v. Emigrant Ditch Co., 95 Cal. 558 [30 Pac. 1108]; Cromwell v. County of Sacramento, 94 U. S. 353 [24 L. Ed. 195]. The test is also claimed to be: 'Would the same evidence support and establish both the present and former action?' If so, it is conceded the former recovery would be a bar; if otherwise, it does not stand in the way of the second action (citing Freeman on Judgments, § 259; 2 Black on Judgments, § 726; Taylor v. Castle, 42 Cal. 367)."

In Phelan v. Quinn the cause of action involved in the second action was very clearly the same as that involved in the first, and the court so held. The decision itself, therefore, does not immediately touch the point here. It may be worth while, however, to discuss briefly the two references to Freeman. It is said:

> "Mr. Freeman is cited to the effect that a judgment is conclusive only upon the issues tendered by the complaint."

But this is not what Mr. Freeman said. He was discussing the question as to when an issue is deemed to be concluded by a judgment, even though such issue was not actually made in the first action. His language is (section 249):

> "The general expression, often found in the reports, that a judgment is conclusive of every matter which the parties might have litigated in the action is misleading. What is really meant by this expression is that a judgment is conclusive upon the issues tendered by the plaintiff's complaint."

This language has no reference to the case of an issue tendered by the answer as distinguished from the complaint. That Mr. Freeman has no such distinction in mind is evident from his language a few sentences later when in summing up his discussion he says:

> "*Neither* party can decline to meet an issue tendered by the other, and then maintain that it has not become res judicata."

As to the test, "Would the same evidence support and establish both the present and the former action?" It is necessary only to point out that the issue here adjudicated was one tendered by the answer by way of defense, and not one tendered by the complaint. Such defense would be supported and established by exactly the same evidence both in the present and in the former action. The test is one which in principle is as applicable to an affirmative defense as to the issues tendered by the complaint. It was certainly very far from Mr. Freeman's intention to say that an affirmative defense once litigated and determined between the parties is not conclusive between them, and yet this is necessary if the language referred to is to be taken as supporting the plaintiff's position.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; LAWLOR, J.; WILBUR, J.; MELVIN, J.

180 Cal. 566

WERINGER v. RUTLEDGE. (L. A. 4650.)

(Supreme Court of California. June 14, 1919.)

1. TRIAL 🔑253(3)—INSTRUCTIONS—AGREED BOUNDARY LINE.

Instructions, in an ejectment suit, relative to an agreed boundary, which failed to contain the necessary element that there must be uncertainty as to the true line before coterminous owners can agree upon a boundary, *held* erroneous.

2. NEW TRIAL 🔑71—GROUNDS—POWER OF TRIAL COURT.

It is the duty of the trial judge to grant a new trial whenever he is not satisfied with the verdict if tried by a jury, or with the findings if tried by the court, and he is not bound by the rule of conflicting evidence.

Department 1.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Ejectment by Joseph Weringer against F. A. Rutledge. Judgment for defendant on a verdict, a new trial was granted, and defendant appeals. Order affirmed.

Thomas Scott, of Bakersfield, for appellant.

Kaye & Siemon, Alfred Siemon, and W. W. Kaye, all of Bakersfield (Henry Harmeling, of Bakersfield, of counsel), for respondent.

LAWLOR, J. This is an action in ejectment brought by the plaintiff against the defendant in which the controversy was over a disputed boundary line. The case was tried by jury, a verdict rendered in favor of defendant, and judgment entered accordingly. Thereafter the plaintiff moved for a new trial, which was granted, and the defendant appeals.

The defendant answered plaintiff's complaint, denying the allegations thereof, and for further defense alleged that the predecessor in title of plaintiff, and the defendant, being coterminous owners, agreed upon a boundary between their adjoining lands. In his cross-complaint the defendant alleged that he and his predecessors in interest had been in the actual, exclusive, and adverse possession of the land in question for more than five years prior to the commencement of the action, and that they had paid all taxes thereon.

Mary A. Rutledge conveyed by deed to Eugenia M. Hooper, on May 30, 1893, a tract of land, being a portion of the land now in dispute, upon the southern boundary of which there was constructed by Eugenia M. Hooper a wooden building 32 feet long by 22 feet wide, wherein has been conducted ever since a general store; a portion thereof being used for many years as a United States post office. During 1893 a well was sunk to obtain water for domestic purposes, the well from that time having been in continual use. The defendant testified that in 1895 or 1896 he went into possession of the land and continued in possession until the commencement of this action. The deed conveying the land from Eugenia M. Hooper to the defendant bears date of February 7, 1898.

The plaintiff alleges that the disputed boundary line runs about 1 foot and 3 inches north of the northeast corner of the store, directly east and west, which puts the store and well upon the strip of land in controversy. The defendant alleges that the true line runs several feet south of the store, and that the disputed line was established by him and his coterminous owner approximately 38 feet from where plaintiff claims it runs, and that this was done in 1896 or 1897.

A general verdict was rendered in favor of the defendant that he was the owner in fee simple of the land in question. A special verdict was also rendered by which the jury found that the defendant had agreed upon a boundary with the predecessor in interest of plaintiff, one Joseph Julian, and that the parties fixed their boundary line at a point 38 feet south of the line between sections 3 and 34 established by the government survey.

In ordering a new trial the court did not state the grounds on which the motion was granted. However, the notice of intention to move for a new trial, and the exceptions in the bill of exceptions, show that the motion was made on the grounds of errors of law occurring at the trial and insufficiency of the evidence.

1. The plaintiff has reserved some 26 exceptions as to the admissibility of certain evidence. We have carefully examined the record touching these exceptions and find that they are without merit. No useful purpose would be served by specifically mentioning or discussing any of them.

[1] 2. Exceptions 27, 28, and 29 are addressed to instructions 1, 2, and 3. The plaintiff contends the jury was told, in effect, that a mere agreement was all that was necessary to make the transaction valid, and that the requirement of uncertainty as to the true boundary as a basis for such an agreement was omitted. It was said in Clapp v. Churchill, 164 Cal. 741, 130 Pac. 1061:

> "The doctrine of an agreed boundary line and its binding effects upon the coterminous owners rests fundamentally upon the fact that there is, or is believed by all parties to be, an uncertainty as to the location of the true line."

The instructions in question do not contain the necessary element that there must be uncertainty as to the location of the true line before the coterminous owners can agree upon a boundary. This omission rendered the instructions erroneous, and it will serve no useful purpose to touch upon the other objections to them.

3. The plaintiff claims that the evidence is insufficient to support the verdict. He contends that the defendant knew that the line he claims to have agreed upon with Julian was not the true one, that the true line was known to the defendant, and that the record shows there was no uncertainty in relation to the true line. The pleadings of the defendant show that the agreement fixing the boundary was based upon and made with reference to the line as established by the government survey. As to the uncertainty of the true line, the county surveyor, a witness on behalf of the plaintiff, testified:

> "Many of the monuments that were necessary to run accurate lines and make an accurate survey concerning the land in question have been obliterated or destroyed. I do not think that any one can tell within 25 or 30 feet where the dividing line really is between the lands in dispute."

[2] In Condee v. Gyger, 126 Cal. 546, 59 Pac. 26, it was said:

> "It is the duty of the judge of the trial court to grant the new trial whenever he is not satisfied with the verdict, if tried by a jury, or with the findings, if tried by the court; * * * and he is not bound by the rule as to conflicting evidence as is this court."

See, also, Churchill v. Flournoy, 127 Cal. 355, 59 Pac. 791; Byxbee v. Dewey, 128 Cal. 322, 60 Pac. 847; Green v. Soule, 145 Cal. 96, 78 Pac. 337; Estate of Motz, 136 Cal. 560, 69 Pac. 294; and Shilling v. Dodge, 22 Cal. App. 517, 135 Pac. 299.

The evidence as to the boundary lines was in sharp conflict, and in the face of this conflict we may assume, in the absence of any specified ground for the order granting a new trial, that in weighing the evidence the court was not satisfied with the verdict of the jury. The order must stand. Hitchcock v. Rooney, 171 Cal. 285, 152 Pac. 913.

Order affirmed.

I concur: OLNEY, J.

SHAW, J. I concur in the opinion of Justice LAWLOR and in the judgment of affirmance. But the instructions numbered 1, 2, and 3 would not be full or complete with the addition of the single statement that the parties must be uncertain as to the location of the true line at the time they agree upon a line between the lands occupied by them, respectively. The instructions lacked other elements essential to such a fixing of the boundary and to the proper information of the jury. There should be no difficulty in framing a correct and full instruction on the subject. The law has been the subject of many decisions and will be found fully stated in Schwab v. Donovan, 165 Cal. 363, 132 Pac. 447; Price v. De Reyes, 161 Cal. 486, 119 Pac. 893; Loustalot v. McKeel, 157 Cal. 641, 108 Pac. 707; Lewis v. Ogram, 149 Cal. 508, 87 Pac. 60, 10 L. R. A. (N. S.) 610, 117 Am. St. Rep. 151; Young v. Blakeman, 153 Cal. 481, 95 Pac. 888; and Grants Pass, etc., Co. v. Brown, 168 Cal. 459, 143 Pac. 754.

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180 Cal. 561

WILLARD et al. v. VALLEY GAS & FUEL CO. (L. A. 4901.)

(Supreme Court of California. June 13, 1919.)

1. Gas 🔑20(2)—Explosion and Fire—Contributory Negligence—Evidence.

Evidence that the owner of a house, in the face of warnings of danger from fire, insisted on having the gas drip pipe placed in the basement instead of outside, did not compel a finding that he was guilty of negligence contributing to destruction of his house from an explosion and fire when the drip pipe was being cleaned.

2. Gas 🔑20(2)—Explosion—Presumption—Evidence.

In an action against a gas company for the destruction of a residence by fire from a gas explosion when a drip pipe in the basement was being cleaned, evidence *held* to justify finding that the presumption of the gas company's negligence through its employé from the happening of the accident stood unrebutted and unbalanced.

3. Evidence 🔑577 — Testimony on First Trial—Absence of Witness.

Plaintiff's absence from the state and temporary residence in another state in search of health was sufficient ground for admitting in evidence on second trial her testimony given at the first trial.

4. Evidence 🔑171, 582(1)—Secondary Evidence—Retrial—Memorandum.

Where a memorandum of personal property, whose loss was sued for, made by plaintiff, and used by her when giving testimony on the first trial of case, was incorporated in the record of her testimony on first trial, not as an independent document, but as part of her testimony, it was properly introduced on second trial despite the objection that plaintiffs were permitted to use secondary documentary evidence without showing loss or destruction of the original.

5. Evidence 🔑474(19)—Opinion—Value—Person Not Owner.

The husband of a wife, whose house and goods were destroyed by a gas explosion and fire, being qualified to testify as to the value of the goods destroyed, was a competent witness in that behalf, though he was not the owner of the goods.

Department 2.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Mary E. Willard and the London Assurance Corporation against the Valley Gas & Fuel Company. From judgment for plaintiffs, defendant appeals. Affirmed.

Porter & Sutton, of Los Angeles, for appellant.

Waterman & Green, Denis & Loewenthal, and Jesse F. Waterman, all of Los Angeles, for respondents.

LENNON, J. This is an appeal from a judgment in favor of the plaintiffs in an action instituted to recover damages for the destruction of a dwelling house by a fire alleged to have been caused by the negligence of the defendant.

The gas meter in the plaintiff Willard's house was below the level of the defendant's street mains. Water and naphthalene crystals accumulate at low points in gas mains and are collected in drip pipes which are cleaned as occasion demands. Such a pipe was installed in a basement room of the Willard home. In this room there was also a gas plate for laundry purposes and a Ruud water heater. It became necessary to clean the drip pipe. This the defendant's workman, one Mills, undertook to do. The fire in question followed an explosion which occurred while Mills was occupied with his work and alone in the basement. The house and its contents were destroyed in the ensuing conflagration. Plaintiff's damage was found and fixed by the trial court, sitting without a jury, in the sum of $13,000— $6,500 for the house and $6,500 for the personal property contained therein.

The two contentions of the appellant are: (1) That the finding of negligence is not supported by the evidence; and (2) that the finding as to the value of the personalty destroyed rests in part upon incompetent evidence and erroneous computations.

[1] Plaintiffs' case was presented and rested practically upon proof of the happening of the explosion and the presumption of negligence arising therefrom as a matter of law. In an endeavor to meet and balance this presumption, the defendant relied on the testimony of Mills and the claimed contributory negligence of the plaintiff Willard in insisting that the drip pipe should be located in the basement of the house rather than out of doors, despite the warning of the defendant that such a location of the drip pipe was fraught with danger. Responsive to the defense of contributory negligence, the defendant introduced evidence tending to show that the plaintiff Willard had been warned of the danger of fire as a result of cleansing a drip pipe so located, but had nevertheless insisted upon having the pipe placed in the basement rather than out of doors. But even so, the court was not compelled to find therefrom that the plaintiff was guilty of contributory negligence. "There was no evidence that there was any inherent danger of explosion of gas due to the placing of these appliances indoors." Willard v. Valley Gas & Fuel Co., 171 Cal. 9, 13, 151 Pac. 286, 288. And, moreover, it appears from the testimony of Mills that the entire gas supply of the house could be cut off by closing a stopcock in the service pipe thereby obviating all possible danger of fire in the course of cleaning the drip pipe. It was also made to appear in evidence that, when ordinary care was used to keep flames away from the vicinity of the drip pipe, there was so little danger of fire that the gas was often left on when the pipe was being cleaned in order that the gas pressure might assist in eliminating the naphthalene crystals. It was also shown in evidence that the drip pipe in the house in question had been cleaned on numerous occasions without accident.

[2] Coming now to a consideration of the issue, evidence, and finding of the defendant's negligence, we find from the testimony of Mills that it is fairly inferrable that he deliberately assumed the risk of leaving open the stopcock in the service pipe while cleaning the drip. He was bound, therefore, to use care commensurate with the risk assumed. Nevertheless, he opened the drip while there was a flame burning in the room, that is to say the pilot light of the Ruud heater, which stood about six feet from the drip pipe. He had no means of knowing whether the obstruction in the drip was caused by water which might speedily run out and be followed by a flow of gas, or whether it was caused by crystals through whose interstices considerable gas might, as the evidence shows, escape into the room. Surely this was not the act of a careful workman. As it turned out, there was about half a teacup of water in the drip pipe. The main obstruction, however, was caused by the naphthalene crystals. When Mills discovered this condition of the pipe, he replaced, so he testified, the plug loosely and proceeded to examine the room for flames. He turned off the pilot light in the Ruud heater, and then opened the lower doors of the heater to make sure it was out. There is some evidence to the effect that a Ruud heater gathers soot about the pilot light and around the hot water coils in which a spark might remain alight for several moments after the gas was turned off. In spite of this fact, Mills neither examined the coils nor waited for so much as a moment before proceeding to clean the drip. He immediately unplugged the pipe and began hitting it in an endeavor to jar loose the crystals. There was at once a terrific explosion from the direction of the heater and the flames therefrom started and spread the conflagration from which the damage complained of arose. Clearly, in the presence of this evidence, it cannot be fairly said that the trial court was not justified in finding that the presumption of negligence from the happening

of the accident stood unrebutted and unbalanced.

The finding that the value of the personal property destroyed by the fire was the sum of $6,500 does rest in part upon an erroneous computation. The plaintiff admits that a reduction of $82.50 should be made, but the calculation upon which this admission is based shows a mistake in addition and subtraction which calls for a further and additional reduction in the sum of $87.50.

Three of the rulings of the trial court are assigned as error: (1) Receiving in evidence the testimony of the plaintiff Mrs. Willard given at a former trial; (2) permitting in evidence the reporter's transcript of the evidence taken at the former trial of the case, which embodied a memorandum made by Mrs. Willard of the articles of personal property destroyed in the house; and (3) admitting in evidence the testimony of Mr. Willard, given at a former trial, concerning values, against the objection that he was not qualified to express an opinion thereon.

[3] It was shown at the trial that Mrs. Willard was then absent from the state of California and was temporarily residing in the state of Arizona, where it appears that she had gone in search of health. Her absence from the state was a sufficient ground for admitting in evidence her testimony given at the first trial of the case. Code Civ. Proc. § 1870, subd. 8; Hicks v. Lovell, 64 Cal. 14, 27 Pac. 942, 49 Am. Rep. 679; Benson v. Shotwell, 103 Cal. 163, 168, 37 Pac. 147. See, also, Meyer v. Roth, 51 Cal. 582; Butcher v. Vaca Valley R. R. Co., 56 Cal. 598.

[4] The reporter's transcript which contained the memorandum of the lost personal property made by Mrs. Willard, and which was used by her when giving her testimony at the first trial of the case, was properly received in evidence upon the trial herein. This memorandum was not used by the witness merely for the purpose of refreshing her memory. The transcript of the testimony of the witness given at the first trial shows that this memorandum was in effect stipulated to be the testimony of Mrs. Willard; that is to say, upon the first trial, it was, in effect, stipulated as a matter of convenience and for the purpose of saving time, that Mrs. Willard would testify that every item in it was true and correct, and that counsel for defendant might thereupon cross-examine her concerning the same. The memorandum was then, it appears, incorporated in the record of the testimony of the witness upon the first trial, not as an independent document, but as part and parcel of the witness' testimony. This being so, there is obviously no merit in the objection that the plaintiffs were permitted the use of secondary documentary evidence without first showing the loss or destruction of the original.

[5] No question is presented as to the admissibility of the transcript of the testimony of Mr. Willard given at the former trial, but it is insisted here, as it was specifically objected in the lower court, that his opinion as to values was permitted at the first trial solely upon the theory that he was the owner of the property, and that, inasmuch as it was conceded upon the second trial that he was not in fact the owner of the property, no foundation was laid for his opinion. Aside from all question of ownership, there is sufficient evidence in the transcript consisting of the testimony of Mr. Willard, adduced by preliminary questions, to show in effect and substance that he had an intimate and adequate knowledge of the character of the contents of the house, a knowledge gained by association with and observation of the various articles of personal property contained therein. It is evident that his opinion as to the value of these articles was based, in part at least, upon such observation and knowledge. The rule is that—

> "The knowledge of values in most cases does not depend upon professional or other skill; and witnesses, without having any special experience or training as would entitle them to be called experts, may yet have gained such a knowledge of the * * * subject under inquiry as to aid the court * * * in arriving at a conclusion. * * * Practically, the chief qualification is that the witness should have an intelligent idea of the value, founded on reliable observation, and capable of being conveyed by him in the form of an estimate and its basis to the court." 2 Jones on Evidence, Blue Book, § 363.

Measured by this rule, the objection as to the admissibility of Mr. Willard's testimony was correctly overruled.

The judgment appealed from is modified by deducting therefrom the sum of $170 erroneously included therein, and, as thus modified, the judgment will stand affirmed.

We concur: WILBUR, J.; MELVIN, J.

180 Cal. 389

OCEAN ACCIDENT & GUARANTEE CORPORATION, Limited, v. INDUSTRIAL ACCIDENT COMMISSION et al.

(S. F. 8986.)

(Supreme Court of California. May 20, 1919. Rehearing Denied June 19, 1919.)

1. Master and Servant 🔑415—Workmen's Compensation Act — Proceedings—Hearing—Reopening Case.

A case under the Workmen's Compensation Act, heard before a referee without notice to the insurance carrier and without its being represented or given an opportunity for cross-examination, and introduction of testimony, should be reopened unless there is no possibility of changing the result.

2. Master and Servant 🔑375(1) — Workmen's Compensation Act—Injuries Arising in "Course of Employment."

An employé of a company, injured in attempting to prevent a child from being run over on its premises by an automobile driven by an officer who was there on the company's business, was injured in the "course of his employment," within the Workmen's Compensation Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

3. Master and Servant 🔑415—Workmen's Compensation Act — Reopening Case—Deposition—Lack of Counter Evidence.

An insurance carrier, which had received no notice of, and was not represented at, the hearing is not entitled to a reopening of the case on the ground that a deposition introduced at the hearing was inadmissible as hearsay, where it did not offer to rebut the matters contained in the deposition.

4. Master and Servant 🔑404—Workmen's Compensation Act—Proceedings—Deposition—Admissibility.

The deposition of a physician as to a servant's injuries for which compensation is sought, although hearsay, as to the employer and the insurance carrier who were not parties to the proceeding in which the deposition was taken, is admissible under Workmen's Compensation Act 1917, § 60, subd. a, providing that no award shall be invalidated because of admission of evidence inadmissible under common-law or statutory rules.

In Bank.

Proceedings by O. N. Nelson against the Sibley Grading & Teaming Company, employer. The Industrial Accident Commission awarded compensation, and the Ocean Accident & Guarantee Corporation, Limited, insurance carrier, petitioned for a writ of review. Writ denied.

Redman & Alexander, of San Francisco, for petitioner.

Christopher M. Bradley, of San Fransciso, for respondent Industrial Accident Commission.

Robinson & Brown, of San Francisco, for respondent Nelson.

OLNEY, J. This is a hearing upon an order directed to the Industrial Accident Commission and the respondent Nelson, requiring them to show cause why a writ of review should not be issued annulling an order of the Commission awarding compensation to Nelson for injuries sustained by him in the employ of a corporation known as the Sibley Grading & Teaming Company. The petitioner for the writ, the Ocean Accident & Guarantee Corporation, is the insurance carrier for the Sibley Company, the employer.

The essence of the complaint of the petitioner, both as set forth in its petition, and as presented in argument at the hearing, is: First, that a referee of the commission held a hearing without notice to the petitioner, and without its being represented, at which hearing testimony directly controverting the contention of the petitioner was presented without any opportunity for cross-examination, and that the commission subsequently refused to reopen the case to permit of such cross-examination and the introduction of counter testimony; and, second, that a portion of a deposition taken in an action to which neither the petitioner nor the Sibley Company was a party was admitted in evidence before the commission.

[1] The return of the commission to the order to show cause discloses a case where in all fairness, to say the least, the hearing should not have been proceeded with by the referee in the absence of the petitioner or some one representing it. This being true, and the hearing having been nevertheless proceeded with, the commission in its turn should have reopened the matter for such cross-examination or counter testimony as the petitioner might properly desire, except upon one contingency, namely, that there was no possibility of such cross-examination or counter testimony changing the result.

In this connection, the return of the commission shows that its order refusing to reopen the case was in fact put upon the ground that upon the facts as contended for by the petitioner the result would be the same, and at the hearing counsel for the commission frankly conceded that unless this were so the award should be annulled and a further hearing had by the commission. The essential question is therefore whether or not a different result might have been arrived at had the petitioner been given an opportunity for cross-examination and counter testimony.

[2] An examination of the proceedings before the commission shows that the fact of the accident was undisputed, as was also the

fact that Nelson was an employé of the Sibley Company. The contentions were: First, as to whether or not the accident occurred to Nelson in the course of his employment; and, second, as to the extent of his injuries. The evidence, other than the deposition, received at the hearing complained of, was concerned with the first question only, and it is as to this question—one as to any liability on the part of the employer—that the possible effect of cross-examination or counter testimony must be considered.

The evidence shows without dispute that Nelson when hurt was at the entrance of the barn of the Sibley Company engaged in stabling a team of the company's horses which he had been driving, and that while so engaged he was struck by an automobile accidentally backed upon him by one Sibley the president of the company. It is contended by the insurance company that the automobile was the property of Sibley personally and not of the Sibley Company; that Sibley was at the barn on his own personal business, or rather for his own pleasure, and not on the business of his company; and that Nelson was hurt in an endeavor to rescue a child which was about to be run over by the backing automobile. From these facts, for which it contends, the insurance company claims that it follows that Nelson was not hurt in the course of his employment. For the purposes of this discussion, we must take the foregoing facts as contended for by the insurance company to be true with a single exception. The claim that Sibley, the president of the Sibley Company, was not at the barn on business of the company, is not substantiated by the record and is directly contrary to his own testimony given on behalf of the insurance company. That testimony given under examination by counsel for the insurance company is as follows:

> "Q. What brought you to the city that day? A. Well, I come to the city quite often on Sundays.
>
> "Q. Just for pleasure? A. Partly pleasure and partly to see how things were going.
>
> "Q. What was the nature of this trip? Did you have any particular duty in the yard that day? A. Nothing particular, just to see how things were going along."

The testimony introduced on behalf of Nelson at the hearing later, when the insurance company was not represented, was not concerned with this phase of the case, but only with the phase as to whether or not Nelson was hurt in attempting to rescue a child, and no evidence counter to that above quoted was sought to be introduced by the insurance company. Under these circumstances, the insurance company cannot claim that the fact as to the occasion for Sibley being present at the barn is any more favorable to it than is disclosed by the testimony quoted. That testimony makes it plain that, while Sibley may have come to the city partly for his own pleasure, he was at the barn partly at least on his company's business, to see, as president, "how things were going along."

The utmost, therefore, that the insurance company can properly contend for as the facts, are that Nelson was in the employ of the Sibley Company, that he was at the latter's barn at the time of the accident stabling horses in the course of his employment, and that he was injured in an attempt to rescue a child that was in danger of being run down on the company's premises by an automobile driven by the president of the company, who was there on company business.

We have no hesitation in saying that upon these facts—and, as we have said, they are the most favorable that can be properly contended for by the insurance company—Nelson was injured in the course of his employment. To be sure, he was not employed to rescue children. But certainly it was reasonably within the course of his employment, within the scope of those things which might reasonably be expected of him as an employé, that he should attempt to prevent an accident on his employer's premises, particularly where the employer would not improbably be responsible for the accident. It is not difficult to imagine how summarily the services of an employé would be dispensed with, who, seeing that such an accident was about to happen, held back and did nothing to prevent it on the excuse that it did not come within the scope of his employment. If, in this case, Nelson, instead of being injured in an attempt to prevent a child being run over on his employer's premises by an officer of his employer there on his company's business, had been injured in an attempt to put out an incipient fire accidentally started in the barn, it is hardly possible that any question would have been made. Yet there is no real distinction between the two cases. Nelson was no more employed to put out fires than he was to rescue children. The point is that the danger which threatened, and in attempting to remove which he was hurt, was one which threatened his employer and directly concerned it, and with which Nelson was confronted in the discharge of his customary duties.

If authorities are needed in support of what seems to us so obvious, we would refer to Dragovich v. Iroquois Iron Co., 269 Ill. 478, 109 N. E. 999; Waters v. Taylor, 218 N. Y. 248, 112 N. E. 727, L. R. A. 1917A, 347; and United States, etc., Co. v. Industrial Accident Com'n, 174 Cal. 616, 163 Pac. 1013.

It follows that the petitioner was not, in fact, prejudiced by the holding of the hearing in question without the petitioner being present or represented or having an opportunity to be present or represented.

[3] There remains for consideration the matter of the admission in evidence of the deposition. It was taken, as we have said, in an action brought by Nelson to which neither the employer nor the insurance company was a party. As to them it was hearsay and not within any of the exceptions to the hearsay rule. It was the deposition of one Dr. Eaves. A portion only was admitted, and that concerned solely the extent of the injuries suffered by Nelson.

It is also the fact that it was admitted in evidence at the hearing at which the insurance company was not represented nor given an opportunity to be represented. This last fact, however, is immaterial. This would not be true if the insurance company, on learning of the deposition, had asked for permission to introduce counter evidence, and had been refused. If such a request had been made, it certainly should have been granted. But the fact is that, while the company petitioned for a reopening of the case to permit it to introduce further testimony, the testimony sought to be introduced was not in rebuttal of the deposition or at all concerned with the only point touched upon by it. This being true, the only thing which the insurance company could have done to better its situation, if it had been represented at the hearing, would have been to have made and reserved an objection to the introduction of the deposition. This it may be considered as having done. The question, therefore, is one simply as to the validity of such objection, or, in other words, as to the admissibility of the deposition.

[4] That the deposition, although hearsay as to the parties against whom it was introduced and not within any exception to the hearsay rule, was yet admissible, is settled by section 60, subdivision a, of the "Workmen's Compensation, Insurance and Safety Act of 1917" (Stats. 1917, p. 831), which reads:

> "All hearings and investigations before the commission or any member thereof, or any referee appointed thereby, shall be governed by this act and by the rules of practice and procedure adopted by the commission, and in the conduct thereof neither the commission nor any member thereof, nor any referee appointed thereby, shall be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in such manner, through oral testimony and written and printed records, as is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this act. No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, rule or regulation made, approved or confirmed by the commission; nor shall any order, award, rule or regulation be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the said common law or statutory rules of evidence and procedure."

It follows that the writ should not issue on either of the grounds advanced, and it is therefore denied.

We concur: ANGELLOTTI, C. J.; LENNON, J.; SHAW, J.; WILBUR, J.; MELVIN, J.; LAWLOR, J.

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180 Cal. 504

BAILLARGEON v. MYERS. (L. A. 4762.)

(Supreme Court of California. June 9, 1919.)

1. Appeal and Error 🔑1002—Review—Conflicting Evidence—Jury's Finding.

Where the evidence is conflicting, jury's finding is binding on appeal.

2. Municipal Corporations 🔑705(4)—Use of Streets — Violation of Ordinance—Negligence Per Se.

Where defendant was driving an automobile on the wrong side of a street in violation of an ordinance, he is guilty of negligence per se, and if injury to another proximately results from such negligence defendant is liable if plaintiff was not negligent.

3. Negligence 🔑56(1) — "Proximate Cause."

The "proximate cause" of an injury is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred, and which is the efficient cause, the one that necessarily sets the other cause in operation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.]

4. Municipal Corporations 🔑706(5)—Collision in Street—Proximate Cause—Evidence.

In an action for injuries received in collision between plaintiff's bicycle and defendant's automobile, jury's finding that the driving of the automobile on the left-hand side of the street, in violation of a city ordinance, was the proximate cause of the injury, *held* warranted by the evidence.

5. Municipal Corporations 🔑706(5)—Negligent Driving of Automobile—Contributory Negligence—Evidence.

In action for injuries received by a newsboy on bicycle in colliding with defendant's automobile, which was driven on the wrong side of the street, jury's finding that plaintiff was not negligent *held* supported by the evidence.

6. Trial 🔑295(6)—Instructions—Misleading Jury—Charge as a Whole.

Objection to an instruction that under it the jury could find for plaintiff if they found defendant's chauffeur was negligent in any particular regardless of the pleadings, *held* not warranted, in view of the entire charge.

7. TRIAL 🔑244(4) — INSTRUCTIONS — UNDUE PROMINENCE TO DUTY OF DEFENDANT.

An instruction interpreting an ordinance as applied to the operation of automobiles *held* not erroneous as singling out the defendant as owing a special duty to plaintiff, and thus ignoring the equal rights of the parties in this respect.

8. TRIAL 🔑234(3) — INSTRUCTIONS—INVADING PROVINCE OF JURY.

Objection to an instruction that it invaded the province of the jury, in that it, in effect, directed a verdict for plaintiff, *held* without merit, in view of the introductory words, "If you believe from the evidence," in all the instructions given.

9. APPEAL AND ERROR 🔑1064(4)—HARMLESS ERROR—INSTRUCTION—USE OF TERM "TESTIMONY."

In an action for injuries received in a collision between plaintiff's bicycle and defendant's automobile, where the bicycle had been admitted in evidence, an instruction which used the term "testimony," instead of "evidence," was not prejudicial error, though the term "evidence" should have been used.

10. TRIAL 🔑260(1)—INSTRUCTIONS COVERED BY OTHER INSTRUCTIONS.

Refusal to give instructions covered by instructions which were given is not error.

11. TRIAL 🔑62(2)—TESTIMONY IN REBUTTAL —PROPRIETY.

In action for injuries received in collision with defendant's automobile, admission of testimony in rebuttal by a witness for plaintiff, as to the number and position of vehicles on the street when the accident occurred, was not error, where defendant in presenting his case went into the subject of the number of vehicles, and his chauffeur testified as to the position of the machines on the street.

12. APPEAL AND ERROR 🔑1047(4) — HARMLESS ERROR—EVIDENCE—REBUTTAL.

In action for injuries received in collision with defendant's automobile, admission of testimony in rebuttal by witness for defendant as to the number and position of vehicles on the street when the accident occurred, if error, was harmless; defendant in presenting his case having gone into the subject of the number of vehicles, and the chauffeur having testified as to their position.

Department 1.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by David Baillargeon, a minor, by Marietta Baillargeon, his guardian ad litem, against J. H. Myers. From a judgment for plaintiff, defendant appeals. Affirmed.

Harry A. Hollzer and W. W. Butler, both of Los Angeles, and F. P. Deering, of San Francisco, for appellant.

Isidore B. Dockweiler and Dockweiler & Mott, all of Los Angeles, for respondent.

LAWLOR, J. This is an appeal by the defendant from a judgment entered against him in favor of the plaintiff, a minor, in an action to recover damages for personal injuries received in a collision which occurred between an automobile owned by the defendant and a bicycle on which the plaintiff was riding.

The accident occurred on June 26, 1911, in the city of Los Angeles, at the intersection of Clay and West Fourth streets. Plaintiff had ridden down on the right-hand side of Clay street, which runs north and south at a grade of about 14 per cent. and has its southern terminus at West Fourth street. He had made the turn into West Fourth street and was proceeding east when he collided with defendant's machine, being struck by the left front fender with such force as to be thrown to the ground and so injure his left leg as to necessitate its amputation just below the knee.

The automobile, a Winton Six, driven by defendant's colored chauffeur, was coming up West Fourth street, which at this point has a grade of 10 per cent. going west on the south side of the street, or on the left-hand side for a vehicle moving in that direction; making a speed of about eight or ten miles an hour. At the moment of the collision, the machine had reached what would be the east line of Clay street, if extended across West Fourth street, and was anywhere from six to fifteen feet from the south curb of West Fourth street.

The plaintiff seeks to recover on the alleged negligence of the defendant, in that at the time of the accident the automobile was so negligently managed, directed, and propelled that it was driven with great force against and over the plaintiff, and that he was driving his automobile on the left-hand side of the street in violation of a certain ordinance of the city of Los Angeles, which makes it a misdemeanor to drive a vehicle other than upon the right-hand side of the street, and as near the right-hand curb thereof as possible.

The defendant in his answer denied that the injury to the plaintiff was caused by the negligence of the defendant in violating the city ordinance, or other negligence, and alleged that the injuries sustained by the plaintiff were caused by his own fault, carelessness, and negligence and failure to exercise ordinary care in the operation of the bicycle.

The case was tried by a jury and a verdict of $5,750 awarded the plaintiff. Judgment was entered accordingly, and from this judgment the defendant appeals. An appeal was taken from a judgment of nonsuit in a former trial of this action. Baillargeon v. Myers, 27 Cal. App. 187, 149 Pac. 378.

[1] 1. The first point relied upon by the appellant is that the evidence is insufficient

to support the verdict. The plaintiff relied for recovery on the alleged violation of sections 2 and 3 of Ordinance No. 21552, new series, which read as follows:

> "Sec. 2. Every person riding, driving, propelling or in charge of any vehicle in or upon any street within the city of Los Angeles shall ride, drive or propel such vehicle upon such street in a careful manner and with due regard for the safety and convenience of pedestrians and all other vehicles upon said street.
>
> "Sec. 3. Every person riding, driving, propelling or in charge of any vehicle, upon meeting any other vehicle at any place upon any street within the city of Los Angeles, shall turn to the right and on all occasions travel on the right hand side of such street, and as near the right hand curb thereof as possible."

With the exception of the chauffeur, the witnesses on both sides agreed that at the time of the accident the automobile was on the left-hand side of the street, their testimony varying only as to the distance of the machine from the south curb; none of those witnesses, however, estimating it at more than 15 feet. The chauffeur testified:

> "At that time there were autos parked on both sides of West Fourth street. Some of them were backed up with their backs against the curb, and some were run in with their fronts to the curb. That was the condition on West Fourth street clear up to Clay. I drove as close as I could to the autos parked along the right-hand side of the street. * * * Just before coming to the intersection of Clay and West Fourth streets, I was traveling about the center of the street."

[2] The appellant contends that, even if it be found that his automobile was on the left-hand side of the street in violation of the city ordinance, such violation was excusable because the condition of the traffic was such that it was impossible to drive the machine on the right-hand side. On this point the testimony of the chauffeur stands alone. Taking the most extreme view of the situation, and granting that the right-hand curb was solidly parked with automobiles and other vehicles, and that they were run in or backed in at right angles to the curb, and further that the machines were all the length of the one owned by the defendant, 14 feet, still there would have been room for the defendant's chauffeur to have driven his machine on the right-hand side of the street. For the street is 40 feet wide and the width of the automobile was 5 feet. In view of the conflict in the evidence in this behalf, we must assume in favor of the judgment that the jury found that at the time of the collision the ordinance was being violated by the chauffeur, and that the condition of the traffic was not such as to excuse such violation. This being so, the defendant was guilty of negligence per se, and is liable for the injury to the plaintiff, if such negligence was the proximate cause of the injury, and if the plaintiff was free from contributory negligence. Fresno T. Co. v. Atchison, etc., Ry. Co., 175 Cal. 358, 165 Pac. 1013; Simoneau v. Pacific Elec. Ry. Co., 166 Cal. 264, 136 Pac. 544, 49 L. R. A. (N. S.) 737; Siemers v. Eisen, 54 Cal. 418; Stein v. United R. R., 159 Cal. 368, 113 Pac. 663; Fenn v. Clark, 11 Cal. App. 79, 103 Pac. 944; Scragg v. Salle, 24 Cal. App. 133, 140 Pac. 706; Connell v. Harris, 23 Cal. App. 537, 138 Pac. 949.

[3] In its instructions to the jury the court thus satisfactorily defined proximate cause:

> "You are instructed that the 'proximate cause' of an injury is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred; it is the efficient cause, the one that necessarily sets the other cause in operation."

The plaintiff had come down on the right-hand side of Clay street, had made the turn into West Fourth street, and was proceeding east along this street on the right-hand side within a few feet of the south curb when he collided with the defendant's machine.

[4] The jury was warranted in finding that the presence of the automobile on the left-hand side of the street, under the circumstances detailed in the evidence, was the proximate cause of the injury, for the reason that if the machine had been on the right-hand side of the street, where it belonged, the accident could not have happened; in other words, the connection between the violation of the ordinance and the accident was "unbroken by any efficient intervening cause." The question of proximtae cause, however, is not to be confused with the defense of contributory negligence.

[5] Appellant's contention that the plaintiff was guilty of contributory negligence is based upon the evidence in regard to the manner in which the plaintiff rode his bicycle down Clay street to the intersection of West Fourth street. It appears that the plaintiff was a newsboy, and that on the day of the accident he was taking over a new route. Ferdinand Fisher, a boy 15 years of age, who had the route up to this time, was breaking him in. As the two boys were coasting down the Clay street hill into West Fourth street, delivering their papers on the way, having started from the top at a speed of 5 miles an hour, Ferdinand noticed, as he stood by his bicycle after delivering a paper, that the plaintiff's bicycle was gaining speed; that, as he testified, the plaintiff "was going very fast" when he approached within 20 or 30 feet of the north line of West Fourth street. He testified further that he saw the plaintiff try his brake and that it did not work; whereupon he called to him to jump off, that he repeated the call, but the plaintiff answered, "I can't."

In his own behalf the plaintiff testified that he was traveling at about 10 or 15 miles an hour when he entered West Fourth street; that he had completed the turn and was proceeding east along West Fourth street within a few feet of the south curb when he collided with the defendant's machine; and that he thought he was going at about 10 miles an hour at that time. He admitted that Ferdinand had called to him to jump off while he was still on the Clay street hill, and also admitted that he had answered, "I can't," because, as he said, he was going too fast and that he was afraid. He testified further that he did not see the defendant's automobile until he had made the turn and was starting east along West Fourth street. He stated that he did not remember whether he at any time attempted to apply his brake.

The defendant's chauffeur testified that he did not see the plaintiff until he came into West Fourth street, that the boy "was riding very fast," and that he stopped his machine instantly and was standing still when the plaintiff ran into him. There was counter testimony tending to show that the machine was in motion at the time of the collision, and that it was not stopped until it passed over the body of the plaintiff.

The court instructed the jury on the subject of contributory negligence, which we will hereinafter discuss in detail. We have reviewed the evidence on this point as the most effective way of showing that it presented a substantial conflict, and that this court is bound by the implied finding of the jury that the plaintiff was not guilty of contributory negligence.

We think there was sufficient evidence to sustain the verdict: First, that the defendant was guilty of negligence per se; second, that the violation of the ordinance was the proximate cause of the injury; and, third, that the plaintiff was free from contributory negligence.

2. The appellant claims that the court erred in giving certain instructions, and in refusing to give others. In our discussion the instructions given will be numbered in Roman numerals and those refused in Arabic. Of those given he cites numbers I, VI, VII, and XI as being erroneous.

[6] The point to the criticism of instruction I is that—

> "The jury were allowed to wander over the entire field of negligent conduct irrespective as to whether or not any issue was presented thereon by the pleadings."

Or, stated in other words, that the instruction authorized the jury to find a verdict in favor of the plaintiff if they concluded that the chauffeur "was negligent in any particular whatsoever, and even though nothing had been charged in that respect by the pleadings." We perceive no ground for this objection, and it would be idle to assume that the jury did not understand from the tenor of the entire charge that any verdict rendered must be based on the issues raised by the pleadings.

[7] Instruction VI is alleged to be misleading, in that, in defining the duty of persons in the operation of automobiles within the meaning of the ordinance, the court singled out the defendant as owing a special duty to the plaintiff, thus ignoring the elementary rule of law that the rights and obligations of the parties were in this respect equal and reciprocal. The court in that particular instruction interpreted the ordinance as applied to the operation of automobiles, so that the jury might be advised of the duty the defendant owed to the plaintiff in applying the law to the evidence. We cannot see that the instruction is susceptible of the construction sought to be put upon it.

[8] The objection to instruction VII is to the same effect, and, in addition, it is claimed that the court allowed the jury to decide without proof that the chauffeur failed to drive the automobile in a careful manner, and that the court assumed as proved that the chauffeur drove the machine along the left-hand side of the street, thereby invading the province of the jury, and in effect directing a verdict for the plaintiff. The objection is without merit. In this, as in all other instructions given, which referred to the evidence, the court was careful to use the introductory formula, "if you believe from the evidence," and to in no manner usurp the prerogative of the jury.

[9] It is urged that the use of the term "testimony," instead of "evidence," in instruction XI, was erroneous and had the effect of excluding from the consideration of the jury the bicycle which had been formally admitted into evidence. It is true that the term "evidence" should have been used, but we do not think that the failure to do so had the effect claimed by the appellant, or that it was prejudicial. To hold otherwise is to impute to the jury a wider knowledge of the niceties of legal terminology than should be reasonably expected. In Mann v. Higgins, 83 Cal. 66, 23 Pac. 206, referring to the use of the word "testimony," where "evidence" was meant, the court said:

> "In common language, and sometimes even among lawyers, the two words are frequently used synonymously; and it is entirely improbable that the jury was misled in the premises."

[10] It is claimed that the court erred in refusing to give eighteen requested instructions which were proposed by the appellant. No. 1 reads: "You are instructed to find a verdict for the defendant." Under the state of the record, such an instruction could not properly have been given. Nos. 2 and 3 deal with the burden and measure of proof. These subjects were fully dealt with in instruction I. The subject of proximate cause,

embodied in Nos. 4 and 5, was also included in instruction I.

Appellant contends that Nos. 6, 7, and 8 should have been given in response to "one of the theories of the defense, namely, that this accident belonged to the category of inevitable casualty." The instructions read as follows:

> "6. The mere happening of this accident does not raise any presumption that the plaintiff was injured through any alleged negligence of the defendant's chauffeur. That fact must have been proved by a preponderance of the evidence. You cannot find a verdict for the plaintiff unless you are first satisfied by a preponderance of the evidence that the defendant's chauffeur failed to exercise reasonable care to avoid colliding with the plaintiff's bicycle. If you believe that such collision was unavoidable, it will be your duty to return a verdict for the defendant.
>
> "7. If you believe that the accident was unavoidable, then the plaintiff cannot recover, and you should return a verdict for the defendant.
>
> "8. If the defendant's chauffeur used every reasonable precaution to avoid the collision, then the plaintiff cannot recover, and you should return a verdict for the defendant."

The substance of the first three sentences of No. 6 was embodied in instruction I, except that it was made to apply to both parties instead of to the defendant alone. It is proper to mention that the evidence offered by the plaintiff in proof of negligence on the part of the defendant was confined to the violation of the ordinance. The defense was threefold—that the ordinance was not violated by the chauffeur, that if it was the violation was excusable because of the state of the traffic at the time, and that the plaintiff was guilty of contributory negligence. Paragraph III of the complaint, without alluding to the ordinance, did allege that the chauffeur while in the performance of his duty as such and acting within the scope of his employment, so negligently managed, directed, and propelled the automobile, by driving it on the left-hand side of the street, that it was driven with great force and violence over the plaintiff. It is alleged in paragraph IV that by reason of the violation of the ordinance the defendant did so negligently drive, direct, and propel the automobile that it collided with and ran into and over the body of the plaintiff. The record shows that no evidence was offered in support of paragraph III, and this is confirmed by the statement in the brief of the appellant that—

> "No attempt was made, much less any proof offered, to establish any other allegation of the complaint, pertaining to the question of liability."

The court gave the following instruction proposed by the defendant and modified by the addition of the portion which we have placed in parenthesis:

> "While as a general rule, the operator of a vehicle is required to drive along the right-hand side of the highway, yet there may be circumstances under which it is legally proper to drive on the left-hand side. The fact that the right-hand side of the street may be obstructed does not require one seeking to drive thereon to abandon such street, but on the contrary, it is legally permissible for such person to use the left-hand side of the highway where it is obstructed on the right-hand side, and no negligence could be predicated upon such use (providing in so doing he exercises the care that an ordinarily prudent person in the same situation would use)."

From these facts we think it must have been the view of the trial court that the evidence relating to the subject of an unavoidable accident had reference only to the position of the machine at the time of the collision, and not to the manner in which it was operated. If this be true, the law on the subject of unavoidable accident was sufficiently stated in the instruction just quoted. Assuming, therefore, that instructions 6, 7, and 8 were properly proposed on the subject of unavoidable accident, the failure to give them, when considered in the light of the one that was given, could not have caused any prejudice to the rights of the defendant. The latter instruction stated that under certain circumstances it would be legally permissible to use the left-hand side of the highway when it is obstructed on the right-hand side. According to the testimony of the chauffeur, the machine was near the center of the street at the time of the collision and could not be driven on the right-hand side without colliding with the automobiles which were on that side. Hence, if this version were accepted, the jury, under the instructions, would have been required to find that the accident was unavoidable and render a verdict for the defendant. The proposed instructions could have accomplished no more than this. We think, moreover, that the proposition of law was inadequately stated in the proposed instructions 6, 7, and 8.

Claim of error is predicated on the refusal of the court to give instructions 9 to 16, inclusive, as proposed by the defendant. These instructions are rather prolix, and hence we will not set them out here in full. In substance they are as follows:

9. Even though you believe that the defendant's chauffeur may have been negligent proximately causing the injury complained of, still if you further believe from the evidence that the plaintiff himself was guilty of any negligence, even in the slightest degree, which directly or indirectly, caused or contributed to the injury complained of, then your verdict must be for the defendant.

10. The law will not excuse a person in failing to make such use of his faculties as will enable him to discover plain and obvious dangers, and if the plaintiff in this

case could, with the exercise of reasonable care, have discovered the danger and could have avoided it, he cannot recover.

11. If the plaintiff was riding a bicycle down Clay street hill at such a rate of speed that he was unable to stop it in time to avoid colliding with another vehicle, and that in so acting he was guilty of negligence proximately contributing even in the slightest degree to the injury, then he cannot recover and you must return a verdict for the defendant.

12. If the plaintiff should have known that it was dangerous to ride a bicycle down hill on Clay street into West Fourth street in the manner in which he did, and that such conduct on his part was a failure to exercise the care and prudence which a person of his age and experience would ordinarily exercise, and that such failure proximately contributed in any degree to his injury, then he cannot recover.

13. If at the time of the accident the plaintiff was riding his bicycle down hill on Clay street at such a rate of speed that he was unable to control it, and that he failed to give such attention to his surroundings, including the section of the city in which he was and the condition of the traffic, to avoid danger as may be reasonably expected from a person of his age and experience, he was guilty of negligence, and if such negligence contributed in any degree, however slight, to his injury, then you must return a verdict for the defendant.

14. The fact that the plaintiff is a minor does not raise any presumption that he was free from contributory negligence. (Then follows a statement of the degree of care required of a minor).

15. The plaintiff must be presumed to have all the qualities ordinarily belonging to a person of his age. Therefore, if you believe that the plaintiff failed to give such attention to his surroundings as may be reasonably expected from the average boy of his age, experience and capacity, then he was guilty of negligence, and if such negligence contributed in any degree, however slight, to the accident, then he cannot recover.

16. The minority of the plaintiff does not raise a presumption that he did not have the capacity to understand the danger of coasting down hill on Clay street at a time of the day when vehicles were likely to be traveling along the street, and contributory negligence, on his part, if any, however slight, which proximately contributed toward causing the accident, is a good defense to this action and would necessitate a verdict in favor of the defendant.

Instructions I, VII, VIII, and IX on this subject were given by the court of its own motion, and III and V at the request of the defendant. They read as follows:

"I. By this action the plaintiff seeks to recover compensatory damages for injuries which the plaintiff alleges he sustained as a direct or proximate result of negligence on the part of the defendant. The burden is on the plaintiff to prove by a preponderance of the evidence that the defendant through his chauffeur was negligent at the time and place in the controversy, and likewise to prove by a preponderance of the evidence that such negligence was a proximate cause of the collision and of the injury to the plaintiff. Unless he make such proof in both of these particulars, he is not entitled to your verdict. If he has proven by a preponderance of the evidence that the defendant was negligent and that such negligence was a proximate cause of the collision and of injury to the plaintiff, then the plaintiff is entitled to your verdict unless it shall also have been established by a preponderance of the evidence that the plaintiff was himself guilty of negligence which contributed directly or proximately in some manner or degree to the collision and to the injury.

"The happening of the accident raises no presumption either of negligence on the part of the defendant or of negligence on the part of the plaintiff. Each of these must be proven and proven by a preponderance of the evidence. As I have said, the burden of proving negligence on the part of the defendant rests on the plaintiff. On the other hand, the burden of proving contributory negligence of the plaintiff rests upon the defendant. If upon either issue the proof is equally balanced, then the party having the burden of making proof by a preponderance of the evidence has not sustained the burden that the law imposes upon him."

"VII. * * * And if you further believe from the evidence that a violation of said ordinance was the proximate cause of said accident and plaintiff's injuries, and that plaintiff was not guilty of any negligence on his part that contributed to said accident or to his said injuries, then it becomes your duty to return a verdict in favor of the plaintiff and against the defendant. If the plaintiff was guilty of negligence that contributed proximately to the collision, then plaintiff cannot recover.

"VIII. If you believe from the evidence that the plaintiff at the time of the collision in question was upon the south side of West Fourth street in the city of Los Angeles, proceeding in an easterly direction thereon and that the said collision between defendant's automobile and the plaintiff occurred upon the south side of the said street when defendant's automobile was proceeding in a westerly direction on said street and upon and along the south side thereof, then you are instructed that the plaintiff was upon the side of the street where he was entitled to be when proceeding in an easterly direction upon and along said street.

"IX. You cannot find in this case that the plaintiff was guilty of fault, carelessness, or negligence that contributed to or caused his injuries, unless you believe from the evidence that he did something which an ordinarily careful and prudent person of the same age and experience, acting under the same or similar circumstances, would not have done, or that he failed to do something which an ordinarily careful and prudent person of his age and experience would have done under those circumstances."

"III. The plaintiff must be presumed to have had such discretion and to have taken such notice of patent and obvious dangers at the time of the accident complained of as would be reasonably expected of a person of his age and experience; therefore, if you believe that he was injured partially through a failure on his part to take such care of himself as a person of his age and experience would ordinarily exercise, then you must return a verdict in favor of the defendant."

"V. If you find from the evidence that the accident would not have happened if the plaintiff had exercised such care for his own safety as may fairly be expected from the average person of his age and capacity, then you are instructed to return a verdict in favor of defendant."

We have thus elaborately stated the tenor of the requested instructions and quoted the instructions that were given on the subject, in order that any difference between them may readily appear. This difference is apparent that the refused instructions called attention in detail to the specific acts or omissions which would constitute negligence upon the part of plaintiff. Appellant based his defense of contributory negligence upon the ground that, taking into account the speed of the bicycle and the manner of its operation, the section of the city in which the accident occurred, the state of the traffic in that vicinity at the time, and the other surrounding circumstances, the plaintiff, by reason of a want of ordinary care for one of his years, brought the injury upon himself. The evidence before us on this subject was addressed to these various aspects. We must conclude therefore that, when the jury was instructed as shown, they must have had actively in mind every aspect of the issue. Clearly, the instructions given to the jury sufficiently stated the law, so as to enable them to determine from the evidence whether the plaintiff, notwithstanding the fact that the chauffeur was guilty of negligence per se, could have, with the exercise of reasonable care, avoided the accident. This is all the defendant was entitled to. By varying the phraseology, by repeating, by segregating the items of evidence into separate charges, the rejected instructions were prolix and to some extent involved and went more into detail than was necessary. The questions of fact were not intricate, and hence a general statement of the law pertinent to the issue was all that was required.

[11, 12] 3. Appellant contends that the court erred in permitting Frank Pierce, a witness produced by the plaintiff in chief, to testify in rebuttal as to the number of vehicles on West Fourth street at the time the accident occurred. The witness did testify on the point as follows:

"Q. How many autos, if any, do you recollect, were on the north side of West Fourth street between Hill street and Clay just before the collision?

"Counsel for the defendant: I object to that as not rebuttal.

"The Court: Answer the question.

"A. There was one wagon on the north side of the street having a horse attached. It was lengthways against the curb a few feet from Clay street. I don't believe, as I remember, there was any other. There might have been, but I don't remember it."

But he also gave testimony in rebuttal as to the position of the vehicles on the street:

"Q. Are you certain that there was not a large number of machines on the north side of the street, backed up against the curb?

"A. No, they didn't back up against the curb themselves. They ran parallel with the curb."

The examination continued as to the number and position of the machines.

The following testimony was given by the plaintiff on his direct examination:

"There was an automobile standing still near the south curb of West Fourth street about here (witness indicating by square and figure 1). There was another automobile going westerly on West Fourth street which collided with me as I was completing making the turn on West Fourth street going easterly and toward Hill street."

This is all the testimony on this subject given on the direct examination of the plaintiff. On cross-examination he admitted that on the former trial he had testified "that there was quite a number of machines all along on the south side of West Fourth street," and that he had testified also on cross-examination at the former trial "that there was quite a few on the north side of Fourth street between Clay and Hill."

The defendant in the presentation of his case went into the subject of the number of vehicles that were on the street at the time of the accident in support of his claim that, even if the chauffeur was on the left-hand side of the street, his action was excusable. In addition, and for the same purpose, the chauffeur testified as to the position of the machines with reference to the curb. whether parallel to it or at right angles with it. The latter was an entirely new inquiry, and the testimony of Frank Pierce in rebuttal on this subject, concerning which no evidence was given before the plaintiff rested, was therefore competent. And while it is true that the subject of the number of machines was made a part of the plaintiff's case in chief, and that Pierce's testimony on the point in rebuttal may have exceeded the proper limits of preliminary inquiry as to their position, yet we are not prepared to hold that this testimony, even if erroneously admitted, prejudicially affected the rights of the defendant.

The judgment is affirmed.

I concur: OLNEY, J.

SHAW, J. (concurring). Instruction I, given by the court of its own motion, directed the jury that the plaintiff was entitled to a verdict "if he has proven by a preponderance of the evidence that the defendant was negligent and that such negligence was a proximate cause of the collision and of the injury to the plaintiff," unless it was also established by a preponderance of the evidence that the plaintiff's own negligence contributed proximately to the injury. The instruction did not in any respect limit the negligence which it was necessary for the plaintiff to prove, to that which was alleged in the complaint. If this had been the only instruction given on the subject, I think it would be true, as claimed by the defendant, that it authorized the jury to find for the plaintiff if they concluded the defendant was negligent in any particular whatever, although the negligence was not charged in the complaint. The failure thus to limit the field of inquiry is emphasized somewhat by the refusal of the court to give instructions 3 and 5, asked by the defendant, which confined the negligence to be considered by the jury to that which was alleged in the complaint. But I do not believe the defect in the instructions could have prejudiced the defendant in any way. There was no attempt to prove any negligence other than that which was alleged, and none other was discussed throughout the case. The instructions given directed the attention of the jury specifically to the particular acts of negligence charged in the complaint. It cannot be supposed that the jury would find a verdict for the plaintiff because they imagined the defendant may have been negligent in a manner not disclosed at the trial.

In other particulars I concur in the opinion of Justice LAWLOR.

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180 Cal. 527

McLAUGHLIN et al. v. LOS ANGELES RY. CORPORATION. (L. A. 4885.)

(Supreme Court of California. June 9, 1919.)

1. Negligence 🔑83—Last Clear Chance.

The doctrine of last clear chance does not apply where the injured person was never in danger from, and not touched by, the instrumentality over which the individual charged with negligence had control.

2. Street Railroads 🔑93(4)—Injuries on Tracks—Duty of Motorman.

A motorman discovering a pedestrian's peril on the tracks is bound to use only the degree of care which a reasonably prudent and skillful motorman would have used under all of the circumstances with which he was suddenly confronted, and which were visible to him only from the platform of his car, and he is not negligent because he did not make the best choice.

3. Street Railroads 🔑114(7)—Injuries on Track—Negligence of Motorman—Sufficiency of Evidence.

In an action against a street railway for death of a pedestrian caught between east and west bound cars, so that she stepped back from the west-bound car, which had been stopped by its motorman, and was struck by the east-bound car, evidence *held* not to warrant finding that the motorman of the west-bound car was guilty of negligence in stopping his car across decedent's path.

4. Street Railroads 🔑114(7)—Injuries on Track—Negligence of Motorman—Sufficiency of Evidence.

In an action against a street railway for death of a pedestrian caught between east-bound and west-bound cars, finding that the motorman of the east-bound car was negligent in not stopping his car sooner *held* supported by evidence.

5. Evidence 🔑140—Similar Facts.

The action of the trial court over objection in discussing with plaintiff's counsel, and in ultimately receiving and reviewing, evidence adduced in another case tried before the same court relative to the distances within which cars of a company other than defendant street railway could be stopped, was error.

6. Appeal and Error 🔑1054(3)—Harmless Error—Evidence.

In an action against a street railway for a death on its tracks, error in receiving evidence adduced in another case tried before the same court, relative to the distances within which cars of another company could be stopped, *held* not cured by the court's certificate that its decision was based on other and competent evidence.

7. Witnesses 🔑372(1) — Cross-Examination of Own Witness—Bias.

Despite Code Civ. Proc. § 2049, in an action for personal injuries, plaintiff's counsel did not have the right to cross-examine his own witness merely for the purpose of showing bias.

8. Witnesses 🔑391—Impeachment—Inconsistent Statements.

Under Code Civ. Proc. § 2052, an impeaching question involving claimed inconsistent statements, and which in the first instance had been put to the witness sought to be impeached, should be propounded precisely or in substance to the impeaching witness, and a categorical answer, as to whether such statement was made, asked for.

Department 2.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Nettie McLaughlin and others against the Los Angeles Railway Corporation. Judgment for plaintiffs, and defendant appeals. Reversed.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for appellant.

Jones & Evans and Mattison B. Jones, all of Los Angeles, for respondents.

LENNON, J. This is an appeal by the defendant from a judgment in the sum of $750, entered in favor of the plaintiffs, who sued as the children and sole heirs of Mrs. Adelia Ackerson, to recover damages for her death, which was alleged to have been caused by the negligence of the defendant in the operation of two street cars on East Seventh street in the city of Los Angeles. The action was tried by the court without a jury.

The undisputed facts are these: Mrs. Ackerson started to cross from the south to the north side of East Seventh street at a point between San Julian and Wall streets at about 6 o'clock on the evening of January 15, 1915. The defendant was operating a street car line with a double track on this street. At the time in question cars were approaching from opposite directions along these tracks at a reasonable rate of speed. No other vehicles were present. It was after nightfall, but the street was artificially lighted, and the headlights and interior lights of both cars were burning brightly. The deceased, although she was 66 years of age, was an active woman, in full possession of her faculties save for being a little hard of hearing. Both motormen saw her and sounded their bells vigorously. Nevertheless the deceased did not hesitate in her course across the street. She looked neither up nor down the street. When the motorman on the west-bound car realized that she was evidently bent upon going upon and across the tracks, he brought his car to a stop so that the rear portion thereof stood across the path which the deceased was pursuing. Meanwhile, when the deceased was within two or three feet of the south rail of the east-bound track, the motorman on the east-bound car cut off his current and put on his air brakes. The deceased entered upon the east-bound tracks, and, seeing the west-bound car in her path, hesitated and stopped, and as she did so was struck by the east-bound car, sustaining injuries from which she died.

The trial court found that the deceased, under all of the circumstances, was guilty of negligence in entering upon the east-bound tracks. It is not disputed that this finding is supported by the evidence. Nor is it disputed that, up to the time when the deceased came within two or three feet of the south rail of the east-bound track, both motormen were justified in believing that she would avoid danger by exercise of due care. Nor can the finding be disputed that the deceased was not guilty of negligence in hesitating and stopping when she discovered the west-bound car in front of her. The undisputed situation, therefore, at the time it became evident that the deceased was going to attempt to cross the tracks, was this: (1) She had negligently placed herself in a place of danger from which it was apparent that she could not or would not extricate herself; and (2) this fact was realized by both motormen. Inasmuch as the deceased was, admittedly, guilty of no further negligence contributing to her injury and death, the doctrine of "last clear chance" comes into play, and must cover and control the determination of the only question involved in the claimed insufficiency of the evidence to support the court's findings of negligence. That question is this: Were the motormen, or either of them, guilty, after the time referred to, of a failure to use due care to avoid the accident? Responding to this question, the trial court found as a fact that both motormen were guilty of negligence after the discovery of the predicament of the deceased, and apparently rested its judgment for the plaintiffs upon this finding.

We will first consider and discuss the question of the negligence charged against the motorman on the west-bound car. Upon this phase of the case the finding of the trial court was:

> "That the defendant, through its motorman in charge of its west-bound car running on its track on East Seventh street, carelessly and negligently stopped said car in front of and in the direct path of the said deceased without any cause or reason therefor, and the said deceased was prevented, through said negligence and carelessness of the defendant and its said servant, from passing in the rear thereof in safety and without injury to her; that if said west-bound car had not been stopped in front of and in the direct path of said deceased, as aforesaid, she would have passed in safety over the south track and out of the zone of danger from the defendant's car running east on its said south track; that because of said west-bound car being carelessly and negligently stopped and operated as aforesaid, the said deceased, when at a position between the said tracks of the said defendant, and while in the danger zone of the defendant's east-bound car, hesitated and stopped and was instantly struck by one of the electric cars of the defendant, which was then and there operated east on said south track by the defendant and its servants in charge of said car at a reckless rate of speed, and the said deceased was thereby thrown violently to said street, and was then and there seriously injured from which injuries she died in about four hours thereafter. * * *"

[1-3] The correctness of the fundamental facts found by the trial court concerning the operation of the cars and the movements and conduct of the deceased are not disputed; but it is earnestly insisted, and justly so, we think, that these fundamental facts neither warrant nor support the finding that the motorman on the west-bound car was guilty of negligence in bringing his car to a stop across the path of the deceased. Practically the only evidence upon this phase of the case is to be found in the testimony of the motorman on the west-bound car, and the admitted fact in the case that there was a space of about three feet between the cars in which the deceased could have stood in safety. The motorman testified as follows:

> "Relative to the south track, she [the deceased] was, I suppose, two or three feet from the south track—she hadn't stepped over the rail yet, or on either track, when I last saw her. As to the east-bound car's front end at that instant—well, I suppose he was somewhere between half a car's length, maybe a little over, in front of me. The woman was still walking north when I last saw her—hadn't slowed up a bit, coming in the direction of my car. I stopped my car as soon as I could, and that was pretty quick. I had an idea—I was pretty near positive that she was going to come on, and with my car stopped she could get up to the side of it and be out of the way of the other; of course, if they were both going, she couldn't so well. I think I stopped before the impact—before she got in there."

It being conceded that the deceased was negligent, the negligence of the west-bound motorman can justify the judgment only upon the theory that he, as well as the east-bound motorman, had a last clear chance to avoid injuring the deceased. It would be without precedent, so far as we are aware, to apply the doctrine of "last clear chance" where, as here, the injured person was never in danger from, and not touched by, the instrumentality over which the individual charged with negligence had control. Conceding that the west-bound motorman did have a last clear chance of avoiding injuring the deceased, the fact remains that he did avoid injuring her. She was imperiled in the first instance, and ultimately injured and killed, by the impact of the east-bound car. We should hesitate to hold that it was negligent to stop a street car in a situation where a collision was imminent between a pedestrian and some other moving vehicle which was completely under the control of a third person. Ordinarily, a street car standing still can hurt nobody. On the other hand, if it be kept in motion, in the presence of an impending crisis involving possible injury to a pedestrian by other vehicles in the immediate vicinity, there immediately arises the peril of the pedestrian's being thrown under the wheels of the moving car. Particularly is this so in a situation such as that presented in the instant case. The deceased was, to the knowledge of the west-bound motorman, about to step upon the east-bound track, thereby placing herself in immediate peril from a car approaching on that track, and a few feet to her left. Under these circumstances the west-bound motorman, we think, was justified in anticipating that while the speed of the east-bound car might be checked to the extent of avoiding striking a fatal blow, nevertheless that car might very possibly throw the deceased under the trucks of his own car. There were, then, two courses open to him to avoid the peril made possible by such a situation. He could either have stopped the car, as he did, or he could have speeded up his car in an attempt to get it completely out of the danger zone. The first course and the course actually adopted would ordinarily result in safety. The latter course would very likely be fraught with peril. A slight miscalculation of the rate of speed of either car or of the deceased might perchance result fatally. We do not think that the motorman of the west-bound car was required to assume any such risk. True, the court below found that if the motorman had speeded up his car the deceased would have passed across the tracks in safety. But that fact alone is not sufficient to charge said motorman with negligence. It must further appear that a reasonably prudent and skillful motorman would not have done as he did. The court's conclusion obviously was based upon a last analysis of the peril of the situation as revealed by the testimony of the numerous witnesses who had viewed the accident from various positions. Clearly, the motorman cannot be held to have been negligent merely because he did not make the choice which such an analysis perhaps shows would have been the best choice. He was bound to use only that degree of care which a reasonably prudent and skillful motorman would have used under all of the circumstances of a situation with which he was suddenly confronted, and which were only visible to him from the platform of his moving car. Assuming that the motorman was bound to surmise that the deceased might have succeeded in crossing the east-bound track ahead of the on-coming car, still he can only be held negligent in stopping upon the theory that he was bound, in addition, to anticipate that the deceased would hesitate and step back upon seeing his car in her path. True, the court found that the deceased was not negligent in so stepping back; but that is a very different thing from finding that the motorman was bound to anticipate that she would do so. Clearly, it would have been the wise and prudent thing for the deceased to have stopped and stood in the clear space between the cars until the east-bound car had stopped or gone by. The motorman was justified, we think, in assuming that the deceased would thus have endeavored to save herself from injury.

[4] This brings us to a consideration of the negligence charged and found against the motorman of the east-bound car. Upon this phase of the case the finding of the trial court was as follows:

> "That the said defendant, through its motorman in charge of said east-bound car, carelessly, negligently, recklessly, and wantonly ran said car against the said deceased while she was between the said tracks of the said defendant, and known to said motorman in charge of said east-bound car to be in a dangerous position; that the said motorman in charge of said east-bound car, after discovering and knowing that the said deceased was in a dangerous position, had ample time and distance within which to stop his said car by the exercise of ordinary care before striking the deceased; that the said

motorman did not exercise ordinary care in operating said east-bound car to avoid injuring her, but, on the contrary, recklessly and wantonly ran said car against her, and thereby caused her death as aforesaid; that the said motorman in charge of said east-bound car saw said deceased from the time she left the south curb until she was struck, as aforesaid, and knew when she was approaching the danger zone of his car; that when deceased was two or three feet south of the south rail of the east-bound track the motorman threw off his current and applied his brakes in an endeavor to stop said car, but that he did not stop said car as soon or as quickly as he should and could have stopped said car; that at said time the deceased was a sufficient distance in advance of the car so that the same should and could have been stopped by the exercise of ordinary care in operating said car; that the motorman had a clear opportunity to avoid injuring the deceased after he knew her to be in a place of danger, but recklessly and wantonly failed to operate his said car to that end; that the said deceased was not careless or negligent in hesitating and stopping as aforesaid."

The sum and substance of these particular findings is that while the motorman of the east-bound car was seasonably vigilant in an endeavor to bring the car to a stop, and thereby avoid the accident, nevertheless he was guilty of negligence in failing to fully avail himself of the last clear chance to avoid injuring the deceased, in that he failed, with the means at hand, to effectively stop the car at a distance from the deceased at which it could and should have been so stopped. Of course, if this be so, it must follow that the negligence of the deceased in going upon the east-bound track did not ultimately contribute proximately to her injury and death. A review of the evidence upon this phase of the case compels the conclusion that the findings, in so far as they declare that the motorman did not stop the car as quickly as he could and should have done must have been made and based upon one of two theories: (1) That although the motorman threw off the current and applied the brakes in an endeavor to stop the car when the deceased was two or three feet of the south rail of his track, nevertheless he did not apply the brakes as vigorously and as effectively as might and should have been done; or (2) that the motorman should have used the reverse instead of the brakes, or that, simultaneously and in conjunction with the use of the brakes, he should have resorted to the use of the reverse.

The evidence of the plaintiff responding to this phase of the case is to be found in the testimony of two passengers on the east-bound car and the testimony of two expert, or rather opinion, witnesses. One of these opinion witnesses was a policeman who had formerly been a motorman, while the other was a laborer who at one time had operated a street car for the period of 11 months. Neither of these witnesses had ever been in control of a car of the type which struck the deceased and caused the injuries resulting in her death. These witnesses, in effect, testified that it was their opinion that the east-bound car, under all of the shown circumstances, might have been stopped sooner than it was. From a perusal of their testimony it appears that their opinions were not based upon any experiment made with the car in question, similarly loaded, on a similar grade, and with the same air pressure. To the contrary, it appears that their opinions were based wholly upon their experience in the handling of different cars, differently loaded, on different grades, with different amounts of air pressure, and with different circumstances calling for the sudden stoppage of the car. One of these witnesses stated that he was merely giving estimates of the distances within which a car might be stopped, and that he could not tell with any degree of precision the distance within which a car might be stopped when going at a specified speed. The other witness gave it as his opinion that there was not any given distance in which a car might be stopped. Both witnesses were practically agreed that the same car will stop within different distances under apparently the same operation and conditions. With reference to the method of effectively stopping in an emergency a car going from 8 to 10 miles an hour within a distance of 20 feet, one of these witnesses declared that he would, in addition to the use of the air, resort to the reverse—that is to say, he would throw off the current, pull the reverse lever, and then feed the current back slowly, during which operation the car would continue its forward movement until checked by the gradual extinguishment of its momentum. This witness, however, admitted that a sudden resort to the reverse was fraught with difficulty, and very likely to result in failure. Finally, he gave it as his opinion that "in 99 out of 100 cases the air will stop quicker and better than the reverse. * * * A person gets excited, and they throw the controller too far and it throws the overhead. If you throw your overhead you are powerless, if your wheels don't freeze to the rail. The brake is the best thing to stop the car, provided your air is all right. Assuming the brake is working and the air is all right, the brake is the best and safest means to make a service or emergency stop." The other witness was also of the opinion that the reverse should be resorted to for an emergency stop, and, in this behalf, testified: "I would use the reverse in an emergency if the track was kind of bad, and I saw that I was going to hit the person, I believe that I would reverse—I don't know whether it would do much good. At times it does, and at times it don't; at times if you slug a car it will slide before it takes effect. You have got to reverse it, and then throw your controller clear around, that throws your overhead; then it takes probably a second or two to take hold." We shall consider elsewhere the testimony of the passengers on the car.

The evidence offered upon behalf of the defendant upon this phase of the case was elicited from several witnesses—motormen and instructors of motormen actively and daily engaged for many years in their respective occupations—whose testimony, in substance, was that there was not a grade at the scene of the accident sufficient to make any appreciable difference in stopping a car going either way; that a quicker and better stop could be made with the air than with the reverse; that if the air was working right the reverse should never be used in an emergency stop; that a better stop would be obtained by using either the reverse or the brakes rather than by using both at the same time; that the brakes stopped the car by retarding the revolutions of the wheels, while the reverse would stop it by revolving the wheels in an opposite direction from that in which the car was first proceeding; that the result of the use of the air and of the brakes together was to reduce the effect of each; and that, while the brakes will produce a stop much quicker than the reverse, the reverse alone will result in a stop quicker than when it is used in conjunction with the brakes. Three of these witnesses were in substantial accord in the opinion, based upon many years of experience and actual tests made, that a loaded car of the type in question could not be brought to a full stop in any distance short of from 50 to 60 feet. During the examination of one of these witnesses it was developed that the defendant, as a result of a series of experiments, had issued to its employés written instructions, which were in force at the time of the accident, designating the method and means to be employed by motormen when required to make emergency stops. These rules, which were produced and admitted in evidence upon the demand of the plaintiff, provided that, "in making emergency stops for any purpose, always rely on your air brakes. Never reverse unless you have less than 30 pounds of air. (Or brakes become useless or ineffective.)" Again, one of defendant's bulletins, introduced in evidence under similar circumstances, states that "in making tests it has been found that the quickest and shortest stops can be made with the air brakes." It was also shown in evidence upon behalf of the defendant, and not disputed by the plaintiff, that the car in question was, at the time of the accident, equipped with an air gauge carrying minimum 45 and maximum 65 pounds pressure, and that the air was working right, carrying pressure within the minimum and maximum limits.

Considering this evidence as a whole, there is not, we think, any substantial conflict existing between the opinions of the witness for the plaintiff and those for the defendant as to the wisdom of using the reverse alone, or in conjunction with the air brakes, for the purpose of making an emergency stop. To the contrary, it would appear, it seems to us, that all of the witnesses were substantially agreed that the use of the brakes alone in an emergency was the best way to stop a car, and all that an ordinarily skillful and prudent motorman was required to do.

This brings us to a consideration of the question of whether or not, by a proper use of the brakes alone, the car could and should have been stopped, considering the speed at which it was going, within a distance sufficient to have avoided striking the deceased. While it is true that the testimony of the two opinion witnesses of the plaintiff consisted largely of estimates, based solely upon their general experience as motormen, of the distance within which the car should and could have been stopped by the use of the brakes while going at a given rate of speed, still this testimony, having been offered and received without objection, was some evidence of the fact in dispute, and the court might have considered it, and doubtless did consider it and give it some weight, when it made its findings. Further support of the finding relative to the effective use of the brakes is to be found in the testimony of the plaintiffs' witnesses Setchell and Pistonetti, who, at the time of the accident, were riding on the front of the east-bound car. Setchell testified, in substance, that he felt the impact of the car against the body of the deceased; that he could not say from the "feeling" of the car that the brakes had been set prior to the collision of the car with the deceased, and that he "felt the brakes set after the lady had been struck." The inference naturally and necessarily deducible from this testimony was that the brakes were not set at all, or, if set, were not so set as to make their operation effective until after the deceased had been struck. While it is true that the testimony of this witness, in so far as it related to the *timely* application of the brakes, was, as is clearly indicated by the findings, rejected by the trial court, nevertheless it does not appear, and we cannot say, that the testimony in question, in so far as it related to the *effective* operation of the brakes, was also rejected by the trial court. The inference that the brakes, though set, were not effectively set, finds further support in the testimony of Pistonetti, who testified that "the car stopped rather gently—it didn't stop with a jerk; it slowed up and stopped rather gently." The testimony of Setchell and Pistonetti, considered in conjunction with that of the opinion witnesses, creating, as it clearly did, a conflict in the evidence, concerning the proper and efficacious use of the brakes, sufficed to support the finding that the motorman of the east-bound car was negligent in not bringing his car to a stop sooner than he did.

[5, 6] It appears from the record that, during the argument of the case, the trial court, in the face of objection, discussed with counsel for the plaintiff, and ultimately received and reviewed, the evidence adduced in another case, which had been tried before the same court, relative to the distances within which cars of a company other than the defendant could be stopped. This was error, and was not cured by the certificate of the court that its decision was wholly based upon other and competent evidence. Peck v. Pierce, 63 Conn. 310, 28 Atl. 524; Rapson v. Leighton, 187 Mass. 432, 73 N. E. 540; Jaques v. Bridgeport, etc., Co., 41 Conn. 61, 19 Am. Rep. 483. That this error contributed to the judgment, and was therefore prejudicial, seems clear when viewed in the light of the fact the evidence upon which rests the finding of negligence in the east-bound motorman was little better than meager. Our conclusion in this behalf is fortified by the fact that when the plaintiffs and defendant had both rested their case, and before the extraneous evidence complained of had been considered at all, the trial court announced, as shown by the bill of exceptions, that "there was the gravest doubt as to whether it was possible for the motorman to have stopped his car sooner than he did."

[7] The trial court also erred, to the prejudice of the defendant, in its ruling, in the face of specific and sufficient objection, permitting the cross-examination by plaintiffs' counsel of plaintiffs' expert witness Lacher. Plainly the purpose of this cross-examination was to show that the witness was biased in favor of the defendant. It tended to, and doubtless did, discredit the witness to the extent that this testimony was favorable to the defendant. This the plaintiffs were not entitled to do. If the witness in question, having been called by the plaintiffs, had unexpectedly given damaging testimony against them, it would have been permissible, under the provisions of section 2049 of the Code of Civil Procedure, to show that the witness had previously made statements inconsistent with his testimony upon the theory that the plaintiffs were taken by surprise by the adverse testimony of their own witness. People v. Creeks, 141 Cal. 529, 75 Pac. 101. Assuming that the witness in question did give testimony against the plaintiffs, and conceding that counsel for the plaintiffs was, as he stated when insisting upon the right to cross-examine his own witness, surprised at the testimony of the witness, still this fact did not give him the right to cross-examine merely for the purpose of showing bias. The general rule is that, where a witness is unexpectedly hostile to or biased against the party by whom he is called, such party cannot introduce evidence tending to show such hostility or bias. In re Mellen's Estate, 56 Hun, 553, 9 N Y. Supp. 929; Wise v. Wakefield, 118 Cal. 107, 50 Pac. 310.

[8] Subsequently counsel for the plaintiffs endeavored to impeach the testimony of this same witness by proof of previous inconsistent statements. As a foundation for the attempted impeachment, the witness in question was asked if he had not made certain statements to a man named Miller at a certain time and place. The witness having denied making the statements contained in the impeaching question, Miller was called and sworn by the plaintiffs as an impeaching witness. The record shows that the trial court, over objection, permitted Miller to be interrogated as to what he said to the witness sought to be impeached, rather than what the latter said. In short, the impeaching question, involving the claimed inconsistent statements, and which, in the first instance, had been put to the witness sought to be impeached, was not propounded, precisely or in substance, to the impeaching witness. "The proper method of impeachment is to formulate the question so as to embrace the very statement, at least in substance, which the witness whom it is desired to impeach has denied making, and to ask the impeaching witness for a categorical answer whether the statement was made, giving 'the circumstances of times, places, and persons present.' Section 2052, Code Civ. Pro." Norris v. Crandall, 65 Pac. 568, 570.[1] See, also, People v. Nonella, 99 Cal. 333, 33 Pac. 1097.

This disposes of all of the points made in support of the appeal which we deem worthy of discussion.

The judgment appealed from is reversed.

We concur: WILBUR, J.; MELVIN, J.

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[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 133 Cal. xix.

180 Cal. 540

MILLER et al. v. PITMAN et al. (L. A. 4893.)

(Supreme Court of California. June 9, 1919. Rehearing Denied July 7, 1919.)

1. Executors and Administrators 🔑315(6)—Decree of Distribution—Collateral Attack.

A decree of distribution is not subject to collateral attack no matter how erroneously it may appear to depart from the terms of the will, if all of the interested parties have had due notice of the petition.

2. Executors and Administrators 🔑314(4)—Petition for Final Distribution—Notice.

It is not necessary that personal notice be given of presentation and pendency of a petition for final distribution, and, where there is no claim that the notice required by law was not given, it will be presumed that such notice was given.

3. Executors and Administrators 🔑315(5)—Decree of Distribution—Construction.

A decree of distribution disposing of the residue of decedent's estate, described as "all of said property," to his widow, naming her, meets the requirements of Code Civ. Proc. § 1666, and distributes all of estate to her without limitation.

4. Appeal and Error 🔑843(2)—Matters Not Necessary to Dispose of Case—Review.

Since neither the pleadings nor proof of plaintiff suffice to support their action to quiet title, the question of the statute of limitations put in issue by the pleadings need not be considered.

Department 2.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by John E. Miller and another against Albert Sidney Pitman and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Kendrick & Ardis, of Los Angeles, for appellants.

A. Moore, of Whittier, and R. A. Moore, of Los Angeles, for respondents.

LENNON, J. This is an appeal from a judgment quieting the plaintiffs' title to an undivided one-fourth of a certain tract of land situate in the county of Los Angeles and awarding to the plaintiffs the sum of $1,750 for the use and occupation of said lands for the period during which the trial court found the plaintiffs were entitled to the possession thereof.

The facts of the case, as revealed by the pleadings, proof, and findings, are generally these: In February, 1888, Elias W. Pitman died seized of a tract of land which included the land in suit. By his will, he left a life estate in the said land to his wife Charlotte Pitman, whom he named as executrix, with remainders in fee to their children and to the heirs of the children's bodies. Under the terms of this will, the plaintiff, John E. Miller, the orphaned grandson of Elias W. and Charlotte Pitman, who was at the time eleven years of age, was entitled to an undivided one-sixth interest in the total remainder, his sister to one-sixth, and the defendants Albert S. Pitman and Mary Cole, née Pitman, to one-third each. In March, 1888, the defendant Albert S. Pitman, son of Elias W. and Charlotte Pitman, was duly appointed the guardian of the plaintiff John E. Miller and of his sister, Mary Miller, and acted as such during their minority and, in fact, never was discharged. The will of Elias W. Pitman was duly admitted to probate upon the petition of Charlotte Pitman, as executrix. In due tme, she petitioned the probate court for a decree of final distribution wherein she alleged, among other things:

> "That the said Charlotte Pitman, your petitioner, is, by reason of the provisions of the last will of said deceased, now on file in this court, entitled to the whole of the residue of said estate during her lifetime, and after her death to be equally divided among his said children."

In November, 1891, the probate court made and entered its decree in the estate of Elias W. Pitman finally distributing "all of the said property to Charlotte Pitman, the widow of said Elias W. Pitman, deceased." Charlotte Pitman entered into possession of the land in suit under this decree of distribution and subsequently deeded a portion of it to the defendant Albert S. Pitman absolutely leaving approximately two-thirds of the original acreage standing in her name. In 1900, the said Albert S. Pitman, desiring to sell the one-third so conveyed to him, requested the plaintiff Miller to join in the deed. Miller did so, as he testified, upon the representation of Pitman that if he would do so he, Pitman, would take this one-third of the land as his full share of the real property in the estate of Elias W. Pitman. In 1907, Charlotte Pitman deeded the remaining two-thirds to the defendants Albert S. Pitman and Mrs. Cole, reserving, however, unto herself a life estate therein. Charlotte Pitman died in March, 1909, on December 18, 1909, the defendant Albert S. Pitman purchased the interest of Mrs. Cole; Charles Cole, her husband, joining in the deed. Since that time Pitman has been in possession of the land, claiming title thereto under the conveyances to him from Charlotte Pitman and the Coles. The plaintiffs' complaint alleged, and the trial court found that the defendants knew the terms of the will of

Elias W. Pitman at all times the probate thereof and "willfully and fraudulently concealed said facts from the said John E. Miller" and, in effect, that said concealment was successful down to 1914. The court found that the plaintiff Miller was absent from Los Angeles county and resided in Oregon, Washington, and Canada from 1907 to the spring of 1915, and, in the latter year, ascertained for the first time that his grandfather, Elias W. Pitman, had made him one of the devisees in his will. The plaintiff Moore clams title to a portion of the land in suit under a deed from the plaintiff Miller.

A first impression created by a cursory reading of the record is that the plaintiffs' cause of action proceeds in part upon the theory of a trust arising in favor of the plaintiff Miller as the result of a fraudulent concealment by Charlotte Pitman and the defendant Albert S. Pitman while standing in the relation of fiduciaries to the said Miller. A closer scrutiny of the record discloses that the plaintiffs' complaint is framed, as were the findings and judgment of the trial court, upon the theory that the probate court had no jurisdiction, under the issues presented by the petitions for the probate of the will of Elias W. Pitman and for the final distribution of his estate, to distribute to Charlotte Pitman any interest therein greater than a life estate, and that, as a consequence, the decree of distribution did not divest the plaintiff John E. Miller of the interest in the estate of Elias W. Pitman devised to him by the terms of the will and did not distribute to Charlotte Pitman the fee simple title to the lands in suit. With this theory as a basis, the plaintiffs contended, and the tral court in effect further found, that the only interest, namely, a life estate, which Charlotte Pitman took under the decree of distribution, terminated at her death, thereby vesting the remainder over, to the extent of an undivided one-fourth, in the plaintiff Miller in fee simple. Of course, if this theory were correct, it would follow, as the trial court ultimately concluded, that the defendants, as grantees of Charlotte Pitman, acquired no interest in or title to the lands in suit. In view of the evident and undoubted theory of the plaintiffs' case, as thus outlined, it is obvious that the facts relative to the alleged fraudulent concealment were pleaded, proven and found solely for the purpose of tolling the statute of limitations and need not, therefore, be considered for any other purpose.

[1, 2] It thus appears that the paramount point presented upon the appeal involves the scope, effect, and finality of the decree of distribution which was made and entered in November, 1891, and never appealed from. The fundamental finding of the trial court to the effect that Charlotte Pitman took no more than a life estate by the decree of distribution is not supported by the evidence. The only evidence responding to this phase of the case consists of the will of Elias W. Pitman, the petition for its probate, the petition for the decree of distribution, and the decree itself. Neither extrinsic fraud nor mistake in the procurement of the decree was alleged, shown, or found. The decree is valid on its face. Clearly the probate court had jurisdiction of the subject-matter of the decree of distribution, and the fact that the decree erroneously construed the terms of the will did not operate to render the decree void. The time for appeal from the decree has long since expired. It is well settled that a decree of distribution is not subject to collateral attack, no matter how erroneously it may appear to depart from the terms of the will devising and bequeathing the estate distributed, if all of the interested parties have had due notice of the petition. The law does not require personal notice to be given of the presentation and pendency of a petition for final distribution, and, the complaint in the present case failing to allege that the notice required by law was not given, it will be presumed that such notice was given. Code Civ. Proc. §§ 1666, 1668; Daly v. Pennie, 86 Cal. 552, 25 Pac. 67, 21 Am. St. Rep. 61; Lynch v. Rooney, 112 Cal. 279, 44 Pac. 565; William Hill Co. v. Lawler, 116 Cal. 359, 48 Pac. 323; Matter of Trescony, 119 Cal. 568, 51 Pac. 951; Goldtree v. Allison, 119 Cal. 344, 51 Pac. 561; Goad v. Montgomery, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145; Jewell v. Pierce, 120 Cal. 79, 52 Pac. 132; Cunha v. Hughes, 122 Cal. 111, 54 Pac. 535, 68 Am. St. Rep. 27; McKenzie v. Budd, 125 Cal. 600, 58 Pac. 199; Toland v. Earl, 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 100; Mulcahey v. Dow, 131 Cal. 73, 63 Pac. 158; Keating v. Smith, 154 Cal. 191, 97 Pac. 300; Estate of Learned, 156 Cal. 309, 104 Pac. 315; Rountree v. Montague, 30 Cal. App. 170, 157 Pac. 623; Beltran v. Hynes, 180 Pac. 540.

[3, 4] This brings us to a consideration of the legal effect of the language of the decree. In our judgment, it is susceptible of no construction save that it purports to, and does in fact, distribute all of the estate of Elias W. Pitman to Charlotte Pitman, without limitation. In this behalf, it will be noted that the decree in terms declares that it is disposing of the "residue of the estate" thereinafter "particularly described" as follows: "All of said property to Charlotte Pitman, the widow of said Elias W. Pitman, deceased." Section 1666 of the Code of Civil Procedure, which provides the requirements of a decree of distribution, declares that it "must name the persons and the proportions or parts to which each shall be entitled. * * *" Viewed in the light of this Code section, there is no escape from the conclusion that the decree in controversy, in express terms distributed all of the property of the estate to Charlotte Pitman without limitation and thereby

confirmed in her an estate in fee simple absolute. This decree, in the absence of a showing or claim of extrinsic fraud or mistake, was irrevocable save upon appeal within the time provided by law, even though it was in contravention of the terms of the will. McKenzie v. Budd, supra; Mulcahey v. Dow, supra. So long as this decree stands unimpeached by such fraud or mistake, and it has not been so impeached herein by any fact alleged in the pleadings, developed in the proof or found by the court, there is no theory upon which any right or title of the plaintiffs to the land in question can be predicated and sustained. It follows that neither the pleadings nor proof of the plaintiffs suffice to support an action to quiet title, and, consequently, the question of the statute of limitations, which was put in issue by the pleadings, need not now be considered.

This opinion might with propriety and perhaps in strictness should end here, but we do not wish to be understood as holding that the plaintiffs in the presence of the potential equities of their case are entirely without remedy. Therefore, we are constrained to say that, if time has not confirmed a wrong, the plaintiff's case might very readily be made to proceed through the medium of appropriate pleadings upon the equitable theory which, while recognizing, as a matter of law, the finality of the decree as a muniment of title in the defendants, nevertheless impresses such title with an involuntary trust in favor of the plaintiffs by reason of extrinsic fraud, or mistake superinduced by such fraud, in the procurement of the decree coupled with the breach of a fiduciary relationship. Estate of Walker, 160 Cal. 547, 117 Pac. 510, 36 L. R. A. (N. S.) 89. In this behalf, it may not be amiss to note again that at the time of the presentation and granting of the petition for the decree of distribution the defendant Albert S. Pitman was the duly qualified and acting guardian of the person and estate of the plaintiff Miller. The decree being obviously erroneous, it was the undoubted duty of the defendant Pitman, as such guardian to have instituted and prosecuted appropriate proceedings by appeal, or otherwise, to remedy the error. His failure as guardian to thus protect and preserve the interests of his ward having ultimately resulted to his own advantage, it would seem to be but just to make him a trustee to the extent that he profited by his default. True, the defendant Pitman did testify that he never knew that the plaintiff Miller was entitled to anything under the will, but, obviously, it was his business and duty as guardian to know the terms of the will.

The appellant assigns error in several of the rulings of the trial court concerning the admissibility of certain evidence. No argument, however, is made in support of these assignments, and therefore we do not deem them worthy of discussion and decision.

The judgment appealed from is reversed.

We concur: WILBUR, J.; MELVIN, J.

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40 Cal. App. 679

HOGAN v. ANTHONY et al. (Civ. 2798.)

(District Court of Appeal, Second District, Division 1, California. April 16, 1919. Rehearing Denied May 13, 1919.)

1. SALES ⚿92—RESCISSION BY CONSENT.

Where plaintiff on discovery of the fraud refused to pay monthly installments for truck he had been induced to purchase by false representations of defendant seller and returned truck in compliance with defendant's demand, there was a rescission by consent. Civ. Code, §§ 1689, 1691.

2. SALES ⚿456—SALE OR LEASE—STATUTE.

Defendants cannot, by designating a contract a lease, take from it its true character as a contract for the conditional sale of truck which it was in fact, in view of Civ. Code, § 1648.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by James P. Hogan against Earle C. Anthony, doing business under the fictitious name of the Chalmers-Los Angeles Company and others. Judgment for defendants, and plaintiff appeals. Reversed.

Ralph E. Swing, of San Bernardino, for appellant.

A. D. Laughlin, of Los Angeles, for respondents.

SHAW, J. Plaintiff, upon the judgment roll alone, appeals from a judgment entered in favor of defendant.

As appears from the second amended complaint, filed after the decision of this court in a former appeal had by defendant wherein the judgment in favor of plaintiff was reversed (Hogan v. Anthony, 34 Cal. App. 24, 166 Pac. 861), the parties, on August 13, 1914, executed a contract, the designation of which is "Lease and Conditional Sale of Automobile" (the subject thereof being an auto truck), upon which plaintiff at the time paid $500 in cash, and for the balance of the purchase price or rental of $1,150 he executed his promissory notes, one of which was for the sum of $100 and by its terms due and payable on September 13, 1914. The writing contained a provision to the effect that the instrument should be construed as a lease with an option on the part of the plaintiff to acquire title to the truck for the sum of one dollar, subject to compliance with his covenants therein contained and payment of the notes according to the terms and conditions thereof.

The complaint embraces two counts, in one of which plaintiff alleges facts which, if true, he insists show a rescission of the contract, under and by virtue of which he is entitled to recover judgment for the $500 paid. The other is a common count for money had and received by defendant for the use and benefit of plaintiff.

On the former appeal the judgment was reversed for the reason that, as shown by the complaint upon which the case was tried, the subject of the action was not the contract, designated "Lease and Conditional Sale of Automobile," under and in accordance with which possession of the truck was by defendant delivered to plaintiff, but a preliminary agreement in the course of the transaction, made the preceding day, and as to which the court, in distinguishing such preliminary and informal contract which contemplated the execution of the lease and conditional-sale agreement here involved, says:

> "The facts * * * disclose a situation, during the period between the execution of the contract and the execution of the lease, in which the parties were engaged in closing a single transaction. Of this transaction, the lease was the conclusion and the culmination, and by it must the rights of the parties be judged. The respondent does not claim to have rescinded the lease. He denies its existence and expressly relies upon an alleged rescission of the contract, a paper merely preliminary to the lease and which was abrogated by it." See Hogan v. Anthony, supra.

It thus appears that on the former appeal the court had before it a case the subject of which was the rescission of a different instrument from the one here involved.

On this appeal, in the absence of the evidence, the sole question presented is whether or not the findings, deemed to be fully established, support the judgment. The court found:

> That on the 12th day of August, 1914, defendant agreed to sell and plaintiff agreed to buy the truck in question for the sum of $1,650, at which time plaintiff paid the sum of $500 to be applied upon the purchase price of the vehicle, and agreed to pay the balance thereof in eleven monthly installments of $100 each, and one, the last, of $50, all of which should be evidenced by promissory notes due and payable in accordance with the agreement. That on the next day, August 13th, plaintiff and defendant executed the contract, designated "Lease and Conditional Sale of Automobile," to which we have hereinbefore referred, and plaintiff made and executed the promissory notes in accordance with his agreement made the day before; whereupon the truck was delivered to plaintiff who continued in possession thereof until September 18, 1914. That "at the time of entering into said contract * * * plaintiff had no knowledge regarding such trucks and so informed defendants and told defendants that he would have to rely entirely upon their representations * * * and * * * informed defendants the nature of his business and for what purpose he desired to use the said truck, and that he needed a truck * * * with a capacity of and capable of carrying and conveying from one to one and one-quarter tons of freight. * * * That he must have a truck that would haul and carry not less than from one to one and one-quarter tons, and that he could not use a truck of a less carrying capacity. That said defendants then and there represented to plaintiff that the truck so leased by plaintiff, as aforesaid, was a ton truck, and that the same * * * had a hauling capacity sufficient for plaintiff's business, * * * and that said truck would easily carry and haul one and one-quarter tons of freight." "That plaintiff relied upon each and all of said representations so made by defendants and believed them to be true and believed that the truck which said defendants were then offering to sell to him was a truck, with a hauling capacity of not less than one and one-quarter tons. * * * That, if it had not been for said representations so made by defendants, plaintiff would not have entered into said agreement and that it was by reason of said representations so made by defendants to plaintiff that plaintiff did enter into said agreement as hereinbefore found, and paid to defendants the said sum of $500. That each and all of the representations so made by defendants to plaintiff with reference to said truck and its carrying capacity, as aforesaid, were and are false and fraudulent, and the said truck so leased by said defendants to plaintiff, as hereinbefore set out, was in truth and in fact a 1,500-pound truck * * * and did not have a carrying capacity of 1 ton or of 1¼ tons. That said defendants knew that said representations so made by them, as aforesaid, were false and fraudulent at the time they were made and said representations were so made by said defendants for the purpose of deceiving and defrauding said plaintiff, and for the purpose of causing him to enter into said contract, as hereinbefore found, and to pay to defendants the sum of $500 and to cause plaintiff to agree to pay the balance thereof in monthly payments. * * * Possession of said truck was delivered to said plaintiff on the 13th day of August, 1914, and thereafter plaintiff attempted to use the same in his business, but said truck could not be used successfully in his said business. * * * When plaintiff first began to use said truck he attempted to haul thereon about one ton of freight. When so doing said truck would heat up to such an extent that it could not be successfully used. Plaintiff thereupon complained to defendant regarding such condition and defendant assured plaintiff that such condition was caused solely by the fact that said truck was new. Plaintiff relied upon such statement of defendant that such heat was being caused by the fact that said truck was new, and continued to use the same; but said truck continued to heat and could not be successfully used by plaintiff in his said business. That plaintiff did not discover the fact that said truck was not a ton truck and was only a truck of 1,500 pounds capacity until on or about the 26th of August. That immediately after discovering said fact plaintiff notified said defendant that said truck was not a ton truck and was not of a capacity which defendant had represented it to be. That plaintiff refused to make any fur-

ther payments upon said contract solely by reason of such facts.

"That on the 18th of September, 1914, defendant * * * at the city of Upland demanded payment of the note then due. That plaintiff then refused to pay said note and also refused to make any further payments pursuant to said agreement unless defendant furnished plaintiff with a ton truck. That on the said 18th day of September, 1914, plaintiff, at the request of defendant, returned said truck to defendant and said truck has been in the possession of defendant ever since. That plaintiff returned said truck to defendant because of the fact that the same was not as it had been represented to be and because of the fact that it could not be successfully used by plaintiff in his said business. That defendant never * * * furnished plaintiff with a truck of a ton capacity or of any other capacity, and on demand made by plaintiff, prior to the commencement of this action, for a return of said $500, refused to repay the same. That defendants did not at any time receive for the use and benefit of plaintiff the sum of $500 or any sum whatsoever. That no part of the $100 note which matured on September 13th, and for which defendants by answer sought to recover, had been paid."

Upon the foregoing facts the court concluded, as a matter of law, that plaintiff was entitled to nothing, and that defendant Earle C. Anthony was entitled to recover upon the $100 note, and gave judgment accordingly.

The facts are quite similar to those involved in Pepper v. Vedova, 26 Cal. App. 406, 147 Pac. 105, and Hackett v. Lewis, 173 Pac. 111, in both of which cases plaintiffs recovered money the payment of which was induced by like deceit. Indeed, the findings quoted show that, as a means of wrongfully obtaining plaintiff's money, defendants knowingly perpetrated the grossest fraud, and to uphold the judgment entered thereon would render the language of the Legislature, that "for every wrong there is a remedy" (section 3523, Civ. Code), and "no one can take advantage of his own wrong" (section 3517, Civ. Code), idle and meaningless declarations.

[1] The acts of the parties had and taken, as shown by the findings herein, present a different case from that involved on the former appeal. That, as shown by the findings, plaintiff was entitled to rescind the contract of sale, admits of no controversy. Were the acts had and taken by the parties sufficient to constitute a rescission? The promised payment of the note as to which default was made was predicated upon the precedent promise of the defendants to furnish him with a truck of a ton or a ton and a quarter capacity. Defendants neglected and refused to comply with their promise, thus dispensing with any obligation of performance on plaintiff's part to pay the note. Mansfield v. New York C. & H. R. R. Co., 102 N. Y. 205, 6 N. E. 386. When for nonperformance defendants requested that plaintiff return the truck, he complied therewith, not because he was under obligation to do so, since he might have affirmed the contract and sued for damages, but, as found by the court, "because of the fact that the same was not as it had been represented to be." A rescission may be accomplished by consent. Section 1689, Civ. Code. When defendants, without performance of their promise, in the absence of which no duty was imposed upon plaintiff to pay the note, demanded the return of the truck and plaintiff complied therewith, a rescission by consent was implied from such acts. Assuming, however, that defendants did not consent to the rescission, nevertheless the act of plaintiff in refusing to pay the note on account of the fraud and returning the truck was all that he was required to do by section 1691, Civil Code, to accomplish a rescission. That section provides that, in order to effect a rescission other than by consent, the party rescinding must—(1) upon discovery of the facts which entitle him to rescind, act promptly, with which provision plaintiff complied. "(2) He must restore to the other party everything of value which he has received from him under the contract." With this provision, waiving his right to exact restoration of the money paid as a condition of delivering the truck, he also complied, the result of which is that defendants have the truck and the $500 so wrongfully obtained from him.

Respondent argues that the instrument was merely a lease for a stipulated monthly rental for the use of the truck, and that for default in the payment of such installments of rent they were entitled to and did retake the truck into their possession. Even were the instrument conceded to be a lease, the law applicable to the case is the same.

[2] By the contract the parties clearly contemplated a sale by the one and a purchase by the other. Respondent cannot, by designating the contract a lease, take from it its true character as a contract for the conditional sale of the truck, which it was in fact. "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." Section 1648, Civ. Code.

The judgment is reversed, and upon going down of the remittitur the trial court is instructed to enter a judgment upon the findings in favor of plaintiff for $500, together with interest thereon from August 12, 1914, and costs.

We concur: CONREY, P. J.; JAMES, J.

40 Cal. App. 790

JOHNS v. BAENDER et al. (Civ. 2657.)

(District Court of Appeal, First District, Division 1, California. April 26, 1919. Rehearing Denied by Supreme Court June 23, 1919.)

1. Appeal and Error 🔑197(3)—Objections in Lower Court—Pleading.

In a suit by judgment creditor to set aside a conveyance for fraud, where demurrer to the complaint was general, and defendants did not object to evidence introduced on the ground of failure to allege that defendants had no other property subject to execution, such point will be deemed to have been waived, and cannot be considered on appeal.

2. Fraudulent Conveyances 🔑58 — Intent to Defraud—Other Property Sufficient to Pay Debts.

A conveyance made with intent to defraud creditors is void regardless of whether the debtor has other property ample in amount to satisfy his creditor.

3. Appeal and Error 🔑169—Questions Raised in Oral Argument.

A point which was made for the first time upon oral argument cannot be considered on appeal.

4. Witnesses 🔑191—Privileged Communications—Husband and Wife—Divorce Complaint.

In a suit by a judgment creditor to set aside a conveyance by a husband and wife as being fraudulent, a divorce complaint of the wife against the husband in which she claimed the property involved to be community property was not privileged so as to exclude its admission in evidence.

5. Appeal and Error 🔑204(1)—Review—Admission of Evidence—Failure to Object.

Where appellants failed to object to the admission of evidence in the court below, they cannot on appeal be heard to complain.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by Arthur T. Johns against Charles L. Baender and others. From a judgment for plaintiff, defendants appeal. Affirmed.

L. W. Jefferson, of Oakland, for appellants.

St. Sure & Rose, of Oakland, for respondent.

KERRIGAN, J. This is an appeal from a judgment against defendants in an action instituted by the plaintiff to vacate and set aside a conveyance of real property alleged to have been made to obstruct and prevent plaintiff from satisfying a certain money judgment which he had theretofore obtained against the defendants Charles L. Baender and Lillie M. Baender, his wife.

The evidence abundantly supports the finding that the conveyance of the property here assailed was made to defraud, hinder, and delay the collection of plaintiff's claim.

It appears from the record that in the latter part of the year 1908 the defendants, Charles L. Baender and his wife, had falsely represented in several material respects a certain business transferred by them to the plaintiff in consideration of a conveyance of real property, by reason of which misrepresentations plaintiff, in the month of June, 1910, obtained judgment against said defendants, which he now seeks to satisfy out of the property described in the complaint, the ownership of which in defendants arises from the original transfer to them by plaintiff of the real property above referred to as the consideration for plaintiff's acquisition of said business, and which, with the intent of concealing their ownership thereof, they transferred to Charles P. Baender, the father of the defendant Charles L., who subsequently conveyed the same to R. M. Meeker. It appears that later it was exchanged for what is called in the record the Fruitvale lot, which in turn was exchanged for the property described in the complaint, and that the deed thereto was taken in the name of the mother of Charles L. Baender, in whom the record title remained until it was conveyed to defendant Niels Gostave, which conveyance was made for the purpose of enabling Gostave to qualify as a bondsman for said Charles L. Baender, at that time charged with the offense of grand larceny.

After obtaining the first judgment plaintiff caused an execution to issue thereon, but neither by this means or in any other way was he able to collect the amount thereof, not learning of his debtors' interest in the real property concerned in this action until early in the year 1915, when Lillie M. Baender commenced an action for divorce against her husband, and alleged in her complaint that it was the community property of herself and husband.

It is also in evidence that shortly after the commencement of the divorce proceeding Charles M. Baender met the plaintiff one day, and tried to effect with him a compromise of his claim. On that occasion Baender not only admitted that he had obtained the first conveyance by fraud, but also that the title to the property here involved was taken in the name of his relative, as already mentioned, for the purpose of obstructing and defeating any claim which the plaintiff had or might have against him and his wife. It further appears that Charles L. Baender and wife were at all times in possession of the property, paid the taxes thereon, and expended money for its repair and improvement, but paid no rent therefor.

The testimony on behalf of the defendants was weak, evasive, and unsatisfactory. The case shows plain indications of fraud.

[1, 2] Defendants, in support of their appeal, urge that, this being an action in equity to set aside a transfer of property on the ground of fraud, facts must be alleged showing that the conveyance was made in such manner and under such circumstances as to show its fraudulent intent, and accordingly that it must appear that at the time it was made, and also when this action was commenced, said defendants had no other property subject to execution out of which the plaintiff's judgment could be satisfied, citing Albertoli v. Branham, 80 Cal. 631, 634, 22 Pac. 404, 13 Am. St. Rep. 200. Assuming for the moment that appellants' position is sound, still we are of the opinion that the most that can be said against the complaint in this regard is that it is somewhat indefinite; but, as the demurrer was general, and as there was no objection to the evidence introduced to establish the fraud on the ground now urged, the point must be deemed to have been waived, and is now unavailing. Sukeforth v. Lord, 87 Cal. 399, 403, 25 Pac. 497. Moreover, the case on which appellants depend appears to have been overruled; and, according to later cases, if a conveyance be made with the intent to defraud creditors it is void, notwithstanding that the debtor has other property ample in amount to satisfy his creditor. First Nat. Bank of L. A. v. Maxwell, 123 Cal. 360, 371, 55 Pac. 980, 69 Am. St. Rep. 64; Bekins v. Dieterle, 5 Cal. App. 690, 694, 91 Pac. 173.

[3] Defendants also assert that the decree rendered in the present suit goes beyond the issues framed by the pleadings and the prayer, by declaring in effect a second judgment against them arising out of the same cause of action. It is true that a portion of the judgment if detached from the remainder seems to be open to the objection urged by defendants, but we think it sufficiently clear that, when the judgment is read in its entirety, the part objected to amounts to no more than a recital of the amount due to plaintiff on account of the former judgment, and for which the plaintiff is given a lien on the property here involved. But aside from this, the point was made for the first time upon oral argument, and may not for that reason be considered.

The appellants also contend that, even if the transfer of the property were fraudulent, the title of the grantee is good as against all the world except this creditor, and that the court could not deprive the grantee of the title so conveyed to her, but that the judgment should have subjected the property to the lien of the judgment, and directed that any surplus which might remain after sale be paid to the grantee. The court under the issues found a certain amount due plaintiff, and, having also found that the transfers already referred to were void as to plaintiff, impressed the property with the lien of his judgment, directing that it be sold in satisfaction of that judgment. To this much under the issue the plaintiff was clearly entitled. As to what may or should be done with any possible surplus is a matter with which under the pleadings we are not now concerned.

[4, 5] The divorce complaint of Lillie M. Baender against her husband, having been filed, was not privileged; and, moreover, as it was admitted in evidence without objection, said defendants cannot now be heard to complain of its admission.

The record as amended on suggestion of diminution thereof shows that the default against defendant Niels Gostave, sued as First Doe, was valid. Nor did the court err in ordering judgment against him.

No other point urged by appellants requires consideration.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

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41 Cal. App. 28

SMITH v. BARRICK et al. (Civ. 1891.)

(District Court of Appeal, Third District, California. April 30, 1919. Rehearing Denied May 30, 1919; Denied by Supreme Court June 26, 1919.)

1. DESCENT AND DISTRIBUTION ⚷75, 84—TITLE OF HEIRS—REAL ESTATE—CONVEYANCE.

Title to real estate of deceased intestate vests immediately in his heirs which title they may convey without administration, subject to payment of debts.

2. ADVERSE POSSESSION ⚷4—ACQUISITION OF ADVERSE TITLE—HEIRS.

As title descends to an heir of a deceased intestate subject to administration and he may convey the same, an heir may lose title by adverse possession.

3. TENANCY IN COMMON ⚷15(1)—ADVERSE POSSESSION—ADMINISTRATION.

A tenant in common who has acquired his title by descent may be divested of such title through adverse possession during the pendency of proceedings for administration of the estate of the deceased intestate from whom title descended.

4. TENANCY IN COMMON ⚷15(1)—ADVERSE POSSESSION—ADMINISTRATION.

While mere possession of land by a cotenant is not sufficient basis upon which to establish an adverse title as against cotenants, yet adverse title in favor of a cotenant may be established by the taking and recording of deeds and mortgages of the entire premises, together with the retaining of the rents and profits for the whole land for longer than the prescribed period.

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Action by Mrs. J. E. Smith, administratrix of the estate of Henry Worrall, deceased, against C. W. Barrick, as the administratrix of the estate of Henry Reece, deceased, and others and Ella Carpenter and others, and also all other persons unknown claiming any right, title, estate, lien, or interest in certain real property. From a judgment for plaintiff the defendants first named appeal. Modified, and as modified affirmed.

Preston & Preston, of Ukiah, and Hennessy & Peterson, of Grass Valley, for appellants.
W. H. Slade and Prewett & Chamberlain, all of Auburn, for respondent.

BUCK, Presiding Judge pro tem. This is an action to quiet title brought by the successor in interest of an heir against the other heirs and the administrator. Plaintiff claims to have acquired ownership by adverse possession, and the suit was commenced under the provisions of section 749a, Code of Civil Procedure. But by the dismissal of the action against all of the defendants except the original heirs and the administrator, the suit has become in fact an action to quiet title. Faxon v. All Persons, 166 Cal. 707, 712, 137 Pac. 919, L. R. A. 1916B, 1209. Judgment was given in favor of plaintiff upon the ground that plaintiff and his predecessors had acquired title by adverse possession against the defendant heirs, and also against the administrator. From this judgment all of the defendants appeal. The facts upon which the trial court based its findings and decree are substantially as follows: On September 4, 1876, the ancestor from whom all parties deraigned title, Henry Reece, died intestate in the county of Nevada, leaving as his sole heirs his widow, Amanda Reece, and three children, the defendants herein, aged, respectively, 12, 6, and 3 years, the youngest of whom did not become of age until 1891. With the exception of some personal property of the value of $447, the deceased left no other property except the quarter section of land in controversy of the value, at that time, of $250. The property was the community property of himself and wife. On October 9, 1876, letters of administration were issued to his widow, Amanda Reece. But she took no other proceedings in the estate than to publish the notice to creditors and cause an inventory and appraisement to be made of the property. She died in 1887, and in 1915 letters of administration on the estate were issued to C. W. Barrick, who is made a defendant in his capacity as such administrator. On January 18, 1878, Amanda Reece made a deed of quitclaim to one A. S. Waldo, by which she did "remise, release and forever quitclaim unto the party of the second part and to his heirs and assigns" the property in controversy. This deed was recorded in the records of Nevada county July 3, 1880. Waldo was a son-in-law of Amanda Reece, and had actual knowledge of the family interest in the land. At about the time she made the deed to Waldo, Amanda Reece and her three children moved from the land in Nevada county to Auburn, in Placer county, where they lived for a period of 5 years and then moved to Ukiah, in Mendocino county, a distance of about 400 miles from Nevada county. It does not appear that any of the defendants ever returned to or visited the premises or ever received any income from the property, nor did their mother ever talk to them "about this property," and they never heard about it until the year 1913, when they were asked to give a quitclaim deed of their interest in it. After he obtained the quitclaim deed to the property in 1878, A. S. Waldo "put some stock on it, and put a man there to take care of the stock." He did not live on the property himself. The property was under fence and was cultivated, and no one ever objected to his possession at the time. He leased the property to a third person, and collected the rent for the whole of it and paid taxes on it. On April 11, 1881, Waldo, by a grant, bargain, and sale deed, which was recorded on April 23, 1881, conveyed the property to John Davis who took possession of the land, cultivated it, and pastured it, repaired and built fences, and built a dwelling house thereon and occupied it until June, 1900, when by his deed, which was also duly recorded, John Davis conveyed the property to his son, Samuel Davis, who made his home on the property a part of the time, and also leased it to third parties, and received all the rents and profits therefrom. On July 9, 1908, Samuel Davis, by his deed of grant, bargain and sale, which was also recorded, conveyed the property to Henry C. Worrall, who remained in possession of the property 7 or 8 years, and during all that time paid the taxes on the property and farmed and pastured it. Also, on July 9, 1908, Henry C. Worrall gave a mortgage of all the property to Samuel Davis as security for the payment of the sum of $1,200, and on August 9, 1912 Worrall mortgaged all of the property to one Edith B. Poulson as security for the payment of the sum of $600; that both of these mortgages were recorded soon after being executed. Ever since 1890 the property has been assessed in the names of the foregoing record title holders thereof and all the taxes have been paid.

[1, 2] From the foregoing it appears that at the time of the death of their father in 1876 the defendants herein became vested with title to the property in question as cotenants in ownership with their mother, the

mother owning an undivided one-half interest therein and each of the three heirs an undivided one-sixth interest therein. As stated in the case of Phelps v. Grady, 168 Cal. 73, at page 75, 141 Pac. 926, 927:

> "Title to the real estate of the deceased intestate vests immediately in his heirs, of a testate in his devisees. That title they may convey without administration, and this they may do whether they be domestic or foreign heirs or devisees. * * * True, the title thus conveyed is not a perfect title, in that the title will always be subject to the right of possession in a local administrator for the payment of claims of local creditors. But with this defect, the heirs who have deliberately parted with their title are not concerned and can find no fault. * * * No case cited by the appellant denies the power of the heirs or devisees so to convey their title. Indeed such a denial would be in the face of our express statutory law. All that such cases as In re Pina, 112 Cal. 14, 44 Pac. 332, Turner v. McDonald, 76 Cal. 177, 18 Pac. 262, 9 Am. St. Rep. 189, Estate of Strong, 119 Cal. 633, 51 Pac. 1078, and Blair v. Hazzard, 158 Cal. 721, 112 Pac. 298, declare upon this matter is that the title thus conveyed is still subject to administration, and is therefore and in this sense only not perfect."

Now, if an heir can convey his interest by deed, it follows that he can likewise lose it by the adverse possession of another under the statute. But the person who takes it by such adverse possession under the statute takes it subject to administration in the same manner that a grantee would. In fact, title by adverse possession at common law was based upon the fictitious assumption of a preexisting lost grant. Bryan v. Tormey, 3 Cal. Unrep. Cas. 85, 88, 21 Pac. 725.

[3] Therefore, there is no rule of law which prevents a tenant in common who has acquired his title by descent from being divested of his title through adverse possession by his cotenant during the pendency of proceedings in administration. Our Supreme Court, in the case of Cooley v. Miller & Lux, 156 Cal. 510, at page 515, declares the rule as follows:

> "In Bath v. Valdez, 70 Cal. 360, 11 Pac. 727 [105 Pac. 981, 983], the court held that a decree of distribution, made in the usual way, does not in any manner affect the title of one who has held by adverse possession against the heirs a sufficient time to gain title by prescription. The court says: 'It is the estate of the deceased upon which the probate court administers. It is the title which the deceased had in and to the real property at the time of his death, or which has inured to the estate after death and before distribution, which passes to the heirs and devisees.'"

[4] As regards the title by adverse possession, it is true that possession of the land by a cotenant is not alone a sufficient basis upon which to establish title as against his co-owner. But, in this case, there are other elements such as the making and taking and recording of deeds and mortgages by the cotenant affecting the whole of the property and the unquestioned retaining of all the rents and profits for a period of more than 20 years after the attaining of the majority of the youngest of the defendants and the placing of valuable improvements upon the property all under a claim of exclusive ownership.

This case, therefore, comes within the rule laid down by our Supreme Court in the case of Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100; Bath v. Valdez, 70 Cal. 350, 11 Pac. 727; Felix v. Felix, 105 Cal. 1, 38 Pac. 521; Packard v. Moss, 68 Cal. 123, 8 Pac. 818, and cases cited in 2 Corpus Juris, 185, par. 355; Alvarado v. Nordholdt, 95 Cal. 119, 30 Pac. 211.

But under the rule laid down in Blair v. Hazzard, supra, as explained in Phelps v. Grady, supra, the title acquired against the heir or his successor by adverse possession cannot be deemed to divest the administrator of the deceased of his power and duty to proceed with and conclude the administration of the estate. To the extent therefore, that the judgment seeks to declare that the defendant administrator has no interest in the property herein which is still a part of the estate, it is erroneous.

The judgment may, therefore, be modified so as to provide that the right, title, and interest of the plaintiff herein is subject only to the right of the defendant administrator to proceed with and conclude the administration of said estate, and, as so modified herein, the judgment is affirmed.

We concur: HART, J.; BURNETT, J.

40 Cal. App. 672

PEOPLE v. HINSHAW. (Cr. 463.)

(District Court of Appeal, Third District, California. April 16, 1919.)

1. Jury ⚷131(15)—Question to Jurors on Voir Dire.

In a prosecution for forgery, a ruling sustaining objections to questions propounded by defendant to prospective jurors on their voir dire, relating to changing their votes during deliberation of the jury, and as to taking instructions from the court or from other jurors, *held* not error.

2. Jury ⚷131(6)—Examination of Jurors—Reason for Asking Question—Bias or Prejudice.

Where counsel for accused asked prospective jurors on their voir dire questions relating to changing their votes during deliberation of the jury, and as to whether they would take instructions from the court or other jurors, he should have stated to the trial court his reasons for asking the questions, if he desired to show bias or prejudice.

3. Criminal Law ⚷369(4)—Evidence of Another Forgery—Indivisible Transactions.

In a prosecution for forgery, evidence of another forgery, appearing as part of defendant's confession to the sheriff of the commission of the crime charged in the information, and so closely connected with the offense charged as to be indivisible therefrom, was admissible.

4. Criminal Law ⚷371(1)—Evidence—Similar Offenses—Intent.

Evidence of other similar offenses is admissible for the purpose of showing guilty intent and rebutting the theory of accident or good faith.

5. Criminal Law ⚷680(1)—Evidence—Order of Introduction.

In a prosecution for forgery, defendant's confession, which also involved the commission of another forgery, may be introduced in evidence before that of any other evidence relating to the checks forged; the order of proof being a matter within discretion of the trial court.

6. Criminal Law ⚷517(3) — Extra Judicial Confessions—Admissibility.

Extra judicial confessions of one accused of forgery alone are not sufficient evidence of forgeries committed by him to render them admissible in evidence.

7. Criminal Law ⚷1169(11)—Harmless Error—Admissibility of Evidence — Other Similar Crimes.

Admission in evidence, in a prosecution for forgery, of another forgery committed by defendant and embodied in his confession to the sheriff, if error, was cured by the later receipt of other evidence in the nature of exemplars of his handwriting, thereby affording a support for a finding that defendant forged the other check.

8. Criminal Law ⚷611—Refusal of Continuance—Grounds.

In a prosecution for forgery, it was not error to refuse continuance on account of absence of a witness for defendant, where no reason was shown why the application was not made at commencement of trial as required by Pen. Code, § 1052, and the affidavit was defective, and it was not shown that the testimony sought would have affected the verdict.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Thomas R. Hinshaw was convicted of forgery, and appeals. Affirmed.

Metzler & Mitchell, of Eureka, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. There seems to be no substantial merit in this appeal from a conviction of the crime of forgery. The evidence was amply sufficient to support the verdict. It consisted in part of the confession of the defendant. This was supplemented by the testimony of a witness who positively identified appellant as the one who cashed the check and by the unequivocal denial of the genuineness of the signature by the purported maker or drawer of the instrument. Indeed, appellant does not claim that the verdict lacks sufficient support, but he relies upon certain alleged errors committed by the court in the progress of the trial.

[1] Of these one relates to a ruling sustaining the district attorney's objection to these questions addressed to the prospective jurors on their voir dire:

(a) "Now if you are accepted as a juror and you enter the jury room to deliberate and find a verdict, and you had once voted 'not guilty,' would you then change your vote to one of 'guilty' and if so, why? (b) When you are discussing the evidence and the law after the case has been put in the hands of the jury to deliberate, and you had forgotten some part or parcel of the evidence, or the jurors did not agree upon what is given in evidence, would you accept the statement of the fellow jurors as to what evidence was given, or would you return to the court and have it read from the record? (c) If at any time during your deliberations, if you are accepted as a juror and you are in doubt as to the law given to you by this court, would you then rely upon the statements of your fellow juror as to what the law is as applied to the facts in this case, or would you return to the court and ask the court to further instruct you?"

Without extended consideration of these questions, we may say that it would be apparently difficult for any juror to answer them definitely and intelligently in advance of the contingencies therein suggested. Moreover, it is a fair inference from the remarks of the court that each of the jurors had stated that he would take the instructions as to these matters "from the court and not anybody else." In fact, it does not appear that the subject was not entirely covered by the other questions and answers which are not disclosed by the record.

[2] Besides, if appellant desired to show bias or prejudice, as he now claims, he should have so stated his reason for asking the questions. Furthermore, it appears that he must have been satisfied with the jurors, since he exercised only three of his peremptory challenges, and in view of the principles enunciated in People v. Schafer, 161 Cal. 573, 119 Pac. 920, it must be said that, if error in the ruling was committed, it was without prejudice.

[3-5] As to the admission of evidence of another forgery, it first appeared as a part of the confession of appellant of the commission of the crime charged in the information. It was embodied in his voluntarily statement made to the sheriff, and it was so closely connected with the recital as to the main offense that the confession was hardly divisible. At any rate, in this class of cases, evidence of other similar offenses is admissible for the purpose of showing guilty intent and of rebutting the theory of accident or good faith, and it is not a vital consideration that the admission of the confession was prior to the introduction of any other evidence as to said checks. The order of proof is a matter within the discretion of the trial court. People v. Rushing, 130 Cal. 449, 62 Pac. 742, 80 Am. St. Rep. 141.

[6, 7] It is true that extrajudicial confessions of defendant alone would not be sufficient evidence of the forgeries to render them admissible in evidence. People v. Baird, 105 Cal. 126, 38 Pac. 633. And it may be that the court committed a technical error in overruling the objections of appellant as to the other forgery; but other evidence in the nature of exemplars of his handwriting was subsequently received, so that the error, if any, was cured. We are satisfied that thereby a sufficient support was afforded for a finding that appellant forged the other check.

[8] There is some contention that the court committed error in refusing to continue the trial of the case on account of the absence of a witness for appellant. But the application was made after considerable progress had been made in the hearing of the cause, and no reason was shown why it was not made when it was called for trial as the statute requires. Section 1052, Pen. Code. Besides, it was quite apparent that the affidavit was radically defective, as appellant virtually admits. Moreover, the testimony of the witness, if produced, would be simply cumulative, and there is nothing to show that it would have affected the verdict of the jury.

The only other objection is addressed to the action of the court in reference to the instructions. It seems unnecessary to notice specifically the various instructions offered on the part of appellant which were refused by the court.

After an examination of the record, we are prepared to say that appellant suffered no prejudice by reason of the action of the court. The instructions were full and correct. Every principle of law necessary for the guidance of the jury was announced, and there is no ground for just criticism as to any of the proceedings during the trial.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(41 Cal. App. 83)

CAMP v. BOYD. (Civ. 2784.)

(District Court of Appeal, First District, Division 2, California. May 6, 1919.)

1. MONEY RECEIVED 🔑17(1)—PLEADING 🔑192(2) — DEMURRER—COMMON COUNT—UNCERTAINTY.

A common count for money had and received is not subject to demurrer for uncertainty.

2. TRIAL 🔑109—ISSUES—UNDUE INFLUENCE.

Where plaintiff in opening statement stated the issue to be whether "at the time that transfer was made, was T. of sound mind; was that transfer obtained by means of undue influence," and where six of grounds in support of nonsuit were directed to undue influence, and only two to unsoundness of mind, the submitting of question of undue influence to jury, after taking from it the question of unsoundness of mind, was not error; defendant being fully informed as to such issue.

3. CONTRACTS 🔑99(2)—UNDUE INFLUENCE—EVIDENCE—MENTAL CONDITION.

Under Civ. Code, § 1575, subd. 2, evidence of mental condition is admissible upon issue of undue influence, where it is claimed that such influence was made possible by reason of weakened mentality from sickness.

4. APPEAL AND ERROR 🔑1050(1)—REVIEW—HARMLESS ERROR.

In action by daughter, as administratrix of father's estate, against stepmother for money secured by undue influence, statement by daughter that her mother did her own work was not prejudicial to stepmother.

5. APPEAL AND ERROR 🔑1047(3)—REVIEW—HARMLESS ERROR.

In action involving question of undue influence upon husband by wife and effect thereof upon transfer of money, where witness, asked concerning husband's health, answered: "He never seemed to know exactly what he wanted to do. When we were riding he always rode with me on the front seat because the wind shield protected him a little more. And I had many talks with him while we were riding"—court's refusal to strike out answer as not responsive was not reversible error.

6. Appeal and Error 🔑1064(1)—Harmless Error—Instructions.

In action by husband's administratrix against surviving wife for money claimed by wife to have been transferred to her by husband, instructions that in case of intestacy the law fixed method of distribution, that under such law wife and the two daughters would divide estate, and that jury could consider the disposition as being just or otherwise upon question of undue influence, *held* not prejudicial.

7. Appeal and Error 🔑762—Objections in Reply Brief.

Objections to instructions raised for first time in the reply brief will not be considered.

8. Appeal and Error 🔑1002—Review—Verdict.

Verdict upon conflicting evidence is conclusive.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Helen B. Camp, administratrix, against Elizabeth Jewett Boyd. Judgment for plaintiff, and defendant appeals. Affirmed.

Ramsey Probasco, Robinson & Sizer, and A. B. Harris, all of Oakland, for appellant.

E. S. Page, of Oakland (E. L. Camp, of Oakland, of counsel), for respondent.

BRITTAIN, J. Elizabeth Jewett Boyd, widow of Thomas Boyd, appeals from a judgment in favor of the administratrix of his estate for $4,186.50 and costs upon a complaint for money had and received.

Rev. Dr. Boyd, a Presbyterian clergyman, who had had some education as a lawyer, was a widower with two daughters. When his wife died in 1913 he was 65 years old. He had been a sufferer from nervous attacks and experienced a complete nervous breakdown upon her death. Because of his condition in 1914 he went to a sanitarium, where he met the defendant, who was 20 years his junior. In February, 1916, they were married. In October of that year he was stricken with paralysis. After a stroke of apoplexy on August 23, 1917, he died, from what was diagnosed in May of that year as a progressive and incurable disease of the brain, on August 28, 1917. He engaged in no active work after the death of his first wife, and spent a great deal of time between her death and his own in various sanitariums and in hotels under the care of physicians. He attended to certain matters of business, but after his second marriage usually through the mediation of his wife. He attended church when he was able, and certain functions connected with his former activities. In March, 1917, his deposits in several banks were changed to joint accounts in the names of himself and his wife. At the same time one or more separate accounts in the name of the defendant were changed to joint accounts. There was a wide disparity between the amounts in the accounts; there being much more money in his accounts than in hers. Upon his death the defendant withdrew the money from the banks. One daughter, the plaintiff, and the defendant were appointed the administratrices of the estate. The daughter, as administratrix, sued the widow individually for the money so withdrawn from what had been Dr. Boyd's personal bank accounts. The trial was before a jury, and upon its verdict judgment was rendered against the widow.

[1] A general and special demurrer to the complaint was overruled. Upon the contention that a common count must fall before a special demurrer for uncertainty, the appellant relies upon two cases, Shade v. Sissons, etc., Co., 115 Cal. 357, 47 Pac. 135, and Minor v. Baldridge, 123 Cal. 190, 55 Pac. 783. In a later case the question was decided adversely to the appellant's contention. Pike v. Zadig, 171 Cal. 273, 152 Pac. 923. A common count for money had and received is not subject to demurrer for uncertainty.

[2] At the opening of the trial counsel for the plaintiff said the issues had been narrowed down to two: "(1) Did Dr. Boyd make a transfer of the money to Mrs. Boyd?" and (2) "At the time that transfer was made, was Thomas Boyd of sound mind; was that transfer obtained by means of undue influence exerted upon Thomas Boyd by this defendant?" At the close of plaintiff's case a motion for nonsuit was denied, and this is assigned as error. It is argued that by reason of the opening statement the only issue which the defendant was called upon to meet was that of unsoundness of mind, and that the plaintiff wholly failed to produce evidence upon that issue. It is further argued that since the court expressly took from the jury the issue of unsoundness of mind, there was no issue in regard to undue influence. The position of the respondent is that from the opening statement to the close of the trial the plaintiff did not contend nor attempt to prove that Dr. Boyd was insane, but that his mentality was so weakened by sickness that he was subject to the undue influence of the defendant; that this position was clearly understood by the court and by counsel for the defendant; and that the case was tried upon this theory. The character of the grounds upon which motion for nonsuit was based supports this statement of the respondent's po-

sition. Nineteen specific grounds were assigned in support of the motion. Only two of them deal with the question of unsoundness of mind. Six of them were expressly directed to the claimed lack of evidence of undue influence. In denying the motion the court said that under all the circumstances testified to, and other testimony to be produced, he would allow the case to go to the jury upon one point only: "Did the defendant exercise undue influence over the decedent?" The argument presented on this point is not that there was no evidence of undue influence, but that there was no such issue. In view of the grounds specified for the motion it does not appear counsel for the appellant was not fully informed regarding that issue. The record shows that at the time the motion was made there was some evidence to support it. The motion for nonsuit was properly denied.

[3-5] Upon the issue of undue influence, the claim being that Dr. Boyd was of weakened mentality by reason of his sickness, evidence of his mental condition was admissible. Civ. Code, § 1575, subd. 2; Estate of Welch, 6 Cal. App. 44, 91 Pac. 336. It is argued the court erred in rulings upon evidence. One instance given in the brief of the appellant fails to show what objection was made, or to refer to the page of the appendix upon which the objection appears. It does not appear, even if proper objection was made, that the jury was, or reasonably could have been, prejudiced by a statement of the plaintiff to the effect that her mother did her own work. The second objection is to the reply to a question addressed to a witness concerning the condition of Dr. Boyd's health. The witness said:

> "He never seemed to know exactly what he wanted to do. When we were riding he always rode with me on the front seat because the wind shield protected him a little more. And I had many talks with him while we were riding."

The attorneys moved to strike the answer out as not responsive. If the refusal of the court was error, it was of such a character as not to warrant the reversal of the judgment.

[6] Objection is made to certain instructions. In one the jury was informed in effect that in case of intestacy, the law fixes the method of distribution, and in this case the law would distribute the estate equally between the surviving wife and the two daughters. Three other instructions were to the effect that the jury might consider the disposition as being just or unjust, reasonable or unreasonable, as tending to throw light upon the question of whether undue influence was exerted upon Dr. Boyd. In the appendix to the appellant's brief a portion only of the instructions is given. From an examination of the typewritten record it appears that the instructions were clear, full, fair, and not unfavorable to the defendant. The instructions attacked were given in connection with other instructions to the effect that while inequality in the disposition of property is not of itself evidence of unsoundness of mind or of undue influence, it might be considered as a circumstance, together with all other circumstances shown by the evidence, bearing on the question of the weakness of mind of the donor at the time the transfer was made, or undue influence exerted upon him at that time. Considered with all other instructions, it cannot be assumed that the defendant was prejudiced by these instructions, nor that the result of the trial would have been different if they had not been given. An instruction in regard to the rule of descent was similarly attacked, and has been upheld by the Supreme Court. Estate of Snowball, 157 Cal. 315, 107 Pac. 598.

[7] In the appellant's reply brief objections to certain other instructions are presented for the first time. The instructions as an entirety appear to have been correct. No reason is shown for considering objections to specific instructions not mentioned in the opening brief. Under such circumstances objections raised first in the reply brief will not be considered. Kahn v. Wilson, 120 Cal. 643, 53 Pac. 24; Hibernia Savings & Loan Society v. Farnham, 153 Cal. 578, 96 Pac. 9.

[8] It is contended there was not sufficient evidence to support the verdict. The record is lengthy. On one side the evidence pictured an old man, sick and nervous, it is true, but attending to his business affairs, meeting his friends, writing personal letters, and of his own desire making provision for the future welfare of the wife who was assiduous in rendering affectionate attention to him during his sickness. On the other side, the picture is drawn of a man so shattered in mind and body as to be subject, as he expressed it, to brain storms, unable alone to make any decision, not knowing what he wanted, dotingly fond of his daughters, anxious to make provision for them, yet taking from them their patrimony, dominated by the second wife, and prevented by her from discussing privately his business affairs with his daughters or with others. There was some evidence of her direct interposition in his affairs without his knowledge and against his desire, particularly in the matter of an attempt to negotiate a sale of certain corporation stock owned by him, and later, upon the sale failing, to negotiate a loan upon the stock, in order, as it is claimed, that the proceeds of the sale or the loan might be added to the joint bank accounts, which, it was further claimed, were made available to her by reason of an influence so far in excess of that which may

properly be exerted by a wife as to be termed undue influence. The most that can be said on behalf of the appellant upon this phase of the case is that the evidence was conflicting, and, therefore, in the absence of reversible error, the verdict of the jury is conclusive.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

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41 Cal. App. 65

PEOPLE v. BLISS. (Cr. 464.)

(District Court of Appeal, Third District, California. May 3, 1919. Rehearing Denied by Supreme Court June 30, 1919.)

1. INTOXICATING LIQUORS 🔑236(1)—CRIMINAL PROSECUTION — SUFFICIENCY OF EVIDENCE.

In prosecution for selling, furnishing, distributing, and giving away alcoholic liquors in no-license territory in violation of Local Option Law, circumstantial evidence *held* to support conviction.

2. INTOXICATING LIQUORS 🔑156 — VIOLATION OF LOCAL OPTION LAW.

Where owner of whisky jug invites others to drink therefrom, and one or more take drink, in no-license territory, he is guilty of violating Local Option Law, though he does not himself perform physical act of passing jug to the parties who take drink.

3. INTOXICATING LIQUORS 🔑156 — VIOLATION OF LOCAL OPTION LAW—FURNISHING LIQUOR TO OTHERS.

If a party should place a jug or other vessel containing liquor on a table, bench, floor, or ground within no-license territory, and by words, or acts, or conduct sufficiently indicative of the fact invite others to partake thereof, either in a limited degree or ad libitum, he would be guilty of violating the Local Option Law.

4. INTOXICATING LIQUORS 🔑224, 233(1) — CRIMINAL PROSECUTION—EVIDENCE.

In prosecution for furnishing liquor to others in no-license territory, evidence that others had gone over to store where defendant's jug was stored before defendant himself had gone over there was not inadmissible upon ground that defendant did not know his jug had been left at such store until he himself went over; inference being that defendant had told the others to go over to store and help themselves.

5. CRIMINAL LAW 🔑1169(1) — REVIEW — HARMLESS ERROR—EVIDENCE.

In prosecution for furnishing liquor to others in no-license territory, admission of evidence that the others had gone over to store where defendant's jug had been left by his brother before defendant knew jug was there, was harmless, where there was evidence that others had drunk from jug in defendant's presence.

6. CRIMINAL LAW 🔑1170½(1) — REVIEW —HARMLESS ERROR—LEADING QUESTIONS.

Leading questions by state to its witness was harmless to defendant where witness was hostile to prosecution and inclined to tell as little as possible.

7. CRIMINAL LAW 🔑413(1) — EVIDENCE — SELF-SERVING DECLARATION.

In prosecution for furnishing liquor to others in no-license territory, evidence as to defendant's statement previous to purchase of liquor to brother who had purchased it that the liquor was to be taken to and used by defendant in his home was inadmissible, being a self-serving declaration.

8. CRIMINAL LAW 🔑720(1)—ARGUMENT OF PROSECUTING ATTORNEY—EVIDENCE.

In prosecution for furnishing liquor to others in no-license territory, district attorney in his argument to jury properly emphasized the circumstance shown by the evidence that defendant's brother, who had bought liquor for defendant, for use, as claimed by defendant, in defendant's home, passed defendant's home with jug and left it at store, from which defendant secured jug and treated friends.

9. CRIMINAL LAW 🔑552(1) — WEIGHT OF CIRCUMSTANTIAL EVIDENCE.

Where evidence is sufficient to convince jurors, as reasonable men, of defendant's guilt beyond a reasonable doubt, it is their duty to convict defendant, though evidence is circumstantial.

10. CRIMINAL LAW 🔑784(5)—INSTRUCTIONS —CIRCUMSTANTIAL EVIDENCE.

Instruction on circumstantial evidence *held* not subject to objection that it authorized conviction on evidence not sufficiently convincing to show guilt beyond a moral certainty.

11. CRIMINAL LAW 🔑1144(15) — REVIEW —PRESUMPTION.

The jury is always presumed to have considered all the evidence submitted to them, whether they acquit or convict defendant.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

J. Bliss was convicted of unlawfully selling, furnishing, distributing, and giving away alcoholic liquors within no-license territory, and from judgment of conviction and from order denying motion for new trial, he appeals. Affirmed.

H. L. Ford, of Eureka, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. An information was filed in the superior court of the county of Humboldt, charging that the defendant, on the 5th day of October, 1918, within no-license territory, "did willfully, knowingly, and unlawfully sell, furnish, distribute, and give away alcoholic liquors, to wit, whisky, * * * to George Normile and Dan Rogers and other persons whose names are unknown." Defendant was convicted of the crime charged in the information and was sentenced to pay a fine of $600, or, if the fine be not paid, to be imprisoned in the county jail one day for each $2 of said fine. The appeal is by the defendant from the judgment and from an order denying his motion for a new trial.

The defendant first contends that the evidence does not support the verdict.

It was stipulated at the trial that the town of Pepperwood, in Humboldt county, was in "no-license territory."

The evidence shows that the defendant lived with his brother, Daniel Bliss, and his sister in a house on the road to Eureka about one mile from the store of one Zecca in Pepperwood, and that defendant always kept intoxicating liquors at his home for his own use. On the 5th day of October, 1918, his supply of whisky being exhausted, he gave some money to his brother, Daniel, who was going to Eureka, with which to buy a gallon of whisky, and told him to leave it at the house; that he bought the whisky to be used at his home. Daniel Bliss bought a gallon demijohn of whisky at Eureka, put it in a suit case belonging to defendant, and in the afternoon started home on a stage. At the town of Loleta he got off the stage, but left the suit case on it. The driver of the stage, when he reached Zecca's store at Pepperwood, left the suit case there, which was the customary place where he left parcels for people in that locality. Daniel Bliss took passage on another stage and arrived at Pepperwood between 9 and 10 o'clock that night.

Defendant reached his home at about 5 o'clock in the evening and saw the stage go by his house, but it did not stop. At about 8 o'clock he attended a dance, at a hall across the street from Zecca's store, in Pepperwood, and his brother, Daniel, also went to the dance when he arrived in town. Defendant asked him if he had sent the whisky, and Daniel said he had, but did not know whether it had been left at the store or not. At about 11 o'clock of that night defendant asked Zecca if there had been a suit case left there for him by the stage driver. Zecca answered that there had, and that, if defendant wanted it, he had better take it, because he (Zecca) was going to close up for the night, and they went over to the store. The only light in the store was a flashlight which Zecca had. Defendant took the demijohn out of the suit case and went out on the porch of the store. He there met Dan Rogers, whom he recognized by his voice, it being a dark night. There were others present whom he did not recognize. Later he recognized Normile by his voice. He stopped to talk with Rogers, set his jug on the porch, and commenced rolling a cigarette.

Up to this point there is no conflict in the evidence, except that the arresting officer, Frank W. Anderson, testified that it was a moonlight night. As to this, the witness was evidently mistaken, for the weather observer at Eureka testified that the moon set that night at 5:34 p. m. Anderson testified that at 11 o'clock at night on the 5th of October, 1918, he saw four or five men, among them the defendant, upon the platform in front of Zecca's store. He said:

> "When I first saw him he was in the act of getting that demijohn from George Normile, and I stepped up and grabbed the demijohn and asked him who that belonged to. He said, 'It belongs to me.'"

The witness said he took the demijohn from the hands of defendant, that he put a seal on it and gave it to the district attorney, and that afterwards he sampled the contents, and found that the demijohn contained whisky. He stated that before he seized the demijohn he saw two men drink from it, one of whom he recognized as George Normile; that the other man smacked his lips and said it was "damned good stuff."

William McKay, an employé of the district attorney of Humboldt county, who was with Anderson at and prior to the time of the arrest, corroborated the latter as to what occurred at the time he took possession of the demijohn.

Ambrose M. Zecca, the owner of the store referred to, testified that he had gone from the dance hall to his store with other men 10 or 15 times that night; that he saw defendant, who said he wanted to go to the store and get his suit case. He was asked what defendant's condition as to sobriety was, and he replied that he "was feeling pretty good." Witness, with defendant and Normile and some strangers, among them Dan Rogers, went to the store. Defendant and Normile went in with him, and defendant got a demijohn from the suit case and took it outside with him. Witness said he had a drink from a jug, but would not say it was the one defendant had; that he was not present when Anderson came up.

Dan Rogers testified that he left the dance hall with defendant to go to the store; that he knew they were going for a drink, although he would not say defendant asked him to go for that purpose; the defendant entered the store and came out with a demijohn; that the jug was passed around, but he would not say that defendant passed it around; that he (witness) had a drink out of a jug, but did not know who handed it to him nor whose jug it was.

George Normile testified that at about 11 o'clock, while in the dance hall, he said to defendant that he wanted to have a glass of beer or something, to which defendant replied that he "did not have any beer; maybe we can find something else"; that they waited until Dan Rogers finished dancing, and the three of them, with some strangers, went across to the store; that defendant went into the store and brought a demijohn out onto the porch; that witness was in the act of taking a drink out of the jug when Anderson's party turned a flashlight on them and came up to the porch.

Edward Bady testified that at the dance hall he smelled liquor upon the defendant; that he was one of the party that crossed the street to the store; that he did not have a drink out of the demijohn, because it did not get around to him; that he saw the defendant pass the jug to some one.

The defendant testified that a man had treated him to whisky before the occurrence at Zecca's store; that when he took the demijohn from the store to the porch he had no drink from the jug that he remembered of; that after he had finished making his cigarette he picked up the jug, and at that time the officer flashed a light upon him and came up; that he had not offered the jug to any one for the purpose of taking a drink; that he did not give his consent to any one taking a drink out of it; and that he did not know the demijohn was making the rounds and that people were drinking from it. He denied having the conversation related by Normile to the effect that defendant told Normile he did not know where there was any beer, but that he had something else.

[1-3] The foregoing synoptical statement of the evidence plainly enough shows that the verdict is sufficiently supported. It is true that much of the evidence was of a circumstantial character, but the circumstances so shown, having been accepted by the jury as proved, were enough to warrant the inference that the defendant owned the jug of whisky; that he invited the parties above named to the store where the jug was to drink therefrom; and that one or more did drink from the jug. Whether actually the defendant himself performed the physical act of passing the jug to all the parties who drank from it or to any of them, in view of the persuasive character of the evidence or the circumstances in support of the theory of guilt, is immaterial. If he by any means or method or in any manner gave or furnished or distributed intoxicating liquor to other persons within no-license territory, he is guilty under the statute. If, for illustration, a party should place a jug or other vessel containing liquor on a table or upon a bench or upon the floor or the ground within no-license territory, and by words or acts or conduct sufficiently indicative of the fact invited others to partake thereof either in a limited degree or ad libitum, he would be guilty under the law as it is written of furnishing intoxicating liquor to others within such territory.

The testimony shows that the defendant owned a jug of whisky which was at Zecca's store, and that he invited several friends to go to the store to get a drink of "something else than beer"; that defendant secured the jug from the store; and that one or two persons drank from it. This testimony falls very little, if any, short of conclusively showing the guilt of the accused under the Local Option Law.

It is next claimed that the court committed prejudicial error in certain rulings on evidence.

Several witnesses were asked as to whether, prior to the time the defendant went to the store, other parties had gone over there. These questions were objected to by counsel for defendant, but the testimony was admitted upon the promise of the district attorney to "connect it up." One of the witnesses replied that he had seen several parties go to the store before the defendant was seen there, and heard one of them remark that it was "damned good stuff." Appellant complains that it was not connected with defendant; that the inference drawn by the district attorney was that these other parties had gone to the store to drink the liquor defendant had there, but that defendant did not know the liquor was there until 11 o'clock, when the storekeeper told him it was.

[4, 5] The objection to this testimony goes more to its weight than to its materiality, relevancy, and competency. It was shown that defendant had requested his brother, Daniel, to procure the whisky for him, and it is a reasonable inference from all the circumstances that he expected it to be left at Zecca's store; he having asked the latter if a suit case in which the whisky had been carried by Daniel had been left at his (Zecca's) store. Of course, the parties referred to might have gone to the store to eat Swiss cheese and crackers or some other article not thus far prohibited to the use of man by the stern mandates of the law, and the party who made such favorable comment upon the quality of the article they had partaken of might have had reference to something other than intoxicating liquor, but this was for the jury to determine when considering it in connection with the evidence showing that the defendant did have whisky at the store and that several persons did subsequently drink from the jug in the defendant's presence. The ultimate significance of the testimony was in the inference to be deduced therefrom that the defendant had told said parties that he had the whisky at the store and that they were at liberty to go to the store and help themselves to it. It is true that the circumstance was of small probative value as in proof of the charge, but, as suggested in a different form of language, this did not render it inadmissible. It is quite manifest, though, that even if we were required to hold that it was improperly admitted, it could not have prejudiced the defendant, since it is very clear that the verdict resulted from the testimony showing that certain parties did drink from the jug in the defendant's presence and that the jug then contained whisky.

[6, 7] Defendant complains of some other rulings respecting the evidence, the objections being that by them the court permitted the district attorney to ask one of his witnesses leading questions and to ask questions upon the assumption that certain facts not in proof had in fact been shown. Also it is objected that the court erred in refusing to permit Dan Bliss, who testified for the defendant, and who, as seen, purchased and had left at Zecca's store the whisky for defendant, to testify as to whether the defendant, previously to the purchase, said to the witness anything "about your obtaining some whisky for his (defendant's) home." The defendant could not have suffered any damage from the leading questions referred to. The witness to whom they were put was one of the parties who were with the accused when whisky was drunk from his jug, and he appeared to be hostile to the prosecution —that is, inclined to tell as little as he actually knew of the matter as possible. A witness in that attitude of mind toward the party calling him would not be likely to tell an untrue story favorable to such party merely because questions suggestive of his answers were propounded to him. The objection to the question by defendant's counsel to Daniel Bliss calling for a declaration by defendant that the liquor he requested said Daniel to procure for him was to be taken to and used at his (defendant's) home was properly sustained on the ground that it was self-serving.

There are very many other assignments involving challenges to the soundness of rulings upon the evidence, but an examination of these has convinced us that they possess no force.

[8] The objection that the district attorney, in his argument to the jury, transcended the record, and thus brought into it matters calculated to prejudice the defendant, is not well taken. This objection arises from the reference to by that officer and his emphasis of the circumstance that, although the stage on which Daniel Bliss carried the suit case containing the jug of whisky passed near the home of the defendant, the whisky was not left there, but taken on to the store of Zecca. This was an important circumstance, was shown by the evidence to have occurred, and, of course, the district attorney was clearly within his rights in making the most out of it in argument that the circumstance would legitimately justify.

In its instructions the court, after explaining the difference between direct and circumstantial evidence, told the jury:

> "There is nothing in the nature of circumstantial evidence that renders it any less reliable than the other class of evidence. All that is required is this: if the testimony is sufficient to convince you as reasonable men beyond a reasonable doubt that the defendant did commit the act charged, then I charge you that it is your duty to convict, although such evidence may be of a circumstantial nature."

Appellant claims that this instruction was not warranted by the facts in the case, and that it implied "that the jury may act on less than convincing evidence or without the moral certainty required by law."

[9-11] The instruction was not only pertinent to the evidence, but it contains a correct statement of the law. Nor does it warrant the implication that the jury were authorized to convict on evidence not sufficiently convincing to show the defendant's guilt to a moral certainty. Of course, the objection that the instruction implies that the jury may "act on less than convincing evidence" really means nothing; for it is the duty of a jury to act on (or consider) all the evidence submitted to them, and this they always presumptively do whether they convict or acquit.

The following instruction, given to the jury, is also complained of:

> "I instruct you that it is not necessary that the evidence should show that the defendant personally handed this demijohn of whisky, if such it was, to George Normile, Dan Rogers or any other person who then and there drank thereof, to warrant you in finding the defendant guilty of the charge alleged in the information; but it is enough if the evidence shows beyond a reasonable doubt that the defendant owned a demijohn of whisky and placed it in a public place and in the immediate presence of said men, with the intention that they should drink thereof, and that they or one or more of them did drink thereof or that the defendant stood in their immediate presence and saw said men, or some of them, drink thereof, and encouraged or asked them to drink thereof."

That instruction corresponds with the construction above given of the Local Option Law upon which the information against the accused is based, and therefore nothing more need be said about it.

The court modified two instructions proposed by the defendant—one defining the word "gift" and the other defining the word "distribute"—by adding thereto substantially the language which the instruction last above considered contained, which, in effect, is as follows: That if the defendant knew that any person or persons were drinking or did drink from the jug in question, and, so knowing that fact, acquiesced in, consented to, or encouraged such person or persons to drink from said jug, in that case he would be guilty, although he did not personally hand or deliver said jug to such person or persons. What we have said of the complaint against the instruction last above disposed of applies to the objection to the one in hand.

We have now considered herein all the objections against the result arrived at below which in our judgment call for special notice, and our conclusion is that no substantial legal reason has been shown for disturbing the verdict.

The judgment and the order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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40 Cal. App. 733

CONLIN v. SOUTHERN PAC. R. CO.

(Civ. 2681.)

(District Court of Appeal, First District, Division 1, California. April 21, 1919. Rehearing Denied May 19, 1919; Denied by Supreme Court June 19, 1919.)

1. TRIAL 🔑40(2)—SETTLEMENT OF BILL OF EXCEPTIONS—EXTENSION OF TIME—DISQUALIFICATION OF JUDGE.

Where the judge of the superior court who originally tried the case on request of plaintiff called in another judge to retry it, after such retrial by such other judge the first judge was not disqualified to extend the time within which defendant appellant might prepare and serve its proposed bill of exceptions, so that, though the extension carried the time beyond the period limited by Code Civ. Proc. § 650, the order of extension was not void and the bill was properly presented and settled.

2. RAILROADS 🔑69—DEED OF RIGHT OF WAY—CONSTRUCTION.

Deed to a railroad, conveying to it an estate limited during company's legal existence at the expiration of which the lands should revert, *held* not to convey a fee on condition subsequent, though it created certain conditions subsequent, but rather to grant an estate or easement limited for years and not in fee.

3. DEEDS 🔑143—CONVEYANCE OF REVERSIONARY INTEREST.

Deed of land wherein an easement for years had previously been conveyed by the grantor's predecessor to a railroad for the term of corporate existence, after which land should revert, *held* to convey to the grantee land company the reversionary interest reserved by the grantor's predecessor from the railroad.

4. EMINENT DOMAIN 🔑268—RAILROADS 🔑64(1)—RIGHT OF WAY—CONTRACTS.

Railroad corporations may contract with reference to land taken by them for rights of way, and such agreements, when made, stand on the same footing as any other contract for the conveyance of land, though where land has been taken without compensation, and its continued possession is necessary to the public use, the owner cannot recover the land itself, but can only compel payment, and his right to compensation is a personal one not running with the land nor passing by conveyance.

5. EMINENT DOMAIN 🔑69—RAILROADS 🔑72(1)—RIGHT OF WAY—ACCEPTANCE OF CONVEYANCE—CONDITION.

A railroad may accept a conveyance of land on any condition that lawfully may be annexed to an ordinary grant, and such a contract may create an estate less than a fee in land taken for a right of way, in which case, if, at the expiration of the estate granted, the land is necessary for the railroad for its purposes, it can continue its use for a right of way by compensating the reversioner, but otherwise must abandon and surrender possession to the reversioner.

6. EMINENT DOMAIN 🔑285—RAILROAD RIGHT OF WAY—EXPIRATION OF TERM OF YEARS—DUTY TO COMPENSATE.

Where the owner of land conveyed to a railroad an easement for years for a right of way, and the grantee railroad was succeeded by another, such other road was a privy to the contract between the grantor and its predecessor to subject it to the duty to compensate the grantor for its continued use of the right of way after expiration of the term of years for which the grant was made.

7. PLEADING 🔑274—"SUPPLEMENTAL COMPLAINT"—NATURE.

A complaint, or a complaint as amended, and a supplemental complaint, must be considered as separate pleadings, the office of the "supplemental complaint" being merely to bring to the notice of the court and the opposite party matters occurring after the commencement of action and which may affect the rights asserted and the rule originally asked.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Supplemental Complaint.]

8. EVIDENCE 🔑158(15) — FORFEITURE OF CHARTER—PROOF BY PAROL.

In an action by a landowner against a railroad to recover the value of land, easement in which for a right of way was conveyed to the railroad's predecessor for a term of years, testimony of a deputy of the secretary of state, that he had made due search of the records of the office of the secretary and found that no franchise tax had been paid by the railroad's predecessor for a particular year, was incompetent to show forfeiture of the charter of such predecessor.

9. TRIAL 🔑251(1) — INSTRUCTION — IRRELEVANT ISSUE.

The refusal of the trial court to instruct on a question which was irrelevant to any issue of the case was correct.

Appeal from Superior Court, San Mateo County; John L. Hudner, Judge.

Action by Henry Conlin against the Southern Pacific Railroad Company. From judgment for plaintiff, defendant appeals. Affirmed.

See, also, 182 Pac. 71.

Frank McGowan and Evan J. Foulds, both of San Francisco, for appellant.

Henry Conlin, Chas. W. Cobb, and B. V. Sargent, all of San Francisco, and Jos. J. Bullock, of Redwood City, for respondent.

WASTE, P. J. This action was brought by the East San Mateo Land Company, a corporation, to recover from defendant the sum of $77,800, the alleged value of about four acres of land used as a portion of the right of way of the defendant corporation. The defendant, after answering plaintiff's amended complaint, moved for judgment on the pleadings, which motion the trial court granted. Judgment was thereupon entered in favor of the defendant, and the East San Mateo Land Company appealed from such judgment. On the appeal, the judgment was reversed. East San Mateo Land Co. v. Southern Pacific Railroad Co., 30 Cal. App. 223, 157 Pac. 634.

After the case was remanded, the present plaintiff was substituted for the East San Mateo Land Company, by an amended and supplemental complaint, and the case proceeded to trial, before a court and jury, on the issues raised by the pleadings. A verdict was rendered in favor of plaintiff for $23,340, which judgment was duly entered. In due time, the defendant made a motion for a new trial, upon various grounds set forth in the motion. Subsequently, an order was made that defendant's motion for a new trial be granted, unless plaintiff within 10 days, in writing, remit all of the judgment in excess of $15,560, and that, if plaintiff should remit the sum of $7,780 from the judgment within said 10 days, the motion for a new trial would be denied. Within the time allowed, plaintiff filed with the clerk of the court, and served on defendant, a statement of remission in compliance with the order of the court. Defendant appeals from the judgment. The evidence is brought here by a bill of exceptions.

[1] A preliminary objection made by respondent demands our first attention. After this case was remanded on the former appeal, the judge of the superior court of San Mateo county, who had theretofore presided without objection from any one, so far as the record discloses, was requested by plaintiff to, and did, call in another judge to retry the case. The judge so called in conducted the trial and all subsequent proceedings, except that the judge of the county made an order after the trial, extending the time of defendant within which to prepare and serve its proposed bill of exceptions. This extension carried the time beyond the period limited by section 650 of the Code of Civil Procedure for such purpose. Respondent now claims that the judge who signed the order extending time was in fact disqualified, that, consequently, the order was void, and therefore, no bill of exceptions having been presented and settled within the time allowed by law, there is nothing before this court for review, other than the matters contained in the judgment roll.

This whole matter was presented to the lower court on objections by respondent to the settlement of the bill of exceptions which were overruled. It does not appear in any manner that the judge who presided at the first trial was, as a matter of fact, disqualified to preside at the second. It does appear, however, that plaintiff served on defendant a notice of motion and affidavit of disqualification which he had prepared. Neither the notice nor the affidavit were ever filed in court, or called to the attention of the judge, or used for any purpose, and were afterwards, by notice served on defendant, actually withdrawn by plaintiff. The first trial judge appears to have merely retired from the actual trial of the case, because of an intimation that he was persona non grata to plaintiff.

By what color of right or reason, on the record as brought before us, plaintiff endeavored to prevent the settlement of the bill of exceptions in the lower court, or its consideration here, we are at a loss to understand.

We are satisfied with the lower court's rulings in the matter.

The San Francisco & San Jose Railroad Company, the predecessor of the defendant, was incorporated under the laws of the state of California, on August 18, 1860, for the term of 50 years, for the purpose of constructing, maintaining, and operating a line of railroad between the city and county of San Francisco, and the city of San Jose. On the 6th day of June, 1862, Alvinza Hayward, then the owner in fee simple of the land here involved, in consideration of encouraging and promoting the construction of such railroad, and of the location and establishment of a way station, and performance of other conditions mentioned, conveyed to said San Francisco & San Jose Railroad Company, and its successors, an estate in said land, limited during "the legal existence of said company," and which deed provided that, upon the breach by the said railroad company, or its successors, "of any of the aforesaid conditions, this grant shall become void, and the estate conveyed hereby, to the said party of the second part, and their successors, shall cease and determine, and the said lands shall absolutely revert to the said party of the first part, his said heirs and assigns, in fee simple, as on his former estate therein, and shall in like manner, at the expiration of the legal existence of said company, revert to said party of the first part, his heirs and assigns, anything hereinbefore contained, to the contrary, notwithstanding."

The first point made by appellant, on this appeal, is that this deed from Hayward to its predecessor had the effect to convey a fee in the land to the San Francisco & San Jose Railroad Company, and that such fee was upon a condition subsequent, that is to say, that the grantee took title in the fee during its legal existence, only to be divested thereof by some subsequent act, or event, to wit, the ceasing of the legal existence of the grantee; that, the land being held upon a condition subsequent, it required some act on the part of the person entitled to take advantage of the forfeiture; that there has been no act of Hayward, or of any of his grantees, indicative of a purpose to claim by reason of a breach of condition subsequent; that the legal title to the land, therefore, was not in plaintiff's assignor after the breach or the time of the commencement of the action.

Furthermore, the appellant contends that the grant in question, being made to the San Francisco & San Jose Railroad Company "during the legal existence of said company, and reverting in like manner at the expiration of the legal existence of said company," and the San Francisco & San Jose Railroad Company having been consolidated with the Southern Pacific Railroad Company on the 11th day of October, 1870, the legal existence of the San Francisco & San Jose Railroad Company terminated at that moment, and therefore the plaintiff's claim is stale and barred by the various provisions of the statute of limitations.

[2] The effect of this deed was before this court on the former appeal. (East San Mateo Land Co. v. Southern Pacific Railroad Co., supra), where many of the objections now presented on this appeal were urged on the attention of the court. While the effect of the document as evidentiary matter was not then being considered, the provisions of the deed were given interpretation, and the court said:

> "No question is here presented of a breach of any condition subsequent. The right here claimed is based upon the estate in reversion to take effect in possession on the expiration of the particular estate granted by the deed. There is a broad distinction between this right and one based upon forfeiture and re-entry for breach of a condition subsequent. Board of Chosen Freeholders v. Buck, 79 N. J. Eq. 472, 82 Atl. 418. The deed in question, it is true, created certain conditions subsequent, and provided upon a breach of any of the conditions that the estate conveyed should cease and determine; but, as we have seen, it also contained the additional clause: 'And shall in like manner at the expiration of the legal existence of said company revert to said party of the first part, his heirs or assigns, anything herein contained to the contrary notwithstanding.' Nothing could be added to more clearly express the intention of the grantor.
>
> " 'The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.' Civ. Code, § 1638. It seems plain to us, therefore, that the duration of the estate or easement granted was definite and precise, and was one limited for years and not in fee. Robinson v. Missisquoi R. R. Co., 59 Vt. 426, 10 Atl. 522; Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049; Weller v. Brown, 160 Cal. 515, 117 Pac. 517; Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603; 14 Cyc. 1161; Pavkovich v. Southern Pac. Co., 150 Cal. 39, 87 Pac. 1097."

It further appears from the complaint and the evidence that on the 8th day of September, 1908, Emma Rose, then owner, by mesne conveyances from said Hayward, of the land here involved, which was subject to the estate conveyed by Hayward to the San Francisco & San Jose Railroad Company, she being the owner, and entitled to all of the interest, estate in remainder, and reversion, in the said real property so reserved by Hayward in the deed of June 6, 1862, sold and conveyed to the East San Mateo Land Company all her right, title, and interest in and to the real property, and in and to the interest, estate in remainder, and reversion therein reserved. Appellant contends that by this deed the land company did not become the owner of the land under the Emma Rose deed.

[3] This same deed was likewise before this court on the former appeal, where, "taking it by its four corners," it was said (without here quoting the reasons therein given for the opinion):

> "Equally clear is the intention of the grantor, Emma Rose, in the character and quantity of the estate conveyed by her to the East San Mateo Land Company, the plaintiff. * * * There can be no question as to the intention of Emma Rose to convey to plaintiff by her deed the reversionary interest reserved by Hayward from the San Francisco & San Jose Railroad Company and to which she had succeeded. Such intention is clearly expressed in the explanatory clause just quoted. The reservation of the 21 excepted parcels was beyond all doubt for the purpose of saving herself harmless from any liability upon the warranties implied from the form of her deed, in view of the previous conveyance of different parcels or interests once forming a part of the tract covered by her present conveyance, and perhaps also because it was deemed that this was the simplest and most convenient manner to describe the land to be conveyed. That she intended to convey all of the right, title, and interest that she owned in the land is plainly evident." 30 Cal. App. 223, 157 Pac. 634.

The next point urged by the appellant upon this appeal was, in substance and effect, urged before, to wit, that as Alvinza Hayward, the owner of the land described in the amended complaint at the time of the entry by his grantee, was entitled to damages, which right was his personal property, such right has not passed to any grantee or successor of Hayward by reason of the conveyance of the real property. We do not understand this to be an action for damages, accruing at the time the land was taken, but rather an action by the reversioner to recover compensation for the appropriation and the continued use and occupation by defendant of the land after the expiration of the estate granted.

[4, 5] We quote from our former decision:

> "It is true that where land has been taken for a public use without compensation being first made, and its continued possession is necessary to such use, the owner cannot recover possession of the land itself, but can only compel payment for the same, and that the right to compensation accrues at the time the land is taken, and belongs to the owner at the time of the taking; also that this right to compensation is a personal one which does not run with the land, nor does it pass by conveyance thereof after the right accrues. These doctrines, however, in no way affect or abridge the right of railroad corporations to enter into a binding obligation or contract with reference to land taken by them for rights of way, and such agreements when made stand on the same footing as any other contract for the conveyance of land. Lewis on Eminent Domain (3d Ed.) §§ 462, 464. In such cases public policy does not enter into it, nor is it at all concerned with the private contracts of railroads unless they interfere with the public welfare. 2 Elliott on Railroads (2d Ed.) 934. A railroad, therefore, may accept a conveyance of land upon any condition that may lawfully be annexed to an ordinary grant; and such a contract may create an estate less than a fee in land taken for a right of way. The contract here provided for a limited estate only. If at the expiration of the estate granted the land was necessary for the railroad for railroad purposes, and the corporation or its successor elected to continue its use for a right of way, it could do so by compensating the reversioner. Otherwise it must abandon this portion of its right of way and surrender possession to the owner of the estate in reversion. Pool v. Butler, 141 Cal. 46–49, 74 Pac. 444; McCowen v. Pew, 153 Cal. 735, 744, 15 Ann. Cas. 630, 21 L. R. A. (N. S.) 800, 96 Pac. 893; Gurnsey v. Northern California Power Co., 160 Cal. 699, 36 L. R. A. (N. S.) 185, 117 Pac. 906. If it elected to continue in the use after the eighteenth day of August, 1910, the time limited by the grant, the owner of the estate in reversion was entitled to compensation at that time."

[6] Our former decision, to the effect that, "if at the expiration of the estate granted the land was necessary * * * for railroad purposes, and the corporation or its successors elected to continue its use for a right of way, it could do so by compensating the reversioner," disposes of appellant's next contention, that defendant in the present action was not a privy to the contract between Hayward and the San Francisco & San Jose Railroad Company.

[7] Appellant contends that in the supplemental complaint there is no allegation of nonpayment; that, by reason of this failure to allege that defendant did not pay the present plaintiff, no cause of action is stated. Appellant fails to note the distinction between a complaint (or one as amended) and a supplemental complaint. They are to be considered as separate pleadings, the office of the supplemental complaint being merely to bring to the notice of the court, and the opposite party, matters which occurred after the commencement of the action, and which do, or may, affect the rights asserted, and the rule asked in the action, as originally instituted. California, etc., Co. v. Schiappa-Pietra, 151 Cal. 742, 91 Pac. 593. The only new matter set up in the supplemental complaint related to the assignment, by which the substituted plaintiff became entitled to maintain this action, and obtain the relief demanded in the action, as originally instituted, which was compensation for the property held by defendant. An examination of the record, however, discloses that in both the amended and supplemental complaints there is a sufficient allegation of nonpayment.

The various assignments by which plaintiff became substituted as plaintiff in the action are sufficiently pleaded. As the only effect of these instruments was to enable plaintiff, after substitution, to maintain the action in accordance with the relief therein sought, we do not need to give further consideration thereto.

[8, 9] The defendant in the court below sought to show forfeiture of the charter of the San Francisco & San Jose Railroad Company, in the year 1905, by reason of the failure of the corporation to pay its franchise tax for that year. It called a deputy of the secretary of state, who testified that he had made due search of the records in the office of the secretary of state for the purpose, and found that no tax had been paid by the corporation for that year. On motion of the plaintiff, this testimony was subsequently stricken out. The testimony was incompetent for the purpose offered, and was properly excluded from the record. Kehrlein-Swinerton Const. Co. v. Rapken, 30 Cal. App. 11, 156 Pac. 972. In view of the decision of this court, on the former appeal, and our present holding, relative to the effect of the Hayward deed, the evidence was irrelevant to any issue of the case. The subsequent refusal of the court to instruct the jury on the question of the forfeiture of the franchise by the company in question was correct. What has heretofore been said in this opinion sufficiently answers the point, made by appellant, that the evidence is insufficient to support the verdict and that the court committed error in the admission of evidence.

Appellant makes some 16 specifications of error in the action of the trial court in giving and refusing certain instructions. We have carefully examined each of these specifications and considered the argument in support thereof. We find no merit in any of them. The charge as given, considered as a whole, was a complete and fair statement of the law in the case. The instructions refused were not proper.

The other points made upon the appeal

are incident to the questions discussed in this opinion, and have been disposed of by what we have already said.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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40 Cal. App. 743

CONLIN v. SOUTHERN PAC. R. CO.

(Civ. 2663.)

(District Court of Appeal, First District, Division 1, California. April 21, 1919. Rehearing Denied by Supreme Court June 19, 1919.)

1. EMINENT DOMAIN ⚷253(3)—APPEAL FROM JUDGMENT ON AWARD.

Where judgment in eminent domain was entered on a verdict in favor of the landowner which was general and did not fix the value of the land or the interest thereon, but fixed the total amount of damage, the landowner, if dissatisfied therewith, had a direct remedy by motion for new trial or by appeal.

2. APPEAL AND ERROR ⚷154(1)—RIGHT TO APPEAL—WAIVER.

If a person voluntarily acquiesces in or recognizes the validity of a judgment, or otherwise takes a position inconsistent with the right to appeal therefrom, he impliedly waives his right to have such judgment reviewed by the appellate court, although to bar the right of appeal on the ground of acquiescence the acts must clearly show the same.

3. APPEAL AND ERROR ⚷154(4)—RIGHT OF APPEAL—WAIVER.

Where a landowner, whose property had been taken under the exercise of eminent domain, after recovering a general verdict which did not provide for interest, filed a remittitur, when the trial court ordered a new trial unless part of the recovery be remitted, *held*, that he waived his right to appeal on the ground the judgment did not provide for interest on the damages awarded.

Appeal from Superior Court, San Mateo County; John L. Hudner, Judge.

Action by Henry Conlin against the Southern Pacific Railroad Company. From the judgment, plaintiff appeals. Affirmed.

Henry Conlin, Charles W. Cobb, and B. V. Sargent, all of San Francisco, and Jos. J. Bullock, of Redwood City, for appellant.

Frank McGowan and Evan J. Foulds, both of San Francisco, for respondent.

WASTE, P. J. Plaintiff appeals from the judgment entered herein upon the verdict of a jury. A full statement of the facts out of which the litigation accrued, together with a consideration of the law therein involved, will be found in Conlin v. Southern Pacific Railroad Co. (No. 2681), 182 Pac. 67, this day decided. Appellant's complaint on this appeal arises out of the action of the trial court in refusing to instruct the jury that compensation for the land appropriated should include interest on the value of the property from August 19, 1910, the date of its appropriation by respondent here (appellant in the other appeal), and the like refusal of the court to include interest in the judgment entered on the general finding of the jury awarding damages in a lump sum to plaintiff.

The court properly instructed the jury that, in considering the value of the land, and fixing the amount of compensation which the plaintiff was entitled to recover, such value was to be determined as of the time of the taking of the property by the defendant, to wit, at the expiration of the legal existence of the San Francisco & San Jose Railroad Company, and not as of the time of the trial, or other time subsequent to the time of the taking. The just compensation, to which plaintiff was entitled, the court instructed the jury, was the fair and reasonable market value of the land at that time, to wit, the highest price in terms of money which the land would bring, if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all the uses and purposes to which it was adapted, and for which it was capable of being used.

Plaintiff requested the court to instruct the jury that such just compensation "is the fair and reasonable market value of said land, on the 19th day of August, 1910, with interest thereon at the legal rate of 7 per cent. per annum, since said date to the date of the rendition of your verdict." This instruction the court refused.

After deliberation, the jury returned into court with their verdict, which, in form, found in favor of the plaintiff, and assessed the amount of his recovery at $6,000 per acre for the 3.89 acres of land involved in the action. The court thereupon instructed the jury to again retire, and change the form of their verdict, by multiplying the number of acres by the amount per acre which they found to be the value of the land, and return a verdict for the aggregate amount. The jury did as directed. The verdict of the jury was as follows:

> "We, the jury in the above-entitled cause, find for the plaintiff and award him damages in the sum of twenty-three thousand three hundred and forty dollars ($23,340.00) which he should recover from the defendant."

Before the jury was discharged, plaintiff moved the court to allow interest on the said verdict at the rate of 7 per cent. per annum from the 19th day of August, 1910, and to direct the clerk to enter the same in the judgment to be entered upon said verdict. This motion the court denied, and judgment was entered in accordance with the verdict, and did not include any allowance of interest.

Defendant made a motion for a new trial, and the court made an order that a new trial be granted, unless plaintiff would, within 10 days, in writing, remit all of the judgment in excess of $15,560, in which case the motion for a new trial would be denied. In compliance with that order, plaintiff remitted the sum of $7,780 from the amount of the judgment entered upon the verdict. The defendant appealed, and the judgment has this day been affirmed by this court.

Plaintiff, on this appeal, does not challenge the action of the trial court in reducing the amount of the judgment, as a condition to denial of a new trial, but merely seeks to have this court remand the cause with directions to the court below to modify the judgment by including interest on the amount of the judgment. Under the authorities, this court, no doubt, has the power to make such an order, provided plaintiff is entitled to interest as prayed for here, and has not by some act of his own estopped himself from seeking such relief. Hurst v. Webster, 128 Wis. 342, 107 N. W. 666; Young v. Winkley, 191 Mass. 570, 78 N. E. 377; People v. California Safe Deposit & Trust Co., 34 Cal. App. 269, 167 Pac. 181.

[1] From the record it appears, as before stated, that the jury first returned a verdict, "which in form found in favor of the plaintiff, and assessed the amount of his recovery at six thousand dollars per acre" for the land involved in the action. The court instructed the jury to retire and change the form of the verdict "by multiplying the number of acres by the amount per acre which they found to be the value of the land." The verdict, which was received and entered, awarded plaintiff "damages in the sum of twenty-three thousand three hundred and forty dollars, which he should recover from the defendant." This general verdict made no mention of either value of the land, or interest thereon, but fixed the amount of damages to which plaintiff was entitled. The judgment which was entered in plaintiff's favor followed the finding of the jury. If plaintiff was dissatisfied with it, he had a direct remedy by motion for new trial, or by appeal.

[2, 3] Respondent contends that, as plaintiff remitted a portion of the amount allowed by the general verdict of the jury, which awarded him damages in the sum specified, he thereby consented to the judgment as entered, was bound thereby, and should not be allowed to appeal therefrom. Plaintiff contends that he only consented under the duress of having a new trial granted, if he did not comply with the order of the court, and that he cannot be held to have acquiesced. He contents himself on this appeal with the following citation:

> "In order to bar the right of appeal on the ground of acquiescence, 'the acts relied upon must be such as to clearly and unmistakably show acquiescence, and it must be unconditional, voluntary, and absolute. And where a judgment or decree relates to two or more distinct matters or demands, acquiescence therein as to one of such matters or demands will not bar an appeal as to the others.' 3 C. J. 665, 666; Coffman v. Bushard, 164 Cal. 663, 130 Pac. 425." Duncan v. Duncan, 175 Cal. 693, 167 Pac. 141.

In the same eminent authority on which the appellant relies, and on the same pages from which the Supreme Court quotes as above, will be found the following:

> "If a person voluntarily acquiesces in, or recognizes the validity of a judgment, order, or decree, or otherwise takes a position which is inconsistent with the right to appeal therefrom, he thereby impliedly waives his right to have such judgment, order, or decree reviewed by an appellate court. * * * As a general rule, if a trial court imposes terms as the condition upon which * * * any order will be granted, or any other thing done or not done, and the party upon whom the terms are imposed accepts them, he will be deemed to have acquiesced in the ruling and cannot afterward question its validity in the appellate court." Corpus Juris, supra.
>
> "Where a motion for a new trial is granted to go into effect unless plaintiff stipulates to reduce the verdict, in which event the motion is denied, plaintiff by giving the stipulation and entering judgment thereon waives his right to appeal, although he entered the remittitur under protest and the court may have been wrong in finding that the judgment was excessive." 3 Corpus Juris, par. 546, note (d), p. 672, and cases cited.
>
> "Filing the remittitur * * * amounted to an acceptance * * * and a consent to such a judgment. It was tantamount to an agreement that all alleged errors were waived and the case settled on the proposed basis of a judgment" for $15,560, with costs and disbursements. Plinsky v. Nolan, 65 Or. 402, 133 Pac. 71.
>
> "The right to accept the fruits of a judgment or order, and the right to appeal therefrom, are not concurrent, but are wholly inconsistent, and an election of either is a waiver and renunciation of the other." San Bernardino v. Riverside, 135 Cal. 618, 67 Pac. 1047.

It is only in case there is no controversy as to a party's right to the amount for which the judgment was given, but he claims to be entitled to a greater amount, that he may accept the fruits of such order or judgment, and appeal therefrom. Such controversy existed during all the progress of the present case. The court, by its order, held that plaintiff was entitled to no judgment except upon the condition that he reduce the amount of the award of the jury. By doing so, he assented to the judgment as reduced. San Bernardino v. Riverside, supra.

"The defendant, under the finding of the * * * court, was entitled to a new trial, unless the necessity therefor was obviated by the action of the plaintiff. The court gave him his choice to accept a reversal of the judgment and a new trial upon the merits, or to remit the sum which, in the judgment of the court, was in excess of the amount that ought to have been recovered. The plaintiff elected to receive the amount of the judgment less the excess. By this election he was bound. He obtained a judgment * * * which he would not have received had he not assented to the action of the court. That he assented reluctantly does not alter the case. By giving consent he became bound by the action of the court." Railroad Co. v. Mowery, 36 Ohio St. 418, 38 Am. Rep. 597.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

40 Cal. App. 758

GRANTHAM v. ORDWAY et al. (Civ. 2830.)

(District Court of Appeal, First District, Division 1, California. April 23, 1919. On Rehearing, May 23, 1919; Denied by Supreme Court June 21, 1919.)

1. TRIAL 🔑139(1)—GRANT OF NONSUIT.

A court may grant a nonsuit only when, disregarding the conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, the result is a determination that there is no evidence sufficient to support verdict for plaintiff.

2. EVIDENCE 🔑87—PRESUMPTION—EFFECT.

Whenever, under a given state of facts, a presumption arises, such presumption is itself evidence.

3. EVIDENCE 🔑598(1)—PREPONDERANCE OF EVIDENCE.

Under Code Civ. Proc. § 2061, subd. 2, courts and jurors are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds against a less number or against a presumption or other evidence satisfying their minds.

4. APPEAL AND ERROR 🔑1002—PRESUMPTION—SUPPORT OF FINDING.

A presumption, even if disputable, will raise a conflict sufficient to support a finding made in accordance therewith, even though there is evidence to the contrary.

5. TRIAL 🔑138—PRESUMPTION—CONTROVERSY.

Whether a presumption has been controverted is a question of fact.

6. CORPORATIONS 🔑432(1)—AGENTS—TORTS—ACTS WITHIN SCOPE OF AUTHORITY—PRESUMPTION.

From the admitted fact of ownership by a company of an automobile which caused an accident and its employment by the company's manager, a presumption arose that the manager at the time of the accident was acting within the general scope of his authority so as to bind the company.

7. CORPORATIONS 🔑433(1)—AGENTS—TORTS—ACTS WITHIN SCOPE OF AUTHORITY—QUESTION FOR JURY.

In an action against a company for injuries to plaintiff by its automobile driven by its manager, question as to whether the manager was acting within the general scope of his authority *held* for the jury.

On Rehearing.

8. CORPORATIONS 🔑432(12)—AGENTS—SCOPE OF AUTHORITY—DRIVING AUTOMOBILE—PRESUMPTION.

In an action for personal injuries when struck by defendant company's automobile driven by its manager, testimony of the manager as to the manner in which he performed his duty, etc., *held* not to eliminate the presumption that at the time of the collision in driving the automobile he was engaged on his employer's business.

9. EVIDENCE 🔑592—ADVERSE PARTY—BINDING FORCE OF TESTIMONY.

Under Code Civ. Proc. § 2055, as added by St. 1917, p. 58, plaintiff, suing a company for personal injuries by its automobile driven by its manager, is not bound by the testimony of the manager, made a defendant and called as a witness by plaintiff.

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by A. B. Grantham against W. F. Ordway and others. From judgment for defendant Pacific Acreage Company, on motion for nonsuit, plaintiff appeals. Reversed.

A. M. Drew, of Fresno, for appellant.

Manning, Hoover & Thompson, of Fresno, for respondents.

WASTE, P. J. This is an appeal by the plaintiff from that portion of the judgment, entered by the court in the above case, giving defendant Pacific Acreage Company, a corporation, judgment on motion for nonsuit.

Plaintiff was injured, during the business hours of the day, by an automobile driven by the defendant Ordway, and admittedly owned by the defendant Pacific Acreage Company, as to which defendant the nonsuit was granted. It was likewise admitted that at the time of the accident Ordway was in the employ of the Pacific Acreage Company; the disclaimer of liability by that defendant resting upon the denial that at that time Ordway was the agent of the company, or acting within the scope of his employment.

In addition to these admissions, it was shown that Ordway was the son of the president of the Pacific Acreage Company and was the general manager of the company's ranch, located near Fresno. His work was mainly in managing operations on the ranch, he purchasing supplies and having men working under him. He testified that he "came and went as he chose, so long as he kept the business of the Pacific Acreage Company moving and attended to. He went to town and various other places, as he saw fit. Nobody dictated to him when he should go and when he should come back." He used the automobile of the company, apparently, as he pleased, and in going about for the purpose of purchasing the necessary supplies for the ranch and attending to its business.

Plaintiff introduced the deposition of the defendant Ordway, as part of his case, in which Ordway testified that on the morning of the accident he had driven from the Pacific Acreage Company's ranch in the automobile to Fresno, for the sole purpose of purchasing a banjo, which he had previously ordered; that, the purchase concluded, he did not remember having stopped at any other place in town; that the purchase of the banjo was his main object, and, that accomplished, that was all he was thinking of; that he made no purchases for the Pacific Acreage Company, and did nothing whatsoever for the company.

In support of his claim that the court erred in granting the motion for nonsuit on the foregoing testimony, the appellant relies upon the manifest conflict, arising in the case from the weight which must be given certain presumptions, as to the liability of the defendant Pacific Acreage Company resulting from the admitted facts in the case, as against the testimony of defendant Ordway tending to completely overthrow such presumptions.

[1] "A court may grant a nonsuit only when, disregarding the conflicting evidence, giving to plaintiff's evidence all the value to which it is legally entitled, therein indulging in every legal inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given." Perera v. Panama-Pacific International Exposition Co. (Sup.) 175 Pac. 454.

[2-5] Whenever, under a given state of facts a presumption arises, such presumption is itself evidence. Courts and jurors are not bound to decide in conformity with the declaration of any number of witnesses, which do not produce conviction in their minds, against a less number, or against a presumption, or other evidence, satisfying their minds. Code Civ. Proc. § 2061, subd. 2. A presumption, even if disputable, will raise a conflict which is sufficient to support a finding made in accordance therewith, even though there be evidence to the contrary. Whether a presumption has been controverted is a question of fact. Fanning v. Green, 156 Cal. 279, 104 Pac. 308; Moore v. Gould, 151 Cal. 726, 91 Pac. 616; People v. Milner, 122 Cal. 171, 54 Pac. 833; People v. Siemsen, 153 Cal. 390, 95 Pac. 863.

Section 1963 of the Code of Civil Procedure is as follows:

> "All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind:
>
> "(20) That the ordinary course of business has been followed."

The general principle that where a servant, acting within the general scope of his employment and authority, injures one, the employer may be held liable, is not disputed in this case; the respondents' contention, as before indicated, being that at the time of the accident the defendant Ordway had departed from the usual line of his employment and was transacting business purely personal, and having no relation to the business of his employer.

[6, 7] Under the decisions of this and other states, however, from the admitted fact of ownership of the automobile by defendant Pacific Acreage Company, and its employment of Ordway, a presumption arose that Ordway was acting within the general scope of his authority, to such an extent as to bind his employer. Upon these facts being admitted in the case, the question as to whether Ordway was so acting became a question for the jury to decide. Adams v. Wiesendanger, 27 Cal. App. 593, 150 Pac. 1016. The automobile being admitted to belong to the defendant Pacific Acreage Company, a presumption arose that it was used for its benefit and on its own account. That presumption was not destroyed as matter of law by the testimony of defendant Ordway. "Even though his explanation of the use of the car would absolve him, if credited, the question of whether it should be credited was one of fact for the jury." Schreiber v. Matlack, 90 Misc. Rep. 667, 154 N. Y. Supp. 109; Ferris v. Sterling, 214 N. Y. 249-253, 108 N. E. 406, Ann. Cas. 1916D, 1161. In the latter case there was much conflicting testimony, and the court held that the fact that defendant was owner of the automobile, and the chauffeur in his employ to operate it, was sufficient to make out a prima facie case that the chauffeur was acting within the scope of his employment at the time of the accident, but that the prima facie showing was not conclusive, and, if the testimony of the chauffeur that he took the automobile for his own business was true, the owner was not responsible. In an action for injuries to plaintiff by being struck by an automobile operated by a chauffeur, in considering whether the car was being used at the time for the purposes of the corporation of which defendant was president, or for his own purposes, or by the chauffeur for purposes authorized by neither the corporation nor the defendant, the most favorable view for the defendant which can be taken on appeal is that such question was for the jury to determine. Benn v. Forrest, 213 Fed. 763, 130 C. C. A. 277.

The case of Jessen v. Peterson, Nelson & Co., 18 Cal. App. at page 353, 123 Pac. at page 221, is instructive as showing the kind of evidence sufficient to support a verdict in this class of cases. The plaintiff, there, was struck by a horse and buggy owned by the defendant, and driven by its vice president. It was contended that the evidence was insufficient to support the judgment, in that it failed to show that the person in charge of the horse and buggy was, at the time of the accident, in any wise occupied in the performance of any duty relating to the business of the defendant. On the appeal this court said:

> "It was an admitted fact in the case that the horse and buggy belonged to the corporation defendant, and that the driver, Charles Nilson, 'was an officer of the defendant who had the right to operate the buggy.' Nilson was the vice president of the defendant, and testified as a witness in its behalf. Upon his cross-examination it developed that in the performance of his duties as vice president he 'had no regular hours whatsoever; that he had to go around all over the city sometimes; had to go out to the park and Richmond, where the corporation was working at the time; had to go everywhere and see that the work was all right.'
>
> "From this it would appear that, in addition to being vice president of the defendant, Nilson was also the general superintendent of its work, and that in the performance of his duties he was granted a roving commission which permitted him to look after the business of the defendant at the times and in the manner which best suited his own convenience. It is the accepted rule in this and other jurisdictions that where an employé is intrusted with the possession and operation of a vehicle, with permission to use it at his discretion in the business of the employer, the latter will be held responsible in damages for injuries inflicted upon the person of another resulting from the negligence of the employé in the use and operation of the vehicle; and in such a case it is not necessary for the person seeking damages to prove that at the time of the injuries the employé was engaged in executing any particular business or specific command of his principal. That the employé, at the time of the commission of the tort, was acting within the general scope of his employment, and that the injury occurred as the result of his negligence, is all that need be shown in order to charge his employer with liability for such injury. Mulvehill v. Bates, 31 Minn. 364, 47 Am. Rep. 796, 17 N. W. 959; Rahn v. Singer Mfg. Co. [C. C.] 26 Fed. 912; Riordan v. Gas Consumers' Ass'n, 4 Cal. App. 639, 88 Pac. 809."

The court held:

> "That the testimony of Nilson, coupled with the admitted fact that the defendant was the owner of the horse and buggy, and had conferred upon Nilson the right of using the same in its business, sufficiently supports the trial court's finding that the horse and buggy were owned by the defendant, and 'wholly in the possession and under the control of the defendant' at the time of the accident."

[The last four paragraphs of the opinion by WASTE, P. J., were withdrawn on rehearing, and are omitted.]

The judgment in favor of the defendant Pacific Acreage Company is reversed.

We concur: RICHARDS, J.; NOURSE, Judge pro tem.

On Rehearing.

PER CURIAM. The opinion in this case is modified by substituting the following, in lieu of the last four paragraphs in the decision heretofore filed:

In the case of Riordan v. Gas Consumers' Ass'n, supra, the court with approval quoted from the case of Mulvehill v. Bates, supra, where, in speaking of the liability of a defendant for the negligence of a driver, while engaged in carrying a load of poles for himself, the court said:

> "But here the wagon was intrusted, generally, to the driver, to be used entirely at his discretion."

In Rahn v. Singer Mfg. Co., supra, the court said:

> "In order to fix responsibility of the defendant, it is not necessary for the plaintiff to prove that the servant, for whose tort he seeks damages, was, at the time of the commission of the tort, engaged in executing specific commands of the defendant. It is enough for him to prove that the servant was acting within the general scope of his employment, but this much is necessary. If the usage of the parties, under the servant's contract of hiring, was of such a character that it allowed the servant to attend to his duties on such terms as suited his convenience, and at the time of the commission of the tort he was engaged in his own private business, but at the same time was pursuing the defendant's business in the service for which he was employed, the defendant would still be liable."

[8] The admitted facts in the case as to the ownership of the automobile by defendant the Pacific Acreage Company, and its operation at the time of the accident by its manager, established a prima facie case against the company. In anticipation of the trial, the defendant took the deposition of Ordway. Plaintiff, as part of his case, read this deposition to the jury. From this deposition, the facts as hereinbefore set out, relating to his employment by the Pacific Acreage Company, and other circumstances, were established. It was shown thereby that, at the time of the accident, Ordway was operating the automobile of the defendant Pacific Acreage Company, under a contract of hiring of such character that it allowed him to attend to his duties as manager at such time and in such manner as best suited his own convenience. He enjoyed a "roving commission" and was intrusted with the possession and operation of the vehicle with permission to

use it at his discretion in the business in which he was employed. Rahn v. Singer Mfg. Co., supra; Jessen v. Peterson, Nelson Co., supra.

Under the admitted circumstances of Ordway's employment, we are not willing to hold that his testimony as to the manner in which he performed his duties connected therewith and his rather uncertain testimony as to his movements following the consummation of the personal business, which he claims brought him from his employer's ranch some distance into the city of Fresno, on the day of the accident, is so convincing, or free from justifiable doubt, as to amount to an admission by plaintiff, or to eliminate the presumption that Ordway at the time of the collision was engaged upon the business of his employer. Ferris v. Sterling, supra.

[9] Furthermore, plaintiff is not bound by Ordway's testimony. "A party to the record of any civil action * * * may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses. The party calling such adverse witness shall not be bound by his testimony, and the testimony given by such witness may be rebutted by the party calling him for such examination by other evidence." Section 2055, Code Civ. Proc., as added by St. 1917, p. 58.

The judgment in favor of the defendant Pacific Acreage Company is reversed.

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41 Cal. App. 74

VOTYPKA v. VALENTINE et al. (Civ. 2834.)

(District Court of Appeal, First District, Division 1, California. May 5, 1919.)

1. HOMESTEAD 🔑115(3) — FORECLOSURE OF MORTGAGES.

Where a deceased husband had declared and recorded a homestead on community property, and notice to creditors of his estate has been given, and no claim has been presented on account of a note and mortgage on the property covered by the homestead, as required by Code Civ. Proc. § 1475, the homestead property is released from the mortgage, and no action can be maintained to foreclose it under such section in view of section 1500.

2. HOMESTEAD 🔑46—DECLARATION—RECORD —PROPERTY IN TWO COUNTIES.

Where a homestead in community property is mainly situated in one county, a homestead declaration recorded in such county only is not void merely because a part of the premises covered by the homestead is claimed to be located in another county wherein no homestead declaration has been made.

3. EXECUTORS AND ADMINISTRATORS 🔑226—NOTICE TO CREDITORS OF DECEDENT—SUFFICIENCY OF PUBLICATION.

Publication of notice to creditors of a decedent's estate, begun on a date after the order therefor has been signed and filed, is not invalidated because the first publication was made before the entry of the order.

4. MORTGAGES 🔑422—FORECLOSURE—VENUE.

Where a decedent's creditor claimed that premises covered by his mortgage was situated in two counties, but decedent had declared a homestead covering the premises situated in one county, suit to foreclose could not be brought in such county as to the part of the premises situated in the other county, in view of Const. art. 6, § 5; there being no property subject to the mortgage in the county where suit was brought.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by John Votypka, Jr., against Flora A. Valentine and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Oscar W. Hilton, of San Francisco, Harlow V. Greenwood, of Vallejo, and W. U. Goodman, of Fairfield, for appellant.

C. M. Crawford, of Lake Port, and Geo. K. Ford, of San Francisco, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants. The action is one to foreclose a mortgage. The facts are undisputed and are briefly as follows: On and prior to the 9th day of May, 1911, the premises described in the complaint herein were the community property of Clarence A. Valentine and Flora A. Valentine, his wife, and on the above date they executed their promissory note, secured by a mortgage, upon the whole of said premises, delivering the same to one George F. Hilton, with the mortgage described therein, which note, as to the principal and as to a certain portion of the interest, was unpaid at the time this action was brought. The mortgage thus executed and delivered described the property covered thereby as "situate, lying and being in the county of Lake, state of California." The mortgage was recorded in Lake county on May 16, 1911, but was also recorded in Napa county on December 15, 1915, a few days before this action was commenced. On March 19, 1912, Clarence A. Valentine made and executed a declaration of homestead upon the whole of said premises, describing the same as being situated in the county of Lake, and recorded said declaration of homestead upon the date of its execution in the county of Lake, but not elsewhere. On August 27, 1912, said Clarence A. Valentine died intestate in the city and county of San Francisco, being then a resident therein, and thereafter and on April 25, 1913, after due proceedings had, his widow, Flora A. Valentine, was duly appointed and qualified as the administratrix of his estate. On said April 25, 1913, an order for the publication of notice to creditors was signed by the probate judge, which was filed with the clerk of his court on the following day; on April 28, 1913, another order for the publication of notice to creditors was signed by the same judge and filed on the same date with the clerk. These two orders are identical, except as to their dates and filing marks, and no reason for their duplication appears in the record. Both orders were recorded on May 2, 1913. The first publication of notice to creditors under one or both of these orders was made on April 29, 1913. It appears in the record that such publication was made in the selected newspaper on said April 29, 1913, and also on May 6th, 13th, and 20th and 27th of that year, and that on June 20, 1917, upon a showing of these facts, a decree establishing due and legal notice to creditors in said estate was signed, filed, and recorded in said probate court. No claim was ever presented to the administratrix of said estate by the holder of said note and mortage which shortly after their execution had been assigned to the plaintiff in this action. In the complaint filed herein for the foreclosure of said note and mortgage the plaintiff describes one of the pieces or parcels of land covered by said mortgage as being situate "partly in the county of Lake and partly in the county of Napa," but does not further show either in said complaint or in the evidence offered in support of its averments what portion of said premises is located in the county of Napa. The court in its findings recited that the allegation of that paragraph of the complaint which contains this brief recital as to the location of a portion of said premises partly in Napa county is true; but the findings do not inform us what, if any, appreciable portion of said premises is located in Napa county. This action was commenced in the county of Lake. The plaintiff, by an amendment to his said complaint, expressly waived all recourse against any other property of the estate than that described in said mortgage, and also waived any deficiency judgment.

The defendants in their answer averred the foregoing facts as to the making and recordation of said homestead, and as to the death of said Clarence A. Valentine, and the said proceedings taken in the course of the administration of his estate, and thereupon prayed that the plaintiff take nothing by this action.

The trial court found these averments of the defendants' answer to be true, and entered its judgment in their favor and in accordance with their said prayer.

[1] The appellant herein contends that said judgment was erroneous for several reasons. The first of these relates to the jurisdiction of the court to entertain said action. The position of the respondents in this regard is that having established the fact that the premises in question were the community property of the Valentines, and that the deceased husband had declared and recorded in the county of Lake a homestead thereon, and thereafter had died, and that in the course of probate of his estate notice to creditors had been duly ordered and published, and that no claim had ever been presented for or on account of said note and mortgage, as required by section 1475 of the Code of Civil Procedure, the property covered by said homestead became thereby released from the operation and effect of said mortgage, and hence this action to foreclose the same could not be maintained under said section and also under section 1500 of said Code. The following authorities cited by respondent sustain this view with respect to the application of the foregoing sections of the Code of Civil Procedure to cases of this character: Camp v. Grider, 62 Cal. 20; Bollinger v. Manning, 79 Cal. 7, 21 Pac. 375; Hearn v. Kennedy, 85 Cal. 55, 24 Pac. 606; Rosenberg v. Ford, 85 Cal. 610, 24 Pac. 779; Hibernia S. & L. Soc. v. Laidlaw, 4 Cal. App. 626, 88 Pac. 730.

[2] The appellant, however, urges three main arguments against the application of the sections of the Code and the cases construing them to the facts of the case at bar. The first of these is that the complaint having averred, and the court having found, that a portion of the premises covered by said homestead was situated partly in the county of Napa, the said homestead is wholly void because it was not recorded in Napa county. We cannot go to the extent which the appellant would have us go in order to uphold this contention. The homestead was duly recorded in the county of Lake. So far as this record discloses, the main amount of the lands covered by said homestead declaration are located in the county of Lake. In point of fact, it has not been shown that any substantial or valuable, or not easily divisible, part of said premises is located in Napa county. This being the state of the record, we are constrained to hold that the homestead is valid as to the lands described therein which are situated within the county of Lake, wherein said homestead was duly recorded, and that the same was such valid and subsisting homestead at and during the time of the giving of notice to creditors in the course of probate of said estate, and that if the publication of such notice to creditors was itself valid, and if no claim was presented by the mortgagee thereunder, his mortgage, in so far as it related to the lands covered by said homestead located in said Lake county, was released under the provisions of the foregoing Code sections and of the above-cited authorities construing the same.

[3] The appellant, however, further contends that this result does not follow for the reason that the publication of such notice to creditors in said estate was void, its alleged invalidity consisting of the fact that

the first publication of said notice was made upon a date prior to the entry of the order for publication of notice to creditors, although it is conceded that the said publication was begun upon a date after the said order for publication had been signed and filed. We find no merit in this contention. In Estate of Hughston, 133 Cal. 321, 65 Pac. 742, 1039, the Supreme Court held that as to probate orders their entry in the book prescribed by the statute was a mere ministerial act of the clerk, having for its purpose the fixing of the time within which an appeal might be taken, and that such orders are perfect and complete from the time they are signed and filed. The case of Tracy v. Coffey, 153 Cal. 356, 95 Pac. 150, cited by the appellant in support of his contention, does not in any degree militate against the rule above announced, since its only effect was to hold that probate orders must be entered in order to fix the time within which an appeal may be taken.

[4] Finally, the appellant contends that he was entitled to commence and maintain this action in the county of Lake for the purpose of foreclosing said mortgage as to that portion of the lands in question as lay within the county of Napa, under the provisions of article 6, § 5, of the state Constitution, which reads in part as follows:

> "Provided, that all actions for the recovery of the possession of, quieting the title to or for the enforcement of liens upon real estate shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated."

The difficulty with the appellant's contention in this regard lies in the fact that, under the authorities above cited, the appellant's failure to present his claim against the estate of Valentine within the period prescribed by law had the effect of releasing so much of the property covered by said mortgage as lay in the county of Lake, as to which we have herein held the homestead to be valid. This being so, such of said property as was thereby released from the operation and effect of said mortgage would be no longer affected by it, and hence would not be affected by any action which could be commenced for the enforcement of the lien of said mortgage. The trial court, therefore, properly held that the action could not be maintained in Lake county for the foreclosure of the mortgage as to lands which were located in the county of Napa. Rogers v. Cady, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100.

This disposes of the several contentions urged by the appellant upon this appeal.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

RINDGE CO. et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.
(L. A. 6148.)

(Supreme Court of California. May 15, 1919.)

PROHIBITION ⚷9—SCOPE OF REMEDY.

Application to Supreme Court for a writ of prohibition against the superior court will be denied; it not appearing that superior court is acting in excess of its jurisdiction.

In Bank.

Application by the Rindge Company and others for a writ of prohibition against the Superior Court of Los Angeles County and others. Writ denied.

Anderson & Anderson and Nathan Newby, all of Los Angeles, for petitioners.

PER CURIAM. The within application is denied upon the ground that it is not made to appear that the superior court is acting in excess of its jurisdiction. See Western, etc., Tel. Co. v. Superior Court, 15 Cal. App. 701, 115 Pac. 1091, 1100.

All concur.

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180 Cal. 626

CONCOFF v. HIPPODROME THEATER CO. (L. A. 4895.)

(Supreme Court of California. June 20, 1919.)

1. CORPORATIONS ⚷423 — LIABILITY FOR SERVANT'S ACTS—TORTS.

A corporation is liable for the torts of its servant, if such servant had express or implied authority from it to do the tortious act, but not otherwise.

2. FALSE IMPRISONMENT ⚷22 — BURDEN OF PROOF—AUTHORITY OF AGENT.

In an action for false arrest and imprisonment occasioned by the act of the servant of a corporation, the burden is on plaintiff to prove that such servant had express or implied authority from the corporation to do the tortious act.

3. FALSE IMPRISONMENT ⚷31 — AUTHORITY OF SERVANT—EVIDENCE.

In an action against a theater company for false arrest and imprisonment of a patron by defendant's usher, evidence *held* not to disclose an implied authority on the part of the usher arising from the scope of his duties to make the arrest.

Department 1.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by A. Concoff against the Hippodrome Theater Company for false arrest and imprisonment. From a judgment for plaintiff, defendant appeals. Reversed.

Alfred H. McAdoo and James E. Mahon, both of Los Angeles, for appellant.

Gerecht & Chambers, of Los Angeles, for respondent.

SHAW, J. The defendant appeals from a judgment in favor of plaintiff for $200 rendered in an action by the plaintiff for damages from an alleged false arrest and imprisonment.

The defendant was conducting a theater in the city of Los Angeles and had in its employment as an usher, one John Barcena. Plaintiff purchased a ticket of admission to the theater, and proceeded to the front thereof, and was in the act of getting to a seat when he was interrupted by Barcena. The plaintiff alleges that Barcena arrested him, compelled him to go to the entrance of the theater, and there delivered him into the custody of a police officer, by whom he was taken to the city jail and kept there for an hour, all without probable cause or right, or any authority to do so. It is further alleged that Barcena did this in the regular course of his employment as servant of the defendant.

[1-3] A corporation is liable for the torts of its servant, if such servant has authority from it to do the tortious act, but not otherwise. The burden is on the plaintiff to prove such authority. The authority may be either express or implied. There was no evidence that any express authority was given by the defendant to Barcena to arrest the plaintiff, and no claim is made to that effect. The contention is that there was an implied authority arising from the fact that the arrest was within the scope of the duties which Barcena was employed by the defendant to perform. This contention is untenable.

The evidence merely shows that he was employed as an usher in the theater which was the scene of the arrest, and that as such usher his duty was to attend to the seating of the patrons after they had entered the room. It may be true that one of the implied duties of an usher in such position is to prevent disorderly conduct in the theater, and perhaps to eject persons guilty thereof, but there is no evidence on the subject respecting his duties in that particular, or that he had any such authority. But in any event there was no implied authority to him from the defendant to arrest or imprison persons who might commit criminal offenses while in the theater. Such authority is not to be implied from the mere fact that he was an usher with the duty of attending to the seating of the patrons and keeping order. The authorities are practically unanimous to this effect. Daniel v. Atlantic Coast, etc., Co., 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455, 1 Ann. Cas. 718; Allen v. London, etc.,

Co., L. R., 6 B. B. 65; Barabasz v. Kabat, 86 Md. 36, 37 Atl. 720; Carter v. Howe Machine Co., 51 Md. 296, 34 Am. Rep. 311; Mali v. Lord, 39 N. Y. 381; Markley v. Snow, 207 Pa. 447, 56 Atl. 999, 64 L. R. A. 685.

The finding of the court was to the effect that Barcena was employed by the defendant as an usher, and that among his duties was that of preserving order in the theater. As we have shown, the latter proposition is not sustained by any direct evidence. But even if it were supported it is insufficient to sustain the conclusion that the defendant was liable for the act of Barcena in making the arrest and imprisonment complained of. The statement in the findings that Barcena, "as agent and servant of the defendant, and acting within the scope of his authority as such," arrested the plaintiff is a mere conclusion of law, and it is wholly unjustified by the evidence or by the facts found. Aside from this conclusion there is nothing in the findings to show that the defendant was responsible for the act. The appeal must be sustained. It may be added that the finding that Barcena arrested the plaintiff is supported by very slight evidence. It was shown that Barcena took charge of him and conducted him to the entrance of the theater, apparently for the purpose of ejecting him, but the arrest appears to have been made by a deputy constable who was in the theater at the time and by a police officer who was stationed at the front door.

The judgment is reversed.

We concur: LAWLOR, J.; OLNEY, J.

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180 Cal. 616

FORD v. CALIFORNIA PAC. INV. CO. et al.
(L. A. 4890.)

(Supreme Court of California. June 19, 1919.)

EXECUTION ⚷253(1) — SALE — PROCEEDINGS FOR VACATION.

Although a purchaser at an execution sale is not a party to the action, the sale may be vacated as unfair and fraudulent on motion in the case wherein the sale was ordered, and a separate action brought for that purpose is unnecessary.

Department 1.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Melissa H. L. Ford against the California Pacific Investment Company and H. B. Learned and others. Judgment for plaintiff, and defendant H. B. Learned appeals. Affirmed.

John O. Bender, of Los Angeles, for appellant.

Slosson & Mitchell and Daniel Beecher, all of Los Angeles, for respondent.

OLNEY, J. This is an appeal from an order vacating an execution sale on the grounds that the price was wholly disproportionate to the real value of the property, and that the sale was unfair and fraudulent. The appellant is the purchaser at the sale. He was not a party to the action, and his position is that where a purchaser at a judicial sale is not a party to the action the sale cannot be vacated on motion, but only in a separate action brought for that purpose. This is the sole question in the case, and it is answered by Thompson v. Superior Court, 119 Cal. 538, 542, 51 Pac. 863, 864, where an order vacating a judicial sale was under attack, and the court said:

> "It is contended that this order is void for want of jurisdiction; that, the title to the property having vested in the petitioner by the sale, he could not be divested of that title in such a proceeding. The rule, however, is quite otherwise. While the party seeking relief may resort to his bill in equity, he may—and, indeed, it is often the preferable practice—apply by motion to the court which has decreed the sale, and in applying to such court he may base his application upon any equitable principle of relief which would give jurisdiction to a court of equity in any other case of sale—fraud, mistake, accident, or other ground of purely equitable cognizance. And particularly will the court entertain such applications where the deception has been practiced or the mistake induced by the act of the purchaser. In all such cases due regard will be had to the intervening rights of third persons, but no such rights have here arisen. Amongst numerous authorities supporting this proposition may be instanced [citing a number of authorities]."

See, also, Georgeson v. Consumers' Lumber Co., 3 Cal. Unrep. Cas. 584, 31 Pac. 257.

If Bryan v. Berry, 8 Cal. 135, the only decision by this court to which appellant's counsel has referred us, is to be taken as holding to the contrary, it must be deemed to have been overruled on this point.

Order affirmed.

We concur: SHAW, J.; LAWLOR, J.

180 Cal. 596

CONIGLIO v. CONNECTICUT FIRE INS. CO. (L. A. 4896.)

(Supreme Court of California. June 17, 1919.)

1. INSURANCE 🔑282(13)—SOLE AND UNCONDITIONAL OWNERSHIP.

A fire insurance policy was not vitiated because there was contained, among the fixtures, a computing scale of which plaintiff was not the sole and unconditional owner, the title being in the vendor, where the scale was not specifically named in the policy, and plaintiff insurer waived in open court all claim for damage thereto, and plaintiff had not concealed or misrepresented any material fact relating to this property, although he had included the scale in his schedule of losses, believing his equitable interest therein entitled him to recover the cash value thereof.

2. INSURANCE 🔑670—FINDINGS.

In action on fire insurance policy, findings *held* to establish that a subsequent explosion was caused by fire within and not without the insured building.

3. INSURANCE 🔑665(4)—ACTION ON FIRE POLICY—EVIDENCE.

Evidence *held* to show that the stock and fixtures insured had been attacked by fire when an explosion took place.

4. INSURANCE 🔑115(6)—INSURABLE INTEREST—CONDITIONAL SALE PURCHASER.

A purchaser of property under conditional sale by the terms of which title is to remain in the vendor until full payment is made has at least an insurable interest to the extent of his payments on account.

5. INSURANCE 🔑146(3)—CONSTRUCTION OF POLICY.

Insurance contracts are to be interpreted in the light of the fact that they are drawn by insurance companies, and are rarely, if ever, understood by the people who pay the premiums, so that every rational indulgence must be shown the assured.

6. APPEAL AND ERROR 🔑1047(4)—TRIAL 🔑377(1)—IRREGULARITY—PREJUDICE.

In action on fire policy, that plaintiff's attorneys, after argument, tendered to the judge and he read an accountant's report concerning books and matters of account which had been introduced in evidence to show the amount and value of plaintiff's stock when the fire occurred, and also sent to the judge, without serving it on opposing counsel, a summary of plaintiff's testimony as to value of destroyed property, *held* not reversible error, where plaintiff's counsel made no closing argument, and there was no order that the case stand submitted, and subsequently defendant's counsel furnished the court with "memoranda of figures used on argument."

Department 2.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by A. Coniglio against the Connecticut Fire Insurance Company. From judgment for plaintiff, defendant appeals. Affirmed.

John R. Layng, of Los Angeles, for appellant.

Force Parker and F. D. R. Moote, both of Los Angeles, for respondent.

MELVIN, J. Plaintiff recovered judgment on a policy of fire insurance issued by defendant, insuring plaintiff against all loss by fire in the sum of $1,500 on a stock of merchandise while contained in a described building, in the city of Los Angeles, and $500 on furniture and fixtures while contained in said building. Judgment was rendered in favor of plaintiff for the aggregate of these sums, together with interest and costs. From this judgment defendant appeals.

The court found that on July 21, 1913, the stock and fixtures covered by said policy were totally destroyed by fire; that the merchandise, the furniture, and other equipment were worth much more than the respective amounts of insurance, and that defendant was fully liable. The court also found as follows:

> "That during said fire, but subsequent to the commencement thereof, an explosion occurred in said building. That there was no explosion prior to said fire. That to the contrary said fire preceded and was the cause of said explosion."

The court also by the findings negatived defendant's attempted showing of fraud in the presentation by plaintiff of his proofs of loss.

[1] One of the contentions of defendant was that the policy was vitiated because there was contained among the fixtures a certain computing scale of which the plaintiff was not the sole and unconditional owner, title being vested in the vendor, a certain scale company. Upon this branch of the case the court found that the scale was not specifically named in the policy; that plaintiff waived in open court all claim for loss of or damage to said scale; that plaintiff had not concealed or misrepresented any material fact relating to this personal property, although he had included in his schedule of losses the said scale, believing that his equitable interest therein entitled him to recover from the insurer the cash value of the property.

[2] Appellant contends that the findings fail to indicate that the explosion occurred by reason of a fire within the building. This is hypercriticism. There was a finding, which is quoted above, that the fire preceded and caused the explosion. There was also a finding against defendant's contention that the building and contents were destroyed by an explosion occurring "within said frame build-

ing," and another that "an explosion did occur in said building on said 21st day of July, 1913, but that said explosion was subsequent to the commencement of said fire, and was the result of and was occasioned by said fire." We cannot see how, in view of these findings, it may be fairly or at all inferred that a fire without the building may have caused the explosion within.

[3] Appellant denies that the testimony or any of it tends to establish the conclusion that the stock and store fixtures had been attacked by fire when the explosion took place.

Several witnesses testified that they saw "light" or "fire" or "flames" in the direction of plaintiff's store some time before the explosion. One witness, Rioloc, said he saw the fire "at" plaintiff's store, and that shortly after there was an explosion. Without reviewing the testimony in detail, we think it sufficient to say that the findings are supported. Many of the witnesses spoke through an interpreter, and their statements are not, perhaps, so clear and satisfying as would be those of witnesses familiar with the English language; but there was sufficient testimony to justify the court in concluding that there was a fire within plaintiff's store which by its size and extent must have been attacking the stock and fixtures at the time of its discovery and before any question relating to the injury worked by the explosion could arise.

Defendant bases its contention that the explosion and not the fire caused the damage upon testimony regarding fragments of the building found at some distance from the site of the store. But other witnesses said that they could find no part of the stock or fixtures thus dispersed. One of defendant's own witnesses testified that there were of the grocery stock outside of the lines of the building the next morning only a few cans. The testimony on behalf of plaintiff, if believed, justified the court in concluding that there had been a substantial destruction of the stock and fixtures before the explosion dissipated any of the parts of the house. Fountain v. Connecticut Fire Insurance Co., 158 Cal. 760, 112 Pac. 546, 139 Am. St. Rep. 214, cited by appellants, is not in point here. In that case the evidence, without substantial conflict, was that the building had been destroyed by earthquake before the fire started. Appellant asks this court to compare the testimony of certain witnesses, who said that they observed the illumination from a distance of several blocks, and that they subsequently heard an explosion, with that of witness Vatcher that there was no light in or about the plaintiff's premises prior to the detonation. Such a comparison is beyond our duty or power. That was the peculiar province of the learned judge of the superior court who presided at the trial, trying matters both of law and of fact, a jury having been waived by the parties.

[4, 5] It is contended that plaintiff had no insurable interest in the automatic scale described in the findings; that the policy is nonseverable, and that by reason thereof it never attached to the risk. There is no merit in the insurance company's position in that behalf. A purchaser of property under conditional sale by the terms of which title is to remain in the vendor until full payment is made has at least an insurable interest to the extent of his payments on account. 14 Ruling Case Law, 916, § 93; Tabbut v. American Insurance Co., 185 Mass. 419, 70 N. E. 430, 102 Am. St. Rep. 353. See 20 Am. Dec. 513, note, Vendor and Vendee. Appellant suffered no possible injury by reason of the fact that plaintiff owed $50 on the scale at the time of the fire, because there was a waiver at the trial of any claim arising out of the destruction of that article. It is true that in the portion of the policy signed by the witnessed mark of Coniglio (who could not read or write) was a declaration that the interest of the insured in the property was "fee simple," but there was no showing that appellant was or could be injured in the slightest degree by such alleged misrepresentation. It is to be remembered that contracts of this sort are to be interpreted in the light of the fact that they are drawn by the insurance companies and are rarely, if ever, understood by the people who pay the premiums. Every rational indulgence must be shown by the assured. Raulet v. Northwestern National Insurance Co., 157 Cal. 213, 107 Pac. 292. The case of Goorberg v. Western Assurance Co., 150 Cal. 510, 89 Pac. 130, 10 L. R. A. (N. S.) 876, 119 Am. St. Rep. 246, 11 Ann. Cas. 801, cited by appellant, has no application to the facts of this case. In that case the applicant for insurance had misrepresented his title to the land on which his house was built, stating that he owned the fee, whereas he was a mere "squatter" on lands of the government. The court held that such a misrepresentation was material because it increased the hazard on all property covered by the policy.

[6] It is further contended that there was a gross irregularity demanding reversal of the judgment, due to the fact that plaintiff's attorneys, after argument tendered to the judge, and he read, a report of an accountant regarding certain books and matters of account which had been introduced in evidence with the purpose of showing the amount and value of stock in plaintiff's store at the time when the fire started. It is shown by affidavits that at the close of the taking of testimony in the case one of the counsel for plaintiff made an opening argument. During the reply of defendant's counsel the judge of the court stated that he would be pleased if the attorneys would furnish him with statements of the figures deemed of importance and brought out in the

course of the trial. Plaintiff's counsel made no closing argument, and there was, according to his affidavit, no formal or other order that the cause stand submitted. Subsequently, defendant's counsel furnished the court with a document purporting to contain "memoranda of figures used on argument," but which also contained certain argumentative matter and certain authorities. Thereafter plaintiff's counsel served on defendant's counsel and delivered to the judge, as their reply to defendant's written argument, a report of one Rea, an accountant. This was adopted by counsel for plaintiff as their argument. It was a review of all the evidence in the record on the amount and value of plaintiff's stock. Plaintiff's counsel also sent to the judge, without serving it upon opposing counsel, a summary of the testimony of Mr. Coniglio as to the value of the property destroyed. While this may have been an irregularity, it does not appear that the "summary" was in any respect improper. It consisted of a tabulated statement of figures indicating the value of property destroyed as Mr. Coniglio estimated its worth. It was accompanied by no comment. Nor can we see how defendant was injured by the analysis of the testimony made by the accountant. It was in the nature of an informal brief furnished by plaintiff's representatives. It does not appear that appellant's counsel regarded this document and its service as a serious invasion of the rights of the insurance company, for he made no motion to reopen the case for the cross-examination of Mr. Rea. In other words, there is no showing that the informality in the manner of argument injured the defendant, or that it did or could prejudice that litigant with the learned judge of the trial court.

The judgment is affirmed.

We concur: WILBUR, J.; LENNON, J.

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180 Cal. 629

In re BERGLAND'S ESTATE. (L. A. 5951.)

(Supreme Court of California. June 20, 1919.)

1. WILLS 🔑656 — CONSTRUCTION — PROVISIONS FOR FORFEITURE IN CASE OF CONTEST.

Although under Civ. Code, § 1320, several testamentary instruments executed by the same testator are to be taken and construed together as one instrument, where testator executed a will containing a clause forfeiting bequests to any beneficiary who objected to the distribution or attempted to defeat the provisions of the will, such provision was not applicable to a later olographic will making no reference to the former will or to its forfeiture clause; the testator's intent being controlling in view of section 1319.

2. WILLS 🔑656 — CONSTRUCTION—FORFEITURE CLAUSE.

While clauses in wills providing for forfeiture in case of objection to distribution or attempt to contest are valid and should be given effect according to testator's intent, such provisions are to be strictly construed, and not extended beyond what was plainly the testator's intent.

3. WILLS 🔑665 — CONSTRUCTION—FORFEITURE FOR CONTESTING WILL—GOOD FAITH.

A clause in a will forfeiting bequests to beneficiaries objecting to the distribution or attempting to defeat its provisions does not extend to an attempt made in good faith to probate a later purported will, spurious in fact, but believed to be genuine.

4. WILLS 🔑665 — CONSTRUCTION — FORFEITURE BY ATTEMPT TO PROBATE FORGED WILL—EVIDENCE OF FORGERY.

That a petition to probate a later purported will was dismissed and a certain person convicted of the crime of forging it is not competent evidence to show that it was spurious, as a basis for proving an attempt to defeat the provisions of an earlier will, providing for forfeiture of bequests to beneficiaries attempting to defeat its provisions.

5. WILLS 🔑665 — CONSTRUCTION — FORFEITURE CLAUSES — "ATTEMPT TO DEFEAT WILL."

Under a will containing a provision forfeiting the interest of a beneficiary who attempts to defeat its provisions, a proceeding to probate a later will known to be spurious constitutes an attempt to defeat the will, notwithstanding it is not carried to the point of hearing and trial but is withdrawn.

6. WILLS 🔑665 — FORFEITURE OF CONTESTING WILL—BURDEN OF PROOF.

Where a forfeiture is claimed under a clause in a will forfeiting bequests to beneficiaries attempting to defeat its provisions, the burden is on the party claiming forfeiture to show bad faith on the part of a beneficiary seeking to probate a later purported will which is spurious.

7. WILLS 🔑665—FORFEITURE FOR CONTEST—PRESUMPTION OF BAD FAITH.

Where it was claimed that a beneficiary in a will had forfeited her share by attempting to probate a later spurious will, no presumption of bad faith arose from the withdrawal of her petition for probate.

Department 1.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Proceedings to probate the will of Andrew Bergland, deceased. On appeal from an order of distribution. Affirmed.

See, also, 177 Cal. 227, 170 Pac. 400.

John H. Bowlby, of San Diego, for appellant.

Luce & Luce, of San Diego, for respondent.

OLNEY, J. This is an appeal from an order distributing to one Kate J. Misner a portion of a legacy left her by the decedent. The sole question is as to whether she had forfeited the legacy under a provision of the decedent's will reading as follows:

> "Fourthly, it is my positive instruction that should any one or more of the beneficiaries named in this will object to the distribution as made, or attempt to defeat the provisions of this will that said person or persons shall receive the sum of five dollars ($5.00) each and no more. And any and all other provisions made herein for such objector other than the sum of five dollars ($5.00) as stated, shall be annulled and revoked and such person or persons shall take nothing from my estate other than the sum of five dollars ($5.00)."

There is no dispute as to the facts, which are:

The decedent, Andrew Bergland, died March 3, 1916, leaving as his heirs two sons, Charles and Louis, and a daughter, the last the legatee mentioned whose legacy is in question. Immediately upon his death a formal instrument, attested by two witnesses, very evidently drawn by a lawyer, and making a complete disposition of the decedent's estate, was offered for probate as his will by the parties named as executors therein. Under it the sons and the daughter are all substantial beneficiaries. It likewise contains the forfeiture provisions quoted, but it does not provide for the legacy in question here. It is dated June 7, 1910, and was reaffirmed by formal codicils—otherwise immaterial here—on March 10, 1914, and December 26, 1914.

Two days after the offer of this formal will for probate, the daughter offered, as being an olographic will of the decedent, a writing reading as follows:

> "August 29, 1915.
>
> "i give al Money in Banks to my Dater Kate Misner when i Die. A. Bergland."

The gift made by this instrument is the legacy involved here. It is to be noted that the date of this writing is subsequent to the dates of the formal will and its codicils, and also that it makes no reference whatever to them.

Eight days after the olographic writing was presented for probate the daughter offered for probate still another instrument, dated this time December 25, 1915, which purported to dispose of practically all the decedent's property in a manner substantially different from that of the will of 1910 and more advantageous to the daughter and to appoint the daughter executrix.

No objection was made by any one, so far as the record discloses, to the probate of the will of 1910 with its codicils, but the two sons filed formal objections to the probating of the two instruments offered by the daughter, alleging that both were forgeries, and that the instrument of December 25, 1915, was the result of a conspiracy to which the daughter was a party. The daughter pressed her petition for the probate of the instrument of December 25, 1915, until it came on for trial, when she dismissed it. Later, after hearing, the will of 1910 with its codicils and the olographic writing of August 29, 1915, were both admitted to probate as constituting together the last will of the decedent.

Subsequently, the daughter petitioned for the distribution to her of the money of her father in bank at the time of his death, pursuant to the provisions of the olographic will of 1915, and this petition was opposed by the sons on the ground that under the forfeiture clause of the will of 1910 she had lost all right to this legacy by her action in seeking the probate of the spurious will of December 25, 1915. The lower court granted the petition of the daughter, and from its order this appeal is taken by one of the sons.

The contention of the appellant must be overruled for two reasons:

[1] First, the forfeiture clause contained in the will of 1910 has no application to the will of 1915 or to the legacy given by it. The will of 1915 contains no reference to that of 1910, is not a codicil to it, and so far as anything appears is wholly independent of it, its provisions prevailing over any inconsistent provisions of the earlier will merely because, in the particular covered by it, it is a later expression of the decedent's testamentary wishes. It is true there is a general rule of testamentary construction formulated by our Civil Code (section 1320) as follows:

> "Several testamentary instruments, executed by the same testator, are to be taken and construed together as one instrument."

But this, like any other rule of construction, is but a guide for the purpose of ascertaining the intention of the testator. It cannot be used to inject into the later instrument terms and provisions not found in it, unless by express reference in the later instrument or by necessary implication it appear that such was the testator's intention. It is always his intention as fairly ascertained and expressed that must govern, and the Code makes the rule quoted, together with other rules of construction, subordinate to this. Section 1319, Civ. Code. In the case of a codicil which by its terms picks up the will previously executed, and, in effect, reaffirms it, it is apparent that the decedent's testamentary intent at the time of the execution of the codicil includes as one both the codicil and the will, with the result that, unless there is something to indicate a contrary intention, any gift made by the codicil is subject to conditions imposed by the will on the testator's gifts generally. Of this character was the codicil in the Estate of Hite, 155 Cal. 436, 101 Pac. 443, 21 L. R. A.

(N. S.) 953, 17 Ann. Cas. 993, wherein a forfeiture clause contained in a will was held to operate because of a contest made to a codicil. But here we do not have a single testamentary act covering both will and codicil, but two distinct testamentary acts occurring at different times, the later making no reference to the earlier, and consisting in terms of an unqualified and unconditional bequest. There is no language, no expression of any nature, that would indicate that the testator intended that the terms of this bequest should be modified and the gift be subject to conditions elsewhere prescribed. The two wills should be read together in the sense that each should be read in the light of the other, and their terms harmonized so far as possible, but this is a very different thing from changing the express terms of the later will by importing conditions into it without express warrant contained in it itself. We do not mean to say that a case is not possible where this may be properly done by implication only. But to justify this the circumstances must be such as fairly to show affirmatively that the testamentary intent of the decedent at the time of his last expression included not merely the matters which he then set down, but also those which he had set down on a previous occasion. Deppen's Trustee v. Deppen, 132 Ky. 755, 117 S. W. 352.

[2] In the present case there is nothing to give rise to any implication that the testator when he wrote and signed the olographic will of 1915 intended to do anything different from what his language literally expresses, namely, to make an unqualified and unconditional gift to his daughter. This becomes doubly clear when we consider the character of the condition which it is sought to import and the effect such importation would have. While it is the rule in this state that forfeiture clauses of the nature of that involved here are valid and are to be given effect according to the intent of the testator, yet it is also the rule, and a salutary one, that such a provision—being by way of forfeiture and condition subsequent—is to be strictly construed and not extended beyond what was plainly the testator's intent. In the present case the importation of the will of 1910 with its forfeiture clause into the will of 1915 would mean that the testator intended, not only that his daughter should forfeit the legacy there given if she contested the disposition made by the will of 1910, but also that if any beneficiary under the will of 1910 contested the will of 1915, he or she should forfeit the testator's bounty. It is hardly conceivable that the testator, when he executed the informal and unwitnessed olographic writing of 1915, intended that if its authenticity should be questioned by his sons, for instance, they should be cut off from their inheritance. The informal and unattested nature of the instrument is such as to make such intent wholly unreasonable. Yet this result would necessarily ensue, if the appellant's contention is to be sustained. In this respect the position of the appellant and his brother is no better than that of the respondent. They have endeavored to contest the later will, and if the earlier will is to be read into it and made a part of it, the later will is protected by the forfeiture clause of the earlier, and the case of the sons comes directly within Estate of Hite, supra. The answer, both as to the daughter and as to the sons, is that such construction is not justified either by implication or by express language, and that the later will is just what it purports to be, an absolute gift to the daughter, unconditioned on the one hand by the forfeiture clause and unprotected on the other by it.

[3] Second. The forfeiture provision has no application to an attempt made in good faith to probate what purports to be a later will. The language of the clause is that if any beneficiary "object to the distribution (of the estate) as made (by the will), or attempt to defeat the provisions of this will," any gift to such beneficiary other than $5 shall be annulled and revoked. If an attempt were made knowingly to probate a spurious will of a later date which purported to distribute the testator's estate in a manner different from that of the genuine will, such an attempt would quite certainly come within the language of the forfeiture clause as an attempt to defeat the provisions of the will. In re Kirkholder's Estate, 171 App. Div. 153, 157 N. Y. Supp. 37.

But it is not alleged in the present case that the daughter acted in bad faith in presenting the purported will of December 25, 1915, and seeking its probate, and no evidence on the point was introduced. It was alleged in the objection to the probate of the instrument that it was a forgery, made pursuant to a conspiracy to which the daughter was a party, but this allegation is not repeated in the objections to her petition for distribution, and apparently the omission is not an oversight. The expressed position of appellant's counsel is that the good faith of the daughter is immaterial, that the mere fact that she unsuccessfully endeavored to probate an instrument making a different disposition of the estate from that directed by the will of 1910 is sufficient to work a forfeiture.

[4] It is to be noted that there is no proof in this proceeding that the instrument of December 25, 1915, was, in fact, spurious. All that appears is that the petition for its probate was withdrawn, and also the fact that a certain person was convicted of the crime of forging it. But neither the dismissal nor the criminal conviction is competent evidence in the present proceeding that

it was not genuine. We, however, do not desire to rest our conclusion upon this ground, and will assume that it was spurious.

[5] Respondent contends that proceedings taken by the daughter to probate the spurious will do not amount to a contest or to an attempt to defeat the testator's real will, that in order to amount to this the proceedings must have been carried to the point of a hearing and trial, which was not done. With this we do not agree. The attempt was there, manifested by overt acts designed and taken for the purpose of bringing about a different disposition of the estate, assuming that the instrument was known to the daughter not to be genuine. The fact that she desisted from her attempt before actually going to trial is immaterial. The attempt was made, and that is enough. Estate of Hite, supra. The question, therefore, reduces itself to this, Is an attempt made in good faith to probate a spurious instrument—whether such attempt is carried through to a final adjudication of the spurious character of the instrument or not—such an attempt to defeat the testator's wishes as is meant by the language of the will?

As we have already said, the forfeiture clause is to be strictly construed, that is, while it is valid and is to be enforced according to the ascertained intent of the testator, yet in ascertaining his intent no wider scope is to be given to his language than is plainly required. The conditions upon which the forfeiture is to work under the will are two: First, in case any beneficiary "object to the distribution (of the estate) as made (by the will)"; or, second, "attempt to defeat the provisions of this will." The attempt to probate a later will cannot be said to be an objection to the distribution made by the first will. Is it within the second condition, "an attempt to defeat the provisions of this will"? It would certainly have the effect, if successful, of defeating those provisions. This, however, is not a complete answer. While the effect would be to nullify, and thereby in one sense defeat, the provisions of the first will, that result is but incidental, and is not the primary object of the attempt to probate the purported later will, provided such attempt be made in good faith. The primary object of such attempt is to establish what is believed to be the final expression of the decedent's testamentary wishes. In the words "attempt to defeat" lies the idea of action taken for the purpose of defeating the provisions of the will. A direct contest of the validity of the will would, of course, be such action regardless of the good or bad faith of the beneficiary, and such was the ruling in Estate of Miller, 156 Cal. 119, 103 Pac. 842, 23 L. R. A. (N. S.) 868. So, also, would be an attempt to accomplish the same result indirectly, as by seeking to probate a later instrument, known to be false. In such a case the primary purpose is to defeat the provisions of the real will. But it is easy to conceive of a beneficiary offering for probate purely through a sense of duty to the decedent what he believes to be the genuine expression of the testator's last desire, without any purpose whatever of defeating a prior will and without any interest in defeating it. Many a child has still such regard for his parent that he or she would endeavor to establish and carry out what was believed to be the father's will, although so doing is directly contrary to his or her own material interest. In such a case there is no element of an "attempt to defeat" a prior will.

It follows that an attempt in good faith to probate a later purported will, spurious in fact, but believed to be genuine by the party seeking its probate, does not fall within the forfeiture clause under consideration here.

As strengthening this conclusion, it may be worthy of note that to hold that the testator intended to forbid under penalty any attempt to probate what was genuinely believed to be a later will would mean that he intended decidedly to limit his own freedom of subsequent testamentary action. Such penalty would seriously discourage any attempt to probate even a genuine later will, and would distinctly lessen the chance of any later testamentary expression by the testator being made effective. It is not to be presumed that he contemplated or intended any such consequence.

[6, 7] Appellant contends that the burden rested on the respondent to show that she acted in good faith. This is not true. The fact of bad faith was an essential element of the appellant's case. The burden rested on him to show that the respondent had brought herself within the forfeiture clause, and this could not be shown without it appearing that her attempt to probate the spurious will of December 25, 1915, was in bad faith and for an ulterior object. Appellant argues that bad faith must be presumed from the fact that the respondent's petition for probate was withdrawn, and cites In re Kirkholder's Estate, 171 App. Div. 153, 157 N. Y. Supp. 37. It is clear, however, that no presumption of bad faith arises from the withdrawal of the petition. It would not have arisen even if the matter had been carried to a hearing and final adjudication that the will was not genuine, unless possibly as a part of such adjudication facts were found that proved the respondent's bad faith. If such facts were found as a part of such adjudication, it may be that such finding would be res judicata as between the parties. This was the situation in In re Kirkholder's Estate, supra, and therein lies the difference between it and the case at bar.

Finally, we would say that there are grave reasons of public policy why a provision for forfeiture in case of an unsuccessful but bona fide attempt to probate a purported later will should not be enforced. It is the policy of the law to encourage the presentation for probate of wills of decedents in order to make the more certain that those really entitled to their bounty shall enjoy it. To place upon one under the moral, if not the legal, obligation of probating the decedent's will the burden of gambling on his ability to do so successfully, no matter how sincere he may be, would be directly opposed to such policy. These reasons are very different from those applicable to direct attacks upon a will, and the question is not precluded by Estate of Hite, supra. It is unnecessary to put this decision upon that ground, and we do not do so. We mention the point, however, to avoid any inference that our discussion of the case solely as one of the construction of the will means that this question of public policy is not present in it. It is present, but it is not necessary to decide it.

Order affirmed.

We concur: SHAW, J.; LAWLOR, J.

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180 Cal. 550

MANN v. SCOTT et al. (L. A. 4596.)

(Supreme Court of California. June 13, 1919.)

1. Municipal Corporations 🔑706(7)—Automobile Accidents—Contributory Negligence—Jury Question.

Where a pedestrian was struck by defendant's automobile while attempting to board a street car, evidence *held* not to show, as a matter of law, that plaintiff was negligent.

2. Municipal Corporations 🔑705(10)—Crossing Streets—Duty to Stop, Look and Listen.

A pedestrian about to cross a city street is under no positive duty to stop, look and listen.

3. Municipal Corporations 🔑705(10)—Automobile Accidents — Care Required of Pedestrians.

Where a pedestrian about to board a street car is struck by an automobile, the question of negligence, under the usual rule of ordinary care devolving upon pedestrians, must be examined in the light of all the attending circumstances, including the knowledge of the existence of a statute or an ordinance describing regulations for the observance of automobile drivers.

4. Municipal Corporations 🔑706(7)—Automobile Accident — Boarding Street Cars—Questions of Fact.

Where a pedestrian was struck by defendant's automobile while about to board a street car, whether, if she saw the automobile, she would have been warranted in approaching the street car, without further watching the automobile, relying upon the ordinance requiring automobiles so situated to stop, *held* a question for the jury.

5. Municipal Corporations 🔑706(5)—Automobile Accidents — Evidence — Sufficiency.

Where a pedestrian while attempting to board a street car, was struck by defendant's automobile which was passing in violation of a city ordinance, evidence *held* sufficient to support a finding that defendant was negligent.

6. Municipal Corporations 🔑592(2)—Regulation of Automobiles—Statutory Enactments — Inconsistency with Ordinance.

Motor Vehicle Act of 1913, requiring automobile drivers when passing street cars in a city to operate the automobile with due care and caution to prevent injury to those boarding or alighting from the car, and a city ordinance requiring an automobile driver to stop 10 feet behind a car standing still to allow passengers to board or alight, are not inconsistent.

7. Municipal Corporations 🔑592(2)—Ordinances — Validity—Enactments—Conflict with State Laws.

Where the Legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipality with subordinate power to act in the matter may make such new and additional regulations in aid and furtherance of the purpose of the general law as may seem fit and appropriate to the necessities of the particular locality, and which are not in themselves unreasonable.

8. Municipal Corporations 🔑706(8) — Street Car Accidents—Instructions.

In an action for personal injury sustained by being struck by an automobile while attempting to board a street car, it was not error to instruct the jury in the language of Motor Vehicle Act 1913, regulating the care to be observed by automobile drivers while passing a street car, and also in the language of a city ordinance, requiring an automobile driver to stop 10 feet behind the car discharging or receiving passengers; such enactments not being in conflict.

9. Municipal Corporations 🔑706(8)—Automobile Accidents—Instructions.

In an action for personal injury sustained by being struck by defendant's automobile while attempting to board a street car, it was not error to instruct that, if defendant violated a city ordinance, and "by reason thereof plaintiff sustained injuries, then you should find for plaintiff, if you further find" that plaintiff was in the exercise of reasonable care, was not erroneous in that the jury should have been instructed that the violation of the ordinance was "negligence."

In Bank.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Merta Mann against De Witt Scott, doing business under the fictitious name and style of Scotty's Personal Auto

Service and another. Judgment for plaintiff, and, from the denial of a new trial, defendants appeal. Affirmed.

Rufus V. Bowden and Duke Stone, both of Los Angeles, for appellants.

Shepard, Olm & Swenson, of Los Angeles, for respondent.

LENNON, J. The facts upon which this appeal is based are stated in the opinion of Mr. Justice Finlayson, presiding in the District Court of Appeal, Second Appellate District, Division 2. We adopt that opinion in part as follows:

"While crossing from the sidewalk to where was standing a street car that she intended taking, plaintiff was struck by an automobile owned by defendant Scott and driven by his chauffeur, defendant Layman. She brought the action to recover damages for the personal injuries thus occasioned. Verdict and judgment were for plaintiff. From the judgment and order denying their motion for a new trial defendants appeal. The injury occurred shortly after 9 o'clock in the evening, in the city of Los Angeles, on Main street, which runs approximately north and south, and at the intersection of that thoroughfare with Republic street. Appellants' main contentions are: (1) That the court erred in not granting their motion for a nonsuit, in that, so it is claimed, respondent's case shows contributory negligence; (2) that, for the same reason, the evidence is insufficient to sustain the verdict; and (3) that the court committed prejudicial error in giving certain instructions to the jury.

[1] "1. We cannot say that, as a matter of law, respondent was guilty of contributory negligence—that is, that 'all the facts plainly and inevitably point to such negligence, leaving no room for argument or doubt.' Bailey v. Market Street Ry. Co., 110 Cal. 328, 42 Pac. 914. As is usual in such cases, there is a sharp conflict between the several witnesses. There was evidence, however, to support the following facts: Immediately prior to the accident respondent had stopped to mail a letter in a mail box on the west side of Main street, at the northwest corner of the intersection of that thoroughfare with Republic street. It was her purpose to board a south-bound Main street car, which she saw coming toward her from the north. The automobile and the street car were both traveling on Main street in the same direction. As respondent stepped up to the box to drop her letter she noticed the street car stop. It had stopped on the near side of the crossing, upon a signal given by two persons who wished to board the car. Just before dropping the letter respondent glanced up, looked toward the north, saw the street car coming, and started for it. She testified that, as she glanced up and saw the car approaching, there was nothing else in sight; that, as she stepped from the sidewalk, there was no automobile or other vehicle in sight; that as she stepped off the sidewalk she looked to see if the street was clear—to see if anything was coming—and then started for the street car, which, in the meantime, had stopped on the near side of the crossing, directly opposite the spot where she stepped from the sidewalk. Asked on cross-examination which way she was looking as she stepped from the curb, plaintiff replied that she did not know, but that she supposed she was looking directly toward the street car, which had stopped just as she mailed the letter. She intended boarding the car at its front-end entrance. When she left the sidewalk she did not again look to see if any automobile was coming. After taking two or three steps from the curb, and when about four feet from the sidewalk, she was struck down and injured by appellants' automobile, which, coming toward her from the north, was traveling abreast of the street car, and between it and the sidewalk. The place where the street car had stopped was the usual stopping place. As the motorman brought his car to a stop to permit the passengers to enter, he saw the headlight of appellant's automobile flash upon respondent. This caused him to look back. As he did so he saw appellants' automobile to his right, opposite about the middle of his car, still traveling, and going at a speed of between 8 and 12 miles an hour. When the automobile came to a stop its rear wheel was about directly opposite the front entrance of the street car. The street car had come to a stop just as the automobile reached the rear end of the car. For a short distance north of the intersection of Main and Republic streets, the street car was traveling ahead of appellants' automobile. Defendant Layman, who was driving the automobile, testifies that, before reaching the intersection, the street car was ahead of him; that there was a machine or two parked along the sidewalk on Main street; that there was no room to pass between the machines and the car; that he wanted the street car, which was traveling very slowly, to run on; and that he ran on slowly behind the car until he had passed the machines parked along the sidewalk, when he swung his automobile beside the street car and ran along beside it at about 12 miles an hour. It will thus be seen that the jury may well have been justified in finding that the driver of the automobile, while traveling in the same direction as the street car, saw the car slow down to permit the entrance of passengers, and, instead of bringing his automobile to a stop behind the car when it stopped, continued on his course, intending to pass the car as it stood waiting for passengers, as he doubtless would have done had he not collided with the respondent.

[2-4] "Appellants contend that, before leaving the sidewalk to board the street car as it stood in Main street opposite her, respondent, as a matter of law, was in duty bound to look toward the north to see if any automobile was approaching, and, further, that, had she so looked, she necessarily must have seen appellants' on-coming automobile, and that, therefore, her testimony that she did look and saw no automobile is not enough to support a verdict in her favor—citing in support of this contention Chrissinger v. Southern Pacific Railway Co., 169 Cal. 619, 149 Pac. 175, an action against a steam railway company. * * * There is no positive duty to stop, look, and listen when a pedestrian is about to cross a city street. * * * Blackwell v. Renwick, 21 Cal. App. 131, 131 Pac. 94; * * * Clark v. Bennett, 123 Cal. 275, 55 Pac. 908. Compare also Scott v. Traction Co., 152 Cal. 604, 610, 93 Pac. 677. The question of negligence under the usual

rule of ordinary care that devolves upon foot travelers, must be examined in the light of all the attendant circumstances, one of which may be knowledge of the existence of a statute or an ordinance prescribing certain fixed regulations for observance by automobile drivers. And it may be that if the jurors in this case rejected, as improbable, respondent's testimony that she looked and saw no approaching automobile, they, nevertheless, concluded—as well they might—that if she did not see the automobile before leaving the sidewalk, she reasoned that its driver would comply with the city ordinance, referred to in the court's instructions, requiring an automobile traveling behind a street car to stop 10 feet in the rear of the car if it stops to let off or take on passengers, until the passengers have safely alighted from or boarded the car. Whether, if she saw the automobile, respondent would have been warranted in going toward the street car without further watching the automobile approach, relying upon a compliance by the appellants with the requirements of the ordinance, was a question upon which men's minds might well differ, and hence it was properly a case for the jury. * * *

[5] "2. Neither can we hold that there was not sufficient evidence to justify the jury in finding that appellants were guilty of negligence. The evidence was such that this question was wholly within the province of the jury. [Scott v. Traction Co., supra.]

"3. We see no reason for reversing the judgment on account of any alleged prejudicial error in the matter of instructions. The court substantially in the language of the Motor Vehicle Act [of 1913 (St. 1913, p. 639)] instructed the jury to the effect that automobiles approaching an intersecting street shall be under the control of the operator; that it shall be the duty of the operator, when overtaking another vehicle, to sound an audible and suitable signal before passing; and that the driver of an automobile, when passing street cars operated in the city, shall operate his automobile 'with due care and caution, so that the safety of passengers alighting from or boarding such street car shall be protected, and for that purpose said vehicle shall be brought to a full stop, if reasonably necessary to obtain his object.' The court, substantially in the language of the ordinance above referred to, likewise instructed the jury as follows: 'If you believe * * * that the defendant Layman was in the employ of the defendant Scott, and was driving his automobile * * * in a southerly direction on Main street at or near the intersection of Republic street * * * and that * * * a street car was proceeding in a southerly direction on said Main street; that the said street car had stopped * * * for the purpose of permitting passengers to alight therefrom, or to board the same; and that the defendant Layman violated the ordinance of the city of Los Angeles prescribing and directing that the driver of an automobile must stop the same at least 10 feet in the rear of such street car * * * until such passengers, or intended passengers, have * * * boarded said street car, * * * and that the defendant Layman failed and neglected to so stop said automobile, * * * but proceeded to pass the street car in violation of said ordinance, and that by reason thereof plaintiff sustained injuries, then you should find for plaintiff—if you further find that at that time the plaintiff was in the exercise of reasonable care with regard to her own safety.' It is not disputed that, at the time of the accident, there was an ordinance of the city of Los Angeles prescribing regulations substantially as set forth in the instruction last quoted. It is, however, contended: (1) That the State Motor Vehicle Act is the controlling law upon the subject, and that it was error to give an instruction embodying the regulatory provisions of the city ordinance; (2) that an instruction on both the state law and city ordinance, where they are distinct and independent declarations of law, is error; and (3) that, instead of instructing that a violation of the ordinance, when the proximate cause of the injury, is negligence, the court erroneously instructed the jury, in absolute terms, that, if appellants violated the ordinance in the particular designated, and if, by reason thereof, plaintiff sustained injuries, 'then you should find for plaintiff.'"

[6, 7] Upon a careful reconsideration of the appellants' contention that the State Motor Vehicle Act of 1913 is the controlling law upon the subject, and that it was error to give an instruction embodying the regulatory provisions of the city ordinance, we are constrained to confirm the opinion of the District Court of Appeal that the municipal ordinance in the respect noted was not inconsistent with the state law, but was valid and operative in the city of Los Angeles at the time of the plaintiff's injury. And this, we think, is so regardless of the question of whether or not the regulation of the traffic upon the streets of a city is a "municipal affair." Conceding that if there were in fact a conflict between the ordinance and the Motor Vehicle Act, the state law would prevail, still we find no conflict or inconsistency between the two enactments. The state law requires that a motor vehicle be operated with due care and caution when it overtakes a street car which is stopping on a city street to receive or discharge passengers, and further provides that the vehicle shall be brought to a full stop if reasonably necessary for the safety of such passengers. The municipal ordinance requires that the vehicle shall in all cases be stopped at a distance of 10 feet in the rear of the stopping street car. The ordinance certainly does not attempt to make lawful the performance of any act forbidden by the state law. It follows that a conflict, if any, can exist only upon the theory that the ordinance prohibits that which is affirmatively authorized by the Motor Vehicle Act. In short, the appellants are placed under the necessity of contending that that act affirmatively authorizes motor vehicles to pass a stopping street car in a city whenever the apparent risk involved in so doing would not deter an ordinarily prudent and careful driver. We do not so construe the statute. Where the Legis-

lature has assumed to regulate a given course of conduct by prohibitory enactments, a municipality with subordinate power to act in the matter may make such new and additional regulations in aid and furtherance of the purpose of the general law as may seem fit and appropriate to the necessities of the particular locality, and which are not in themselves unreasonable. Mr. Justice Henshaw stated in the case of In re Hoffman, 155 Cal. 114, 118, 99 Pac. 517, 519 (132 Am. St. Rep. 75), that the correctness of this principle cannot be doubted. He continues:

> "If the state should pass a law declaring it unlawful to erect a chimney of a height exceeding 150 feet, would any one seriously contend that a city of the state within the earthquake zone might not by ordinance, in the clear exercise of police power, for the benefit of its citizens, still further restrict the height of chimneys? Such, in principle, is the present case. The Legislature has in effect declared that it shall be unlawful to sell milk containing less than 11.5 per centum solids, 3 per centum of which solids shall be milk fat. An ordinance of a municipality requiring of the milk vended therein a larger percentage of solids, if not in its exactions unreasonable, does no violence to the law of the state. The state's declaration merely is that milk shall not be sold containing less than 11.5 per centum of solids, 3 per centum of which shall be milk fat. If the city of Los Angeles had provided that milk might be vended which contained less per centum of milk fats than that exacted by the state law, there would be presented a plain case of conflict. The municipality would be endeavoring to legalize that which the state had declared to be unlawful. But what the city has in fact done has been to impose not fewer, but additional, qualifications upon the milk which may be vended to its consumers. The state in its laws deals with all of its territory and all of its people. The exactions which it prescribes operate (except in municipal affairs), upon the people of the state, urban and rural, but it may often, and does often, happen that the requirements which the state sees fit to impose may not be adequate to meet the demands of densely populated municipalities; so that it becomes proper and even necessary for municipalities to add to state regulations provisions adapted to their special requirements. Such is the nature of the legislation here questioned."

It is true that in the case of In re Hoffman, supra, the state statute therein considered was general in its terms, and made no distinction between regulations applicable in urban and those applicable in rural communities, whereas the Motor Vehicle Act makes express provision that certain rules shall apply in business districts, that other rules shall apply in territory which is closely built up, and that still different rules shall apply in country districts. But it does not follow that, because the Legislature has seen fit to distinguish in the operation of the act between urban and rural communities and to make certain general rules applicable in all of the cities of the state, it has thereby impliedly prohibited the enactment of additional local regulations by municipalities in keeping with the purpose of the general law. The question whether the Legislature has undertaken to occupy exclusively a given field of legislation is, we think, to be determined in every case upon an analysis of the statute and of the facts and circumstances upon which it was intended to operate. Such was the analysis made in the case of In re Hoffman, supra. The opinion of this court in Ex parte Hong Shen, 98 Cal. 681, 684, 33 Pac. 799, 800, was based upon the same process of reasoning. There it was said:

> "Our Constitution provides that 'any county, city, town, or township, may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.' Article 11, § 11. It is claimed by the petitioner that, inasmuch as the Legislature has regulated the sale of certain poisons, including opium, by the acts above referred to, it is not within the power of the board of supervisors of the city and county of San Francisco to make another regulation or to prohibit the sale of opium; that an ordinance is in conflict with the general laws when it makes another and different regulation for the sale of an article of commerce than that provided by a statute of the state.
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> "The soundness of this contention we cannot admit. They may be different regulations without a conflict. * * * So, in the action at bar, the Legislature has simply prohibited the sale of opium, and certain other poisons, unless a certain record is kept. It has not directly authorized the sale of opium without the prescription of a physician; it has not legislated upon that subject at all, except in providing that where a physician's prescription is presented no other record need be kept. The city has gone further than the statute, and provided that no opium shall be sold without a prescription. While the regulation is different from that of the state there is no conflict, and therefore it is not in violation of the provision of the Constitution quoted above."

Upon a careful analysis of the Motor Vehicle Act of 1913 and of its purpose viewed in the light of the traffic conditions upon which it was intended to operate, we are of the opinion that the reasoning of the court in the case last quoted is decisive of the question now presented. In other words, we believe that by extending the operation of the act in terms to the traffic upon city streets the Legislature did no more than to prescribe obviously necessary safeguards for travel upon such streets viewed as part of the public highways of the state in which all of the people of the state are essentially interested, and that it did not thereby intend to prohibit the enactment of such new and additional police regulations in furtherance of the purpose of the act as might appear reasonable and proper in a given locality. It is true that the Motor Vehicle

Act of 1915 expressly limited the scope of such police regulations. Stats. 1915, c. 188, § 22d. It may perhaps be open to question whether the ordinance here in controversy falls within the prohibition of that act, but it is sufficient for the purpose of this case to say that the Motor Vehicle Act as in force at the time of the plaintiff's injury did not contain a clause prescribing limitations upon the local regulation of traffic. Moreover, the very fact that subdivision "d" was added to section 22 of the Motor Vehicle Act in 1915 shows, we think, that the construction which we have placed upon the act as it stood at the time of the plaintiff's injury accords with the legislative intent.

The remaining contentions of the appellants are fully and correctly answered in the remaining portion of the opinion of Mr. Justice Finlayson, which we adopt as follows:

[8] "Nor was it prejudicial error to instruct the jury in the language of both the state law and the ordinance. Upon this point appellants cite Sheppard v. Transit Co., 189 Mo. 362 [87 S. W. 1007], where the court enunciated the well-recognized doctrine that where two inconsistent instructions are given, one declaring the law correctly and the other erroneously, the one that declares the law correctly does not cure the error of the other. But here there is no inconsistency between the specific requirements of the ordinance and the more general requirement of the state law that the driver of an automobile passing a street car 'shall operate the vehicle with due care and caution,' and shall bring it to 'a full stop if reasonably necessary' to the safety of passengers alighting from or boarding such street car. The ordinance has simply declared what, under certain circumstances, shall be necessary to constitute 'due care and caution' for the safety of such passengers. Furthermore, if as we hold, the ordinance is operative * * * appellants were not injured merely because, in another part of the instructions, the court gave certain of the provisions of the state law that prescribe for appellants less onerous requirements.

[9] "We perceive no prejudicial error in the instruction to the effect that, if the jury believed appellants violated the ordinance, 'and that, by reason thereof, plaintiff sustained injuries, then you should find for the plaintiff, if you further find that at that time the plaintiff was in the exercise of reasonable care with regard to her own safety.' Assuming that it would have been more consonant with time-honored usage to have told the jury that a violation of the ordinance is 'negligence,' for which, if such violation was the proximate cause of her injuries, respondent could recover, nevertheless, in the instruction as given the court not only told the jury that respondent herself must be free from contributory negligence, but that, to entitle her to a verdict, they must find, not only that appellants violated the ordinance, but that 'by reason thereof'—that is, by reason of their violation of the ordinance—'plaintiff sustained injuries.' By this language the jurors were told, in effect, that they could find for respondent, she being free from contributory negligence, if her injuries were caused by appellants' violation of the ordinance. It was not necessary for the court to add that they could find for respondent if, and only if, appellants' acts were the 'proximate' cause of her injuries; for, in other instructions given by it, the court fully instructed the jury that, to find a verdict for plaintiff, they must not only find that the defendants were negligent, but 'also that such negligence was the proximate cause of the injury to the plaintiff,' and likewise instructed the jury as to the meaning of the phrase 'proximate cause.' The instruction complained of, which is one of a series, cannot fairly be torn from its context for criticism. The instructions, as a whole, show that the jurors were fully advised as to the necessity for finding that respondent's injuries resulted from appellants' conduct as the proximate cause thereof."

The judgment appealed from is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; OLNEY, J.; LAWLOR, J.; MELVIN, J.

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180 Cal. 570

In re MOORE'S ESTATE.

MOORE et al. v. McKEVITT.

(S. F. 8654.)

(Supreme Court of California. June 16, 1919. Rehearing Denied July 16, 1919.)

1. Wills 🔑260—"Contest of Will"—Offer of Later Will.

Code Civ. Proc. §§ 1327, 1333, as to conclusiveness of will not contested within a year after probate, does not bar the offering, more than a year after such probate, of another document as a subsequent and genuine last will; such offer not being a contest of the will admitted to probate, in view of section 1299, providing that a will may be offered "at any time" after testator's death, and section 1423, as to procedure when a later will is offered.

2. Witnesses 🔑258—Testifying from Papers in Legal Proceedings.

In view of Code Civ. Proc. § 2047, allowing testimony from a writing, although witness retains no recollection of facts, on the issue of testator's mental capacity, it was error to refuse to allow testator's former attorney, testifying from a document in the form of a bill of exceptions, prepared by such attorney while its contents were fresh in his memory, using the court reporter's notes to check it, which purported to contain testator's testimony in an action, to state what testator testified to while on the witness stand in such action.

3. Witnesses 🔑258 — Testifying from Writing—"May."

Code Civ. Proc. § 2047, providing that a witness "may" testify from a writing, though he retain no recollection of the particular facts, is mandatory, and allowing such testimony is not discretionary.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, May.]

4. APPEAL AND ERROR 🔑1066—TRIAL 🔑252(22)—INSTRUCTION—SUPPRESSION OF EVIDENCE.

An instruction with respect to the presumption of law that evidence willfully suppressed would be adverse if produced was error, there being no evidence of suppression, and the error *held* prejudicial, in view of argument of counsel.

5. EVIDENCE 🔑78—SUPPRESSION OF EVIDENCE.

In a will contest, failure to call as witnesses those named as legatees is not necessarily suppression of evidence.

Angellotti, C. J., and Lawlor, J., dissenting.

In Bank.

Appeal from Superior Court, Santa Cruz County; Edgar T. Zook, Judge.

In the matter of the estate of Thomas W. Moore, deceased. A purported will was admitted to probate in 1914, and Charles Moore, William A. Moore, and Stella Moore Tolle were appointed, respectively, administrators and administratrix of the estate. In 1916, another purported will, of date subsequent to the will first probated, was offered, to which the above parties filed written opposition. From a judgment against the validity of the second will, Hugh K. McKevitt appeals. Reversed.

Marcel E. Cerf, C. H. Sooy, and A. B. Weiler, all of San Francisco, and Netherton, Johnston & Snyder, of Santa Cruz, for appellant.

Charles M. Cassin and James L. Atteridge, both of San Jose, J. Early Craig, of San Francisco, and John H. Leonard, of Santa Cruz, for respondents.

MELVIN, J. This appeal is taken from a judgment pronounced after verdict of a jury declaring that Thomas W. Moore was not of sound and disposing mind on November 21, 1908, at the time of executing a purported will.

Mr. Moore died on May 12, 1914. A purported will, dated January 13, 1896, was admitted to probate on June 19, 1914. In accordance with the terms of this writing, respondents Charles Moore, William A. Moore, and Stella Moore Tolle, nephews and niece of the deceased, were appointed, respectively administrators and administratrix of the estate. In October, 1916, a purported will, bearing date of November 21, 1908, was offered for probate, with a petition, asking not only for its admission, but praying that the letters previously issued be revoked, and that those persons who had been administering the estate be required to account to an administrator to be appointed under the later will. Respondents filed written opposition to the later will, based upon the alleged unsoundness of the testator's mind at the time of the execution thereof. They were successful in their contest.

[1] Respondents deny the jurisdiction of the superior court to entertain the appellant's petition, upon the ground that under sections 1333 and 1327, Code of Civil Procedure, no contest of a will may be effectually maintained. Section 1327 provides that the probate of a will may be contested within one year after such probate. Section 1333 makes the probate conclusive (except as to those under certain disabilities) unless there has been a contest filed within one year. If, as respondents contend, the offer of another document as a genuine last will, more than a year following the probate of a writing having the characteristics of a testament, is a contest of the probate, these sections would seem to be conclusive. Respondents cite and quote at length from the opinion in Estate of Adsit, reported in Myrick's Probate Decisions, at page 266, in which that learned jurist adopted the view expressed by Page, in his work on Wills (section 322), that the profert of a will discovered after an earlier will has been admitted to probate necessarily involves a contest of the probated will and must be made within the time limited for contest. Respondents also cite with apparent confidence the Estate of Marx, 174 Cal. 762, 767, 164 Pac. 640, L. R. A. 1917F, 234. In that case Mr. Justice Shaw, who prepared the opinion, was discussing the effect of the subsequent offer of an earlier will after one of later date, not disposing of the entire estate, had been probated, and it was held that, where the two writings could be so construed together as to constitute the last will of the testator, it was the court's duty to give them such effect. In the course of the discussion in the opinion the following language was used:

> "After a will has been probated, and another paper of an earlier date is found, which constitutes a part of the last will of the decedent, together with that already probated, it is not necessary to revoke the former order of probate. A different question would be presented, if the earlier will had been the one first discovered and probated. In that case, the later will, if admitted to probate, would partially supersede and revoke the prior will if inconsistent in part only, or wholly revoke it if entirely inconsistent. Within the year from the first probate, the later will could be offered for probate in connection with a petition to revoke the probate of the earlier one, if it was inconsistent therewith, on the ground that the later will substantially affected the validity of the will probated, as provided in subdivision 4 of section 1312 of the Code of Civil Procedure. Code Civ. Proc. §§ 1327, 1328, 1329, 1330. Aft-

er that period perhaps the probate of the earlier will would be conclusive so far as it disposed of the estate. Code Civ. Proc. § 1333; State v. McGlynn, 20 Cal. 233, 81 Am. Dec. 118. The present petition was filed within the year, and therefore the precise question last mentioned does not arise."

Counsel for respondent insists that this is a decision upon the question presented in the case now under consideration. We do not agree with this contention. The court was not there seeking to define the rights of one offering a subsequent will which would by its terms utterly supersede one of earlier date previously probated. Some of the possible objections to such an offer were suggested for the purpose of illustrating the fact that the wills of Marx and the order and date of their presentation involved quite a different problem.

Appellant's contention is that, while section 1333, Code of Civil Procedure, relates to the conclusiveness of the unopposed probate of a will against a contest, the offer of another will is not a contest of the one admitted to probate. This position is well taken. There can be no question that the probate of wills is purely a creature of statute, and that we must look to the statutes pertaining to estates of deceased persons rather than to those of general application, if we seek to define the powers and limitations of the probate courts. For example, this court has recently held that the general statute of limitations does not apply to a proceeding to probate a will. Estate of Hume, 176 Pac. 681. In the opinion in that case attention is called to the fact that section 1299, Code of Civil Procedure, contains the declaration that any person interested in the estate "may, at any time after the death of the testator, petition the court having jurisdiction to have the will proved." This implies that there is no arbitrary time limit, and the provisions for contesting the validity of a will containing nothing in the nature of a statute of limitation, it follows that no such ground may be urged on demurrer to a petition for probate of a will. Such, in brief, are the reasons for the decision in the Hume Case. Upon like reasoning, it may be said that presentation of a later will for probate is not enumerated as one of the grounds of contest to a will of earlier date previously offered and that, therefore, the conclusiveness of probate arising by reason of section 1333, Code of Civil Procedure, is only potent against a contest of the will which has not been attacked within the statutory period therein prescribed, but not against the offer of another and a later will. It is true that a will may be contested upon any questions "substantially affecting the validity of the will" (section 1312, Code Civ. Proc.), and respondents assert that the production of a testament of later date than the one previously offered for probate, raises just such a question. There might be some force in this assertion, were it not for the fact that the Legislature has elsewhere specifically provided for the procedure to be followed when a later will is offered for probate in place of one already proven in due form. Section 1423 of the Code of Civil Procedure, so far as material here, is as follows:

> "Upon the admission to probate of a later will than the one before admitted to probate, the pre-existing grant of letters testamentary or of administration must be revoked."

It will be apparent from an examination of the statutes and authorities relating to the results, respectively, of a successful contest and the admission of a posterior will to probate, that the latter was not regarded by the Legislature or the courts as equivalent to the former. Upon the successful revocation of a will the powers of the executor cease ipso facto. Section 1331, Code Civ. Proc.; Estate of Crozier, 65 Cal. 332, 4 Pac. 109; In re Freud, 73 Cal. 555, 15 Pac. 135. But upon the admission to probate of a posterior will the pre-existing grant of letters testamentary must be revoked. Section 1423, Code Civ. Proc. The necessity for specific revocation of prior letters upon the probate of a subsequent will differentiates that procedure from a will contest. Moreover, section 1423, Code of Civil Procedure, is not found in the chapter of the Code relating to contests. It is clear that the legislative intention was to keep distinct and separate the practice respecting contests from that to be followed in petitioning for probate of a will and after probate of an earlier writing. As was well said by the Supreme Court of Tennessee in the opinion in Murrell v. Rich, 131 Tenn. 378, 404, 175 S. W. 420, 427:

> "The latter proceeding does not in any respect question the correctness of the judgment rendered by the probate court in the former proceeding. The paper here involved does not speak as the will until established by the judgment upon the issue devisavit vel non; nor does that judgment assail, collaterally or otherwise, the correctness of the proceeding or the judgment for the probate of the Clarendon will. The judgment probating the will here involved on the issue devisavit vel non in the circuit court, if that judgment shall be affirmed, may, in connection with the revocatory clause of the will, render null the Clarendon will. But this result does not flow from any collateral attack made either upon the proceedings or judgment which established the Clarendon will. It flows from the law which gives vitality and force to the last testamentary act of the testator."

It has been held that petitioning for probate of a will later in date than one containing a proviso which cuts off with a small legacy all who may contest it does not bring the proponent of the later will within the terms of the proviso. Estate of Bergland, 177 Cal. 227, 170 Pac. 400. And in Estate of

Walker, 160 Cal. 547, 117 Pac. 510, 36 L. R. A. (N. S.) 89, it was determined that a decree of distribution in a supposed intestate's estate, although it had become final, did not prevent the probating of a subsequently discovered will. Upon the principles announced in the opinions in those cases and in the authorities therein cited, we must hold that the offer for probate of the second will in this proceeding was not a contest, and that therefore the superior court had jurisdiction of the matter.

This we believe to be in accord with the weight of authority in other jurisdictions. The general rule seems to be that courts of probate have inherent power to set aside their own orders admitting wills to probate upon the discovery of later and inconsistent wills. In Waters v. Stickney, 94 Mass. 1, 90 Am. Dec. 122, the action of the probate court was approved in a proceeding in which after admitting a will to probate and after the time for appealing from the decree had passed, the court admitted a codicil to the same will, written upon the back of the leaf upon which the will was inscribed; such codicil having escaped attention at the time of the probate of the original will. In the opinion of the court, written by Mr. Justice Gray, the following language appears:

> "By the practice of the English ecclesiastical courts, a will may be proved either in common form, ex parte, upon being presented by the executor; or in solemn form, after notice to all parties interested—which last accords with our practice in all cases of probate of wills. When a will is proved common form, the court may, upon the subsequent application of any party interested and notice to the executor, at any time within 30 years, order that will, or a later one, if produced, to be proved in solemn form. 1 Williams on Executors (5th Am. Ed.) 282, 300, 508; Case of Executors, Hetley, 77; Ridgway v. Abington, 3 Swab. & Tristr. 3. And probate of a will, granted upon the mistaken supposition that the testator is dead, may be revoked and canceled by the court which granted it. Goods of Napier, 1 Phillim. R. 83. Even when a will is proved in solemn form, it is within the jurisdiction of the court, for sufficient cause shown, to revoke the probate. The English authorities recognize, as sufficient causes of revocation, forgery of the will, fraud in obtaining probate, neglect or mismanagement in conducting the suit, or the production of a later will."

In New York it was provided by an early statute (2 Rev. Stats. 1829, p. 61, § 29) that—

> "The probate of any will of personal property, taken by a surrogate having jurisdiction, shall be conclusive evidence of the validity of such will, until such probate be reversed on appeal, or revoked by the surrogate, as herein directed, or the will be declared void by a competent tribunal."

The following section (30) contained the provision that—

> "Notwithstanding a will of personal property may have been admitted to probate, any of the next of kin to the testator may, at any time within one year after such probate, contest the same, or the validity of such will, in the manner herein provided."

And section 31 is as follows:

> "For that purpose, such relative shall file in the office of the surrogate by whom the will was proved, his allegations in writing, against the validity of such will, or against the competency of the proof thereof."

These sections are followed by those outlining the procedure in the contest of a will. In Campbell v. Logan, 2 Brad. Sur. (N. Y.) 90, the surrogate, in a learned opinion, held that although a will has been admitted to probate a legatee under a later will may propound it for probate and is not concluded by the probate of the other will. In the course of the opinion the following language appears—language which is very persuasive in view of the fact that the sections reviewed are the very ones from which the corresponding parts of our probate act of 1851 were copied and now embodied in our Code (Hittell's General Laws of California, p. 820 [2d Ed. corrected, published in 1870]):

> "The statute has provided the means of enabling the next of kin of a testator, within a year after the probate, on filing allegations against the validity of the will or the competency of its proof, to compel the executors to prove the will anew; and, after hearing the proofs, if the surrogate decide the will to be invalid, or not sufficiently proved, he may annul and revoke the probate thereof. But no provision has been made for revoking the probate, where another and later will is subsequently discovered. And yet such a case may often occur after proof of a previous will, and the parties in interest under the last will be deprived of their rights, without notice and without fault or negligence, unless a remedy exists beyond the express provisions of the statute."

The learned surrogate also in the same opinion used this language:

> "It is true, the revised statutes define the jurisdiction of the surrogate, and direct its exercise 'in the cases and in the manner prescribed by the statutes of the state' (2 R. S. [3d Ed.] p. 318, § 1); but the power to take the proof of wills being given generally, the mode of its exercise in a case not provided for by statute, must be regulated by the court in the exercise of a sound discretion according to the peculiar circumstances of each particular case. For example, there can be no doubt that a legatee or party interested in a later will, discovered after a previous will has been admitted to proof, has a right to have the last will proved and letters testamentary issued thereon. But there cannot be two last wills and two sets of letters at the same time. It is incidental, therefore, to the exercise of jurisdiction in taking probate of the last will, and the consequent grant of letters, to revoke the first probate and the first letters testamentary."

If this be a correct declaration of the law (and we so regard it) section 1423, Code of Civil Procedure, is merely a statement of the rule already in effect.

In Gaines v. New Orleans, 6 Wall. (73 U. S.) 642, 704 (18 L. Ed. 950), the court said:

> "But it is said the probate of the will in dispute cannot stand, because there was no direct action by the Louisiana court annulling the probate of the will of 1811. This was not necessary. The probate of the will of 1813, by the mere fact of its probate, necessarily annulled the will of 1811, so far as its provisions were inconsistent, and so far as the estate was not legally administered under it. And this precise point was decided in the Hennen Case."

In Gaines v. Hennen, 24 How. (65 U. S.) 553, 567 (16 L. Ed. 770), the following language was used:

> "Courts of probate may for cause recall or annul testamentary letters, but they can neither destroy nor revoke wills, though they may and often have declared that a posterior will of a testator shall be recognized in the place of a prior will which had been proved, when it was not known to the court that the testator had revoked it."

In 3 Redfield on the Law of Wills (2d Ed.) 123, 124, Waters v. Stickney, supra, is cited with approval as a learned examination of the powers of probate courts in Massachusetts and "incidentally throughout the country, and in England." And that case is cited with warm approval in the opinion in Cousens v. Advent Church, 93 Me. 292, 45 Atl. 43.

In Bowen v. Johnson, 5 R. I. 112, 73 Am. Dec. 49, the court emphatically declares the implied power, in the absence of any statute, of a court of probate to revoke probate of a will once granted by it upon discovery of a later testament, citing, with approval, Campbell v. Logan, supra, and Schultz v. Schultz, 10 Gratt. (Va.) 358, 60 Am. Dec. 335. Other cases supporting this same authority of probate courts to probate later wills are Vance v. Upson, 64 Tex. 266, Gale v. Nickerson, 144 Mass. 415, 11 N. E. 714, and Cunningham v. Souza, 1 Redf. Sur. (N. Y.) 462.

That there is some authority holding or seeming to hold that the profert of a later will is a contest of one previously admitted to probate is true, but the weight of authority is the other way. In State ex rel. Wood v. Superior Court of Chelan County, 76 Wash. 27, 135 Pac. 494, the court granted a writ of prohibition on the ground that a contest of a probated will involved in the presentation to the probate court of a later will was barred by a statute of limitations. The question here involved was not discussed and apparently was not suggested. Hardy v. Hardy's Heirs, 26 Ala. 524, and Watson v. Turner, 89 Ala. 220, 8 South. 20, were also cited by respondents.

The first of these cases was an appeal from an application to have a later will admitted to probate after the expiration of 5 years from the probate of an earlier testament. The law of Alabama provided that a will might be contested by a bill in chancery within 5 years after its admission to probate. As the provisions of the later writing were in part inconsistent with the earlier one, the court held that the offer amounted to a contest, which was neither in the mode nor within the time prescribed by the statute. No authorities are cited in the brief opinion, and the question here discussed seems not to have been considered. In the later case the decision in the Hardy Case is followed, and the court lays stress upon the fact that the ancient power of courts of equity to probate later wills is, in Alabama, entirely taken away by the statute permitting courts of chancery to entertain bills of contest. Gaines v. Hennen is cited, and the court says:

> "Prior to this statute there can be no doubt of the fact that the inherent jurisdiction of probate courts in this country, as of ecclesiastical courts formerly in England, embraced the power to set aside the probate of a will at any time upon the discovery of a posterior will of the testator, and upon proper proof of its execution by the testator."

The Alabama cases, therefore, must be regarded merely as interpretations of the peculiar statute of that state. In this connection it is well to remember that proof of a writing as a will, as well as will contests, in California are committed to the superior court sitting in probate.

Concluding the discussion of this branch of the case we decide that the lower court was clothed with jurisdiction to consider the offer of the later will by appellant and the objections to it by respondents.

[2] Appellant's next contention is that the case of the successful contestants of the later will was dependent entirely upon opinion evidence, and that the opinions of the witnesses were unsupported by any evidence of facts which would indicate incapacity to make a will. It was the theory of respondents that Mr. Moore became so feeble of mind as to be totally unfit to make a will in 1875, and that from that time until the day of his death the incapacity continued. Some of them testified that ever since 1875 he had been dirty, blasphemous, given to amorous approaches to women, and that he always appeared irrational; yet two of the witnesses did not apparently have any scruples against acting as executor and executrix, respectively, of their uncle's first will. There is no mistaking the theory upon which respondents opposed the later will, because their counsel, early in their brief, make the following declaration:

> "We make bold to assert that at all times from the year 1875 up to the 12th day of May, 1914, when Thomas W. Moore died, he was a driveling idiot; that his mind was absolutely

unsound; that he was childish and simple, and was so regarded by all persons. Further, that as administrator of the estate of William H. Moore, deceased, he was no more than a rubber stamp in the hands of his attorneys and advisers."

In view of these theories of the contending parties and the wide scope of the testimony describing events extending over a period of many years, it became very important to appellant to get into the record authentic evidence of the conversation and conduct of the testator at any time during the years between 1875 and his death, which would tend to support the theory that he was of sound mind and not an imbecile. If any such material evidence was improperly excluded appellant is entitled to a new trial. We think there was such error committed, and are therefore spared the task of deciding the correctness or fault of the contention that the opinions of the witnesses of respondents were unsupported by sufficient evidence of facts. In other words, we shall assume that the verdict was based upon conflicting testimony.

Before discussing the evidence excluded, it may be well to quote some of the testimony of Mr. Moore, given in a proceeding pending in Judge Graham's court, in San Francisco, 12 days before the execution of the later will. He had made application for change of guardian, and was examined and cross-examined as a witness in open court. Proof of his testimony there given was offered and received. It was in part as follows:

"Thomas W. Moore called as a witness in his own behalf, being duly sworn, testified as follows:

"Mr. Cantrell: Q. Who is your present guardian? A. William A. Moore.

"Q. What relation is he to you? A. He is a nephew of mine.

"Q. How many times have you seen your guardian, Mr. Moore, in the last two years? A. I have seen him about three times.

"Q. About three times in the last two years? A. He has called on me about three times in the last eight years.

"Q. Has he ever provided a home for you or a residence? A. No, sir.

"Q. Has he ever asked you to go down and live with him at Pescadero? A. No, sir.

"Q. Where does he live now? A. Pescadero.

"Q. How far is that from here? A. About 50 miles.

"Q. Were you in San Francisco during the time of the earthquake and fire here? A. Yes, sir.

"Q. Did your guardian come up to attend to you in any way? A. No, sir. I never saw him for a year after that.

"Q. He left you entirely on your own resources, to hunt a home for yourself? A. Yes, sir.

"Q. Your physicians reside in this city and county? A. Yes, sir; all of them.

"Q. Where do you think that you get proper treatment for your complaint? A. I would not take treatment anywhere else but in San Francisco.

"Q. You don't think you could be treated properly elsewhere? A. No, sir; I have tried nearly all the doctors in the world. I have traveled all over Europe hunting doctors.

"Q. Where are you living now? A. On Steiner street—1114 Steiner street.

"Q. Who got that place for you? A. I got it.

"Q. Your present guardian never provided a place for you to live in at any time? A. He did not provide a place for me.

"Q. At the time that the guardian was appointed in Judge Troutt's department, did he make any representations to the court what he would charge? A. He said he never wanted a cent. He said, 'He is my uncle,' and he never wanted a cent.

"The Court: Q. What are the relations between you and your guardian now—friendly? A. He is my nephew.

"Q. Do you want him to continue to act as your guardian? A. No, sir."

On cross-examination he testified, in part, as follows:

"Mr. Craig: Q. You say he does not give you money enough—how much money does he give you? A. I get $600 a year.

"Q. And how much do you want? A. I want $75 or $100 a month. I need that very bad, because when that $50 was allowed me everything was very cheap, and now it is very high. I can't buy clothes. I bought all my own clothes since he has been my guardian. He never bought me but one suit—one coat. * * *

"Q. Isn't $50 enough to pay your board and get your clothes? A. No, sir; it does not satisfy my desires at all.

"Q. How much does your board cost you? A. I cannot get board less than $30.

"Q. And you have $20 left for your personal expenses? A. Yes, sir.

"Mr. Cantrell: Q. Part of your expenses, of course, is your physician. You have a running expense with the physician at all times? A. Yes, sir.

"Q. You say you lived at Stanyan street before you lived on Steiner street; who provided that place for you on Stanyan street? A. I did.

"The Court: Q. You feel that you are capable of getting your own home? A. Yes, sir.

"Q. You don't want your guardian hanging over you all the time? A. No, sir; I don't want the guardian around me at all.

"Q. What do you want this young man removed for? A. Because he don't pay me, and don't see me, and don't pay any attention to me.

"Q. You get your $50 every month. A. Yes, sir.

"Q. What else can you expect from a guardian? A. I want him to pay me more money.

"Q. Is that the only trouble? A. That is the main trouble.

"Q. Do you understand the situation here—there is a heavy mortgage on this ranch—$8,000? A. Yes, sir.

"Q. And it takes nearly all the income from the ranch to pay for that mortgage outside of keeping you? A. Not by a long shot. He has the ranch rented for $1,800 a year for the last five years."

In answer to his own counsel, he testified as follows:

"Q. You are very friendly with Capt. Dahler? A. He is my friend, I know.
"Q. He has been very good to you? A. Very good to me indeed. He is better than my guardian, a great deal.
"Q. How long have you known Mr. Dahler? A. About a year."

And to questions by the court he replied:

"Q. Where did you meet Mr. Dahler? A. I met him first at Mrs. Sheerer's.
"Q. And you and Mr. Dahler became friends? A. Yes, sir.
"Q. Mr. Dahler says he is willing to assume this guardianship and act as companion to you? A. Yes, sir.
"Q. Have you ever stopped at the Tolle home? A. No, sir.
"Q. How about you and Mrs. Oscar Tolle—are you good friends? A. I don't know her hardly at all."

Notwithstanding this testimony, the jury was convinced of the testator's imbecility, perhaps upon the theory that the apparent lucidity of the old man's mind in 1908, as shown by his testimony, was but due to a temporary absence of symptoms of a lifelong condition of mental incompetency. It therefore becomes apparent that testimony given by Mr. Moore at any other period of his life after 1875 might be of great value to the jurors and its exclusion, therefore, highly prejudicial to the proponents of the second will. Mr. Warren Olney, who for many years had represented Mr. Moore as his attorney, was called as a witness, and testified that in his opinion the testator was of sound and disposing mind during the entire period of their acquaintance. Mr. Olney was shown a document setting forth that which purported to be the testimony of Mr. Moore on the witness stand at a trial in the superior court of Santa Cruz county. This document was in the form of a transcript of a bill of exceptions, and was indorsed as filed March 12, 1889. Regarding this paper Mr. Olney testified in part as follows:

"I recognize the document shown me. It is a correct statement of what transpired in court at the time stated in the document. I prepared this document myself while its contents were fresh in my memory, using the court reporter's notes to check it. The portion shown to me is testimony given by Thomas W. Moore on the witness stand at the date stated in the document. It is a correct statement of what Mr. Moore said on the witness stand. Looking at the document does not sufficiently refresh my memory to cause me to remember and narrate what Mr. Moore testified to, or the other facts stated in the document; but I know that the document is a correct statement of what occurred."

The court refused to allow the witness, testifying from the document, to state what Mr. Moore testified to while on the witness stand on the occasion indicated, and also denied the offer of defendant to put parts of the transcript in evidence to show the date and nature of the proceeding and Mr. Moore's testimony. Mr. Olney's testimony was clearly admissible. Section 2047, Code Civ. Proc. Respondents' counsel concede that perhaps the reporter who made and transcribed the notes of Mr. Moore's testimony would be permitted to read from his transcript, but deny that any one else might do so. They also call attention to the fact that the transcript did not purport to contain all the testimony of the witness. Both contentions are without force. Mr. Olney had heard the testimony, as well as the reporter. He prepared the document himself while the contents were fresh in his memory, "using the court reporter's notes to check it." True, it was in narrative form, but it contained "a correct statement of what Mr. Moore said on the witness stand." The omission of the questions which elicited Mr. Moore's answers made them none the less his statements, and they were proper matters for the jury's consideration, under appropriate instructions, whether they were all or only part of his declarations. It would seem from Mr. Olney's testimony that the transcript contained all of his client's testimony; but that is not material, as it is perfectly competent for a litigant to offer a part of the narrative of a witness for the purpose of illustrating his mental condition.

[3] But counsel for respondents call attention to that part of section 2047 which provides that a witness "may testify from such a writing, though he retain no recollection of the particular facts," and insist that the admission or rejection of such testimony is within the sound discretion of the trial court. Even if this were the meaning of the quoted language, we would be constrained to declare that under the revealed circumstances the court abused its discretion. We are convinced, however, that the quoted language from section 2047, Code of Civil Procedure, is mandatory. That a stenographer has a right to read from notes of testimony taken at the time there can be no doubt. People v. Sexton, 132 Cal. 37, 64 Pac. 107; Burbank v. Dennis, 101 Cal. 90, 35 Pac. 444; People v. Ammerman, 118 Cal. 23, 32, 50 Pac. 15. The tendency of courts, although there is some difference in the practice in different jurisdictions, is towards liberality rather than strict technicality in the application of the rules with respect to the admission of this sort of evidence as may be seen from an examination of the text and citations in 1 Greenleaf on Evidence (16th Ed.) § 439b. It has been held in Illinois that a witness, who is testifying from recollection, when refreshed by a memorandum consisting of a transcript of testimony in another case, may adopt the language of the transcript as relating the substance of the facts within his

recollection. Iglehart v. Jernegan, 16 Ill. 513, 520. Solomon Railroad Co. v. Jones, 34 Kan. 443, 458, 8 Pac. 730, is very similar to the case at bar. There the attorney who had prepared the bill of exceptions in another case and had an original recollection from his insight into the case, but depended largely upon the transcript was permitted to read from the bill. We will not lengthen this opinion by quotation from this bill of exceptions, but merely say in passing that the testimony of Mr. Moore, as set forth in the rejected memorandum, was quite as lucid as that adduced in Judge Graham's court many years later.

[4, 5] The court gave the familiar instruction with respect to the presumption of law that evidence willfully suppressed would be adverse if produced. This was error because the record fails to disclose any instance of suppression of evidence or anything that could be properly construed as such withholding of facts in defendant's possession. That, under the circumstances, the error was prejudicial there can be no doubt, and this is emphasized when we note that one of the counsel for respondents, in his argument, sought to apply the rule subsequently announced in the instruction to the circumstance that no person named in the will had been called as a witness. Failure to call as witnesses those named as legatees is not suppression of evidence, and there was no showing that under the facts of this case it became such suppression. It is argued, however, that no advantage may be taken of the erroneous statement of counsel in argument, because no exception was taken to it and it was not assigned as error—citing People v. Babcock. 160 Cal. 537, 545, 117 Pac. 549, a case in which not erroneous statement of law, but alleged misconduct was the issue. The alleged error was not in the argument merely, but in the subsequent instruction which seemed to ratify the misapplication of the rule with reference to suppression of evidence. Under the authority of Estate of Carpenter, 94 Cal. 406, 419, 29 Pac. 1101, and Thomas v. Gates, 126 Cal. 1, 58 Pac. 315, the giving of the instruction under the circumstances must be held error.

The judgment is reversed.

We concur: LENNON, J.; WILBUR, J.; SHAW, J.

OLNEY, J., does not participate.

ANGELLOTTI, C. J. (dissenting). I cannot concur in the conclusion that the superior court could properly entertain the petition for the probate of the alleged later will, in the face of the judgment admitting the will of January 13, 1896, to probate. That judgment had become final, and more than one year having elapsed from its entry without any contest, the probate of such will is conclusive against the world, except infants and persons of unsound mind. It is so expressly provided by section 1333, Code of Civil Procedure. The whole matter of wills is regulated in this state by statute. Under our statute, as has often been said, the proceeding in proof of a will is a proceeding in rem, "to determine the legal status of a written instrument," in which all persons are required to present their claims and by which the world is bound. See Estate of Baker, 170 Cal. 578, 585, 150 Pac. 989; Estate of Allen, 176 Cal. 632, 169 Pac. 364. A judgment admitting a written instrument to probate as the will of a deceased person is necessarily a judgment that the instrument is the will of the deceased, which, of course, means that it is his last and only effective will. When a paper is offered for probate as the will of a deceased person, if any person interested claims that it is not the true will for the reason that there is a later will, he unquestionably may contest the paper offered on that ground, for his contention is one "substantially affecting the validity of the will" offered. Subdivision 4, § 1312, Code Civ. Proc. As in the case of original probate, such a contest may be made after probate on the ground that the admitted will is not the will, because of the execution of a later will. The petition for probate necessarily tenders to the whole world the issue that the paper offered is the will of the deceased, and the whole world is bound by the judgment, except in so far as the statute permits further proceedings.

The only further proceeding authorized by the statutes is the contest of the validity of the admitted will, which must be instituted within one year from probate, with the right to infants and persons of unsound mind to so contest within one year after their respective disabilities are removed. It is my opinion that in the absence of any such contest within the year, the status of the instrument as the last will of the deceased is conclusively and for all time established as against all interested parties in so far as any proceeding in the probate court is concerned. This it seems to me is substantially recognized in all our previous decisions, for even in Estate of Walker, 160 Cal. 547, 117 Pac. 510, 36 L. R. A. (N. S.) 89, all the justices concurred as to the question of finality of the proceedings in probate, and the probate of the subsequently discovered will was justified by the majority of the justices concurring in affirmance as being solely for the purpose of establishing a foundation for the prosecution by the beneficiaries of their rights in equity. It was certainly expressly recognized in Estate of Marx, 174 Cal. 762, 164 Pac. 640, L. R. A. 1917F, 234, as is shown by the majority opinion herein.

The effect of the majority opinion in this case apparently is that a decree admitting a will to probate is not an adjudication that the will so admitted is the will of the deceased, but simply that it is an instrument that was at one time duly executed as a will which will stand as the will pending the production and probate of a later instrument so executed. Such I do not believe to be the theory of our statutory system relative to the proof of wills. Therefore I am constrained to dissent from the judgment.

I concur: LAWLOR, J.

180 Cal. 601

LOS ANGELES INV. CO. v. HOME SAV. BANK OF LOS ANGELES.
(L. A. 4898.)

(Supreme Court of California. June 19, 1919. Rehearing Denied July 17, 1919.)

1. Banks and Banking 🔑148(2)—Forged Indorsement of Check—Liability.

Generally, if a bank pays out money on a check drawn to order on a forged indorsement of the payee's name, it has not paid in accordance with the depositor's order, and has no right to charge the payment against the account.

2. Banks and Banking 🔑148(2) — Forged Indorsement of Check — Liability — Negligence.

A bank which pays out money on a check drawn to order on which the payee's indorsement has been forged is liable to the depositor, irrespective of the bank's freedom from negligence.

3. Bills and Notes 🔑6—Bearer Paper.

Paper drawn to the order of a fictitious payee is payable to bearer, but is not considered so where the maker did not know the fact, but believed the payee designated to be an existing person.

4. Bills and Notes 🔑6—Checks to "Fictitious Payees."

Where the officers of an investment company authorized to sign its checks signed checks to the order of fictitious payees on demand of the fraudulent manager of the company's insurance department without any knowledge the payees were fictitious, such checks were not made to "fictitious payees," and were not payable to bearer; the company not being bound by the guilty knowledge of its fraudulent manager.

5. Principal and Agent 🔑180—Knowledge of Agent—Imputation.

A principal will not be charged with the knowledge of its fraudulent agent adverse to the principal and against the agent's interest to reveal.

6. Appeal and Error 🔑842(7)—Review—Finding.

A finding of negligence on the part of plaintiff, in the absence of a conflict in the evidence, was not a finding on a question of fact concluded on appeal by the finding; the conclusion being one which could not reasonably be drawn from the probative facts in evidence.

7. Banks and Banking 🔑148(3) — Payment on Forged Indorsements—Contributory Negligence.

Investment company, which drew checks on the requisition of the manager of its insurance department relying upon his honesty and the regularity of his demands on their face, *held* not guilty of any negligence inducing or contributing to the payment by a bank of such checks drawn to the order of fictitious payees whose indorsements were forged by such fraudulent manager.

8. Banks and Banking 🔑148(3) — Payment on Forged Indorsements—Contributory Negligence.

Any negligence of an investment company in drawing on the mere requisition of the manager of its insurance department checks to the order of fictitious payees whose indorsements were forged by the manager *held* not to have contributed to or induced the acceptance of such forged indorsements by defendant bank.

9. Banks and Banking 🔑148(4) — Payment on Forged Indorsements—Examination by Depositor.

A bank depositor is not bound to examine the indorsements on returned checks, though he is bound within a reasonable time to ascertain the genuineness of the checks themselves.

10. Banks and Banking 🔑148(4)—Payment on Forged Indorsements.

Though there was an account stated between a bank and its depositor by the rendition of semimonthly statements, such account stated could be opened by the depositor for fraud or mistake, as mistake by the depositor in drawing checks on the requisition of the manager of its insurance department to fictitious payees whose indorsements were forged by the manager and the checks cashed with the bank.

11. Banks and Banking 🔑148(4)—Agreement in Passbook—Binding Force.

Before a bank, sued by its depositor to recover the amount of checks paid on forged indorsements, can avail itself of a statement headed "Agreement with Depositor," printed in front of the passbook, which statement provides that after 10 days the depositor cannot question the genuineness of indorsements, etc., the bank must prove the statement was called to the attention of some responsible officer of the depositor, a corporation.

12. Banks and Banking 🔑154(3)—Payment on Forged Indorsements—Tender Back of Checks.

Where a bank paid checks of its depositor on forged indorsements, and on demand by the depositor for payment of the amount involved took such a position that tender back of the checks to it by the depositor would have been an idle ceremony, such a tender back was not required.

13. Appeal and Error 🔑173(4)—Raising Question.

Such a point as lack of tender by plaintiff to defendant, which plaintiff might and in all probability could have met by sufficient evidence if objection had been made during trial on such ground to any recovery, cannot be raised for the first time on appeal.

Department 1.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by the Los Angeles Investment Company, a corporation, against the Home Savings Bank of Los Angeles, a corporation. From judgment for defendant, plaintiff appeals. Reversed.

Flint & Jutten and L. W. Jutten, all of Los Angeles, for appellant.

Herbert J. Goudge, Charles L. Chandler, and Goudge, Williams, Chandler & Hughes, all of Los Angeles, for respondent.

OLNEY, J. This is an action to recover $16,009.20, the aggregate of certain checks drawn by the plaintiff upon its deposit account with the defendant bank and paid by the latter on forged indorsements. The defendant had judgment in the court below, and the plaintiff appeals.

The material facts are not in dispute, and are these:

The plaintiff is a large concern in Los Angeles, engaged in many lines of the real estate business. Among other activities, it acted as a solicitor and broker of fire insurance, and had a separate department for attending to this class of business. The manager of this department was one F. R. Emory. As might be supposed, the business of the department required the constant making of disbursements, which were made by check. Emory had no authority to sign checks, and the method of obtaining them was for the insurance department to prepare a demand or requisition for the payment, showing what it was for and to whom it was to be made. This requisition was then transmitted to the accounting department, where it was examined and, if found correct, approved and entered on the plaintiff's books. A check in accordance with the demand was then prepared and presented with the approved demand to the officers authorized to sign checks. Upon being signed, it was returned to the insurance department for delivery to the party to whom payment was to be made. So far as appears, there would seem to be no substantial difference between the system adopted by the plaintiff for the signing of checks and making of disbursements and those followed by most large concerns.

Beginning with February 17, 1914, and ending September 11, 1915, Emory prepared a series of some 20 demands on behalf of his department for checks in payment of ostensible claims against the company which did not in fact exist. Several of the demands gave a purely fictitious name as the name of the party to be paid. In the other cases the name of a person known to Emory was used, but such person had nothing whatever to do with the matter, was utterly ignorant of it, and Emory had no intention of making any payment to him. The demands in some cases appeared to be for return of premiums In the other and the majority of cases they appeared to be in settlement with an agent for premiums collected by the company.

Checks were signed by the officers of the company in accordance with these demands and returned to Emory for delivery to the ostensible payees. Upon their receipt, Emory indorsed them in the name of the ostensible payees, then indorsed his own name, and secured their payment, in most cases by direct presentation to the defendant, and in other cases through other banks.

In addition to the 20 checks so signed upon false demands, there was one check signed upon a bona fide demand and in favor of a genuine payee, which Emory, instead of delivering, realized upon in similar fashion by forging the payee's indorsement.

During the period between the first and the last of these checks, the bank sent the usual bank statement with canceled checks to the plaintiff every half month; the statement specifying that claims or exceptions must be made within 10 days or the account would be considered correct.

[1] The general rule must be conceded that the undertaking of a bank is to pay out the depositor's money only on the order of the depositor and in accordance with that order. If it pays out money on a check drawn to order, as were the checks in this case, upon a forged indorsement of the payee's name, it has not paid in accordance with the depositor's order, and, in the absence of anything further, has no right to charge such payment against the depositor's account.

To escape from the operation of this elementary rule, the bank advances five defenses:

First, that it was not negligent in paying on the forged indorsements.

Second, that the checks were drawn to fictitious payees and were therefore, in effect, payable to bearer, with the result that the payments to Emory, who was the bearer, were in accord with the terms of the depositor's order.

Third, that the depositor was guilty of negligence which induced or contributed to the payments, and therefore was estopped from insisting on the responsibility of the bank.

Fourth, that the rendition of the half-monthly statements to the plaintiff and the latter's failure to object thereto constituted a stated account between the parties which could not be gone behind.

Fifth, that the plaintiff had not offered to return the checks in question, and this was a condition precedent to its right of recovery.

[2] In regard to the first defense, want of negligence on the part of the bank, it is evident on very slight consideration that it is wholly immaterial whether the bank was negligent or not in paying on the forged indorsements. The obligation of the bank is not merely to use reasonable care to pay on the depositor's order and in accordance therewith. Its undertaking and obligation are absolute that it will pay only in that manner. If we have the simple case of a payment on a forged indorsement without anything further, it makes no difference how careful the bank was in making payment or how impossible of detection the forgery was. That is a risk which the bank and not the depositor assumes. 3 R. C. L. p. 542; 1 Morse on Banks & Banking, § 474; Otis Elevator Co. v. First Nat. Bank, 163 Cal. 31, 38, 124 Pac. 704, 41 L. R. A. (N. S.) 529.

[3] As to the second defense, it is true that paper drawn to the order of a fictitious payee is payable to bearer, and if the checks here are of that character the bank was justified in paying them. But it is also true that paper is not considered as drawn to a fictitious payee where the maker did not know it to be so drawn but believed the payee designated to be an existing person. 8 Corpus Juris, 179; Hatton v. Holmes, 97 Cal. 208, 31 Pac. 1131.

It is also true that the payee named in several of the checks had no existence in the mind of Emory, and that the payees named in all of the others with one exception—that prepared on a bona fide demand—were persons to whom Emory did not intend the checks to come. As to Emory, the payees, with the single exception noted, were all fictitious. The question is: Were they fictitious as to the plaintiff company?

The answer to this question obviously depends upon whether Emory's intention that the checks be made payable to persons who were not to receive the paper, who were nonexistent so far as the checks were concerned, is attributable to the company. The bank's counsel in their brief say:

> "But appellant did intend something when it issued the checks. What was it? It intended that the money be paid to the person to whom Emory intended it to be paid—and the money was so paid."

[4, 5] This is the very crux of the matter. But is it true? Plainly it is not. Emory did not execute the checks on behalf of the company. It is the intention of the officers who did that must be taken to be the intention of the company. The execution of the checks was one within the scope of their authority, not within that of Emory. As to these officers, it is plain that they did not intend to execute checks to fictitious parties or to pay money to the person to whom Emory intended it should be paid, to wit, himself. They intended to pay money to what they believed to be existent persons, and, this being so, the checks cannot be considered as made to fictitious payees.

Nor is the company bound by the guilty knowledge of Emory. That knowledge was adverse to his company and such as in the nature of things he would not communicate to it. It is elementary that a principal will not be charged with knowledge of an agent under such circumstances. Henry v. Allen, 151 N. Y. 1, 45 N. E. 355, 36 L. R. A. 658; United, etc., Co. v. Central, etc., Bank, 185 Pa. 586, 40 Atl. 97. This, of course, is very different from an agent binding his principal by acts done within the scope of his authority, although done with knowledge and intent adverse to his principal; and we have no intention of saying that an agent may not bind his principal under such circumstances. It may well be that in this case, if Emory had had authority to draw checks, and had drawn these particular ones making them payable to fictitious payees, his intent in this respect would, in legal effect, as to third persons be the intent of the company, although such intent was adverse to the company and part of a scheme to defraud it. But charging a principal with knowledge merely because such knowledge is possessed by an agent, and charging him with acts done by the agent within the scope of his authority, are not the same thing, and it is only in the latter case that the principal may be bound by the uncommunicated information or intent of the agent when such information or intent is hostile to the principal. The point in this case is that the checks were not executed by the guilty agent; we are not concerned with an act done by him within the scope of his authority, and therefore his guilty intent and knowledge are not the intent and knowledge of his principal. The intent and knowledge of the principal was, as we have said, that of the officers who drew the checks, and they were wholly innocent of any intention of drawing checks to fictitious payees.

There is eminent authority to sustain the foregoing views. In Shipman v. Bank, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821, the facts and contentions are practically identical with those of the case at bar. One Bedell, an employé of the plaintiffs and in charge of their real estate department, secured from time to time checks of the plaintiffs with which to pay parties whom Bedell represented were borrowing money from or through the plaintiffs. Some of these alleged borrowers were real persons, who were not, however, borrowing any money and to whom Bedell had no intention of delivering the checks. Others were nonexistent persons. The checks were in each case made payable to the order of the alleged borrower. Bedell, on receiving the checks, forged the names of the ostensible payees, and had the checks presented to the defendant bank on whom they were drawn, which paid them. The amount involved was very large, and the case was elaborately presented and argued by eminent counsel. In reply to the contention that the checks were payable to fictitious persons and therefore to bearer, the court said (126 N. Y. 330, 331, 27 N. E. 374, 12 L. R. A. 791, 22 Am. St. Rep. 821):

> "It is claimed by the defendant that the 16 checks made payable to the order of persons having no existence were, in legal effect, payable to bearer. It is provided by statute that paper made payable to the order of a fictitious person and negotiated by the maker has the same validity 'as against the maker and all persons having knowledge of the facts, as if payable to bearer.' 1 R. S. 768, § 5.
>
> "We are of the opinion, upon examination of the authorities cited by counsel on both sides, that this rule applies only to paper put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious and actually intends to make the paper payable to a fictitious person. Irving National Bank v. Alley, 79 N. Y. 536; Turnbull v. Bowyer, 40 N. Y. 456 [100 Am. Dec. 523]; Vagliano v. Bank of England, L. R. 22 Q. B. D. 103; s. c. on appeal 23 Q. B. 243; Armstrong v. Pomeroy Nat. Bank, 46 Ohio St. 512 [22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655, 7 Railway and Corporation Law Journal, 114]; Gibson v. Minet, 1 H. Black. 569.
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> "The findings of the referee that the plaintiffs in good faith believed that the names of the payees represented real persons, entitled to receive from them the amount of the check in each case, having been led to believe this by the fraudulent contrivances of Bedell, and that they intended that Bedell should deliver the check to a real payee therein named and that they did not intend that they should go into circulation or be paid by defendant otherwise than through a delivery to and indorsement by the payee named; and that plaintiffs gave no authority to Bedell to indorse the name of the payee, or to put the checks into circulation, and that no one in fact relied on any appearance of authority, derived from the plaintiffs, in Bedell to indorse the payee's name upon the checks or to put them in circulation—dispose of this question. The indorsement of the names of the fictitious payees upon the checks, with intent to deceive and to put the checks in circulation, constituted the crime of forgery by means of which, and without any fault of the plaintiffs, payment was obtained thereon. The defendant does not occupy any different position with reference to the checks payable to fictitious payees than it does with reference to those payable to real parties whose indorsements were forged.
>
> "Bedell, of course, knew that the payees were fictitious, but he was not acting within the scope of his employment, but in carrying out a scheme of fraud upon the plaintiffs, and under such circumstances his knowledge cannot be imputed to his principals. Frank v. Chemical Nat. Bank, 84 N. Y. 209 [38 Am. Rep. 501]; Weisser v. Denison, 10 N. Y. 68 [61 Am. Dec. 731]; Welsh v. German American Bank, 73 N. Y. 424 [29 Am. Rep. 175]; Cave v. Cave, L. R. 15 Ch. Div. 643, 644."

Identical facts and contentions also appear in Jordan Marsh Co. v. National Shawmut Bank, 201 Mass. 397, 408, 87 N. E. 740, 743 (22 L. R. A. [N. S.] 250). Upon the point under immediate discussion the court said:

> "The question arises whether the making of a check payable to a fictitious or nonexisting person, through negligent failure to discover the fraud by which the check is obtained, stands differently from making a check to an actual person, in reference to its effect upon payment by the defendant. We are of opinion that there is no difference in law. In either case it is the duty of the bank to see that there is a genuine indorsement. In some respects it would be more difficult to deceive a bank in this particular, as against vigilant investigation, if the payee was fictitious than if he were real. In some respects it might be less difficult. We know of no decision that has recognized a difference in law between the two cases. It has been held that there is no difference. Armstrong v. National Bank, 46 Ohio St. 512, 6 L. R. A. 625, 22 N. E. 866 [15 Am. St. Rep. 655]."

To the same effect is U. S. v. Nat. Bank of Commerce, 205 Fed. 433, 123 C. C. A. 501.

The bank's counsel rely largely to sustain their position upon two decisions, Phillips v. Mercantile Nat. Bank, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596, and Snyder v. Corn Exchange Bank, 221 Pa. 599, 70 Atl. 876, 128 Am. St. Rep. 780. The facts in these two cases were much the same as those in the case at bar, with a very important exception, viz., that the dishonest employé had authority to draw checks and did himself draw the very checks in question. In both cases the decision is put upon this ground and on this ground distinguished from Shipman v. Bank, supra.

[6, 7] As to the third defense, that the plaintiff was guilty of negligence which induced or contributed to the payment of the checks by the bank, the only negligence claimed is in the officers of the plaintiff signing the checks on the false demands or requisitions of Emory, and in the failure of the plaintiff to discover the forgeries more promptly. The lower court found such negligence, and it is urged upon us that the question being one of fact is concluded on appeal by such finding. This is not true, of course, if there is no conflict in the evidence (and there is none), and the conclusion of negligence is one which cannot reasonably be drawn from the probative facts put in evidence. We are much inclined to the opinion that negligence cannot be reasonably inferred from the probative facts in this case. The company had rather an elaborate system of approving, checking, and entering demands before checks were drawn to pay them. It was, as we have said, very similar to the systems found in other large corporations. Complaint is chiefly made that the company relied upon the honesty of its heads of departments and the regularity on their face of the demands or requisitions which such heads approved, and make no investigation to determine whether such demands were fraudulent or not. But trust must be placed in some one (Kohn v. Sacramento, etc., Co., 168 Cal. 1, 141 Pac. 626; The Yamato v. Bank, 170 Cal. 351, 149 Pac. 826), and necessarily in heads of departments. If trusting them in regard to demands for checks for disbursements regular upon their face is negligence, so it would be negligence to trust them in a hundred other ways in which it is within their power to defraud their employer. Business could not be conducted on any such basis. It is impossible for any large concern to investigate minutely in advance every demand for disbursement necessary for it to make in its daily business. The delay and expense of so doing would be too great.

[8] But however this may be, even if the company were guilty of negligence in signing the checks upon the fraudulent demands of Emory, it is plain that such negligence did not contribute to or induce the acceptance by the banks of the forged indorsements. The forgery of the indorsements was entirely distinct from the issuance of the checks on false demands, and there was no relation between them. This is clearly shown by the fact that Emory could just as easily have forged indorsements on and secured the payment of checks issued on genuine demands, and in fact did so in one instance.

This point also is discussed in Jordan Marsh Co. v. National Shawnut Bank, supra, and the matter is there summed up as follows (201 Mass. 408, 87 N. E. 742, 22 L. R. A. [N. S.] 250):

> "But the whole duty of seeing whether there is a forgery of such an indorsement upon any check rests primarily upon the banker. The drawer of the check has nothing to do with that. Ordinarily he makes no representation that has any relation to it. In the case just supposed he made no representation in regard to it. The checks payable to the order of A. L. Sefton, which she did not indorse, were wrongly paid, and the defendant's liability for payment is like that for the payment of any other check bearing such a forged indorsement. The plaintiff had nothing to do with the payment, or with the defendant's performance or nonperformance of its duty to see that payment was made to the right person. There are many cases that illustrate the rule that negligence of the maker is immaterial unless it is of a kind that directly and proximately affects the conduct of the banker in the performance of his duties. [Citing many cases.]"

[9] The other particular in which it is claimed that the plaintiff was negligent is, as we have said, that the plaintiff did not examine more carefully the canceled checks as they were returned to it, and discover the forgeries earlier. The plaintiff did indeed make some examination of the returned checks to see that the indorsements were regular. But a depositor is not bound to examine the indorsements on returned checks. He is bound within a reasonable time to ascertain the genuineness of the checks themselves (Janin v. London, etc., Bank, 92 Cal. 14, 27 Pac. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82); but, as to indorsements, the rule and its reason are correctly stated in Shipman v. Bank, supra.

> "The defendant's contract was to pay the checks only upon a genuine indorsement. The drawer is not presumed to know, and in fact seldom does know, the signature of the payee. The bank must, at its own peril, determine that question. It has the opportunity, by requiring identification when the check is presented, or a responsible guaranty from the party presenting it, of ascertaining whether the indorsement is genuine or not. When it returns the check to the depositor, as evidence of a payment made by his direction, the latter has the right to assume that the bank has ascertained the fact to be that the indorsement is genuine. Weisser v. Dennison, 10 N. Y. 68 [61 Am. Dec. 731]; Welsh v. German American Bank, 73 N. Y. 424 [29 Am. Rep. 175]; Frank v. Chemical Nat. Bank, 84 N. Y. 209 [38 Am. Rep. 501]; First Nat. Bank v. Whitman, 94 U. S. 347 [24 L. Ed. 229]; Leather Mfg. Bank v. Morgan, 117 U. S. 107 [6 Sup. Ct. 657, 29 L. Ed. 811]."

See, also, Jordan Marsh Co. v. Nat. Bank, supra; United, etc., Co. v. Central, etc., Bank, 185 Pa. 586, 40 Atl. 97; German, etc., Bank v. Citizens', etc., Bank, 101 Iowa, 530, 70 N. W. 769, 63 Am. St. Rep. 399; Guaranty, etc., Co. v. Lively (Tex. Civ. App.), 149 S. W. 211; Masonic, etc., Ass'n v. First State Bank, 99 Miss. 610, 55 South. 408.

[10] As to the fourth ground of defense, that there was an account stated between the parties by reason of the rendition of semimonthly statements by the bank to the plaintiff and no objection made by the plaintiff, it is the rule that an account stated may be opened for fraud or mistake shown. The mistake in this case is plain, and the rule is as applicable to an account stated between a bank and a depositor as to any other. Shipman v. Bank, supra; Jordan Marsh Co. v. Shawmut Nat. Bank, supra; Janin v. London, etc., Bank, supra; 3 R. C. L. 532.

[11] A further question, however, presents itself upon this point. In the front of the passbook used by the plaintiff up to June, 1914, is a printed statement headed "Agreement with Depositor," and reading as follows (the italics are ours):

> "In accepting this passbook it is understood that the Globe Savings Bank in receiving notes, drafts and checks on points other than Los Angeles, either for collection or credit, shall transmit the same in the usual manner for collection, either to the bank on which the same are drawn, or to such bank or persons as it may deem reliable, with the express understanding that the same is done solely for account and convenience of the depositor, and that the Globe Savings Bank shall in no way be liable for de-

fault of any such bank, person or subagents, or for loss in transit, or for any other cause whatever, until the proceeds in actual money shall come into its possession.

"It is also further expressly agreed and declared that it is a condition upon which the Globe Savings Bank accepts the deposits of, pays the checks of, and does business for the depositor herein named, that whenever this book may be written up by the said bank and returned to said depositor with checks drawn by said depositor on, and paid by said bank, and other vouchers, by personal delivery, messenger, mail or otherwise, said depositor shall, within 10 days after receipt thereof make such examination of the account and the returned vouchers and checks as will satisfy him (or her) of their correctness, genuineness and regularity, both as to face and *indorsements*, and that a failure by said depositor to report in writing anything to the contrary to said bank within 10 days after such delivery, shall be deemed positive and conclusive evidence that the examination as above has been made by said depositor, and that the account and checks and vouchers have been found correct in all the particulars above indicated, and that after the said 10 days shall have elapsed without objection or notice to the said bank of errors or omissions, the said depositor shall not have the right as against the said bank to question or dispute the genuineness, regularity or correctness of the said account, vouchers, or checks or any of them concerning the amount thereof, or the signatures or other writing on the face of said checks or the *indorsements*, or other writings on the back thereof."

This statement is not signed by the plaintiff, nor is there any showing that it was called to the plaintiff's attention or wittingly agreed to by it. It is just the character of thing that the average man would not trouble to read, or reading would fail to appreciate the significance of the inclusion in it of "indorsements," and the fact that it very materially changed the usual obligation of a bank to its depositors. There is no reason, so far as we know, why a depositor may not make such an agreement if he deliberately chooses to do so, unreasonable as it is. But it is evident that the statement comes in the category of "traps for the unwary," and before such statement can be given effect as a contract binding upon the depositor and changing in a substantial particular the relation which presumably he thought he was entering into, it must appear affirmatively that he consented and agreed to it either by being required to sign it or by having his attention particularly called to it. It is not sufficient merely that it appear in the front of the passbook. The case is not one in which the party must know that he is accepting a contract, as where he is accepting an insurance policy, and should therefore realize the necessity of acquainting himself with its terms. For this reason it does not come within the principle of such cases as Madsen v. Maryland Casualty Co., 168 Cal. 204, 142 Pac. 51. It is more nearly analogous to the case of special conditions or limitations printed on the back of a railroad ticket. It is also to be noted that probably the passbook never came to the attention of any responsible officer of the plaintiff authorized to make contracts. The actual handling of the passbook and the making of deposits is ordinarily in the case of large concerns intrusted to some subordinate. The case comes within the principles discussed on pages 260 to 263 of 9 Cyc. and is not distinguishable from Neuman v. National Shoe, etc., Exch., 26 Misc. Rep. 388, 56 N. Y. Supp. 193, and Ackenhausen v. Peoples', etc., Bank, 110 Mich. 175, 68 N. W. 118, 33 L. R. A. 408, 64 Am. St. Rep. 338.

In order for the bank to avail itself of the statement as a contract made by the plaintiff, it was necessary for the bank to prove that the statement had been called to the attention of some responsible officer of the company. Without this it cannot be fairly said that it was accepted or consented to by the company, and nothing of this sort appears.

We are not unaware of the numerous authorities holding that a rule or regulation printed in a savings bank passbook accepted by the depositor is binding upon him. Practically all, if not all, of these cases, however, are cases wherein either the circumstances were such that the consent of the depositor to the by-law reasonably appeared, or the bank was a mutual one, the members of which were the depositors who as members were bound by the bank's rules. In practically all of them also the rule involved was a reasonable and customary one, which presumably the depositor would be aware of as an ordinary incident of the relation of savings depositor and bank. The matter is discussed at some length in Ackenhausen v. People's Savings Bank, supra, and with that discussion we agree.

[12] The fifth and last point of the respondent is that the checks were not tendered back to the bank before the commencement of the action. The facts regarding this are that immediately upon the discovery of the forgeries the plaintiff notified the bank in writing of that fact and that it held the bank responsible. Copies of the checks were attached to the notice. The complaint alleges a demand by the plaintiff for the amount of the checks and a refusal by the bank. This allegation is admitted by the answer. The answer also denies liability and sets up other affirmative defenses, but contains nothing whatever relative to any failure by the plaintiff to tender the checks. Apparently, the point was not brought up in any manner at the trial, although at the opening of the trial the question of a demand by the plaintiff was discussed, and the bank's counsel admitted that such demand had been made. The first reference to the nonreturn of the checks is in the findings which contain a finding that the plaintiff has not returned or offered to return

them. The conclusions of law contained in the findings, however, show that the decision for the defendant was not placed on this ground. So far as the record shows, we believe it is a fair conclusion that the bank's position from the time it was notified of the forgeries has been one of an absolute repudiation of any liability. Under such circumstances a tender of the checks would have been an idle ceremony, not changing in the slightest the existing positions of the parties, and therefore not required (38 Cyc. 135).

[13] If, however, the record is not sufficent to justify an affirmative conclusion as to the bank's position from the time demand was made upon it, the bank cannot rely upon appeal upon the insufficiency of the record in this respect. It is clear that the point was not made at the trial, that the cause was tried on other issues entirely and as if this point were not present, and that the necessity of proving either tender or an excuse for it was not brought to the plaintiff's attention. Such a point, which the plaintiff might, and in this case in all probability could, have met by sufficient evidence if objection to its recovery had been made on this ground at the trial, cannot be raised for the first time on appeal. Bank of Stockton v. Howland, 42 Cal. 129; Richey v. Haley, 138 Cal. 441, 71 Pac. 499.

We have discussed this point as if a tender of the checks by the plaintiff to the bank were in fact necessary unless excused or waived. Redington v. Woods, 45 Cal. 406, 13 Am. Rep. 190, would seem so to hold. There is, however, strong authority to the contrary (see U. S. v. Nat'l Bank of Commerce, supra, and cases there cited), and we do not desire to be considered as conceding that a tender was in fact necessary.

Judgment reversed.

We concur: SHAW, J.; LAWLOR, J.

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180 Cal. 588

TUCKER v. BENEKE et al. (L. A. 4936.)

(Supreme Court of California. June 17, 1919.)

1. Appeal and Error 🔑110—Appeals from Judgment and Order—Dismissal of Latter.

On appeal from judgment for defendants and from the order denying plaintiff's motion for new trial, the Supreme Court will dismiss the appeal from the order.

2. Fraud 🔑58(1)—Exchange of Properties—Sufficiency of Evidence.

In an action by plaintiff for damages from defendants' fraud in the exchange of their city lots for plaintiff's tract of orange land, evidence *held* sufficient to sustain findings for defendants on all issues.

3. Fraud 🔑49—Action—Waiver and Laches as Issues.

In an action for damages from fraud in the exchange of defendants' city lots for plaintiff's orange land, matters of plaintiff's laches and waiver of any fraud *held* within the issues, under an averment of the answer deemed denied.

4. Fraud 🔑35 — Misrepresentation — Waiver.

If plaintiff, who had exchanged his orange land for city lots, knew of any fraud, or believed there had been fraud, practiced by defendant owners of the lots, his requesting an extension of time on the mortgage of the lots to defendants was a waiver of their fraud.

5. Fraud 🔑35, 49 — Misrepresentation — Discovery of Facts—Laches.

Where plaintiff, who had exchanged his orange land for city lots, delayed action for fraud and misrepresentation after discovery of the true facts regarding the city property, he was guilty of laches, which the court might find, directly or impliedly, without any pleading on the subject.

6. Fraud 🔑52—Action—Evidence.

In an action for damages from the fraud of defendants in procuring an exchange of their city lots for plaintiff's orange land, plaintiff's letter asking for an extension of time on the mortgage of the lots to defendants, was admissible on the issue of waiver of the fraud.

7. Evidence 🔑271(19)—Self-Serving Letter.

In an action for damages from fraud of defendants in procuring an exchange of their city lots for plaintiff's orange land, purely self-serving letter, written to plaintiff's agent, *held* inadmissible to prove that at such agent's request a third party investigated the value of the lots some time after the trade was made.

8. Fraud 🔑55—Action—Evidence.

In an action for damages from fraud in the exchange of defendants' city lots for plaintiff's orange land, testimony of the escrow holder, who delivered the papers to plaintiff, *held* admissible as relevant and important.

9. Fraud 🔑55—Action—Evidence.

In an action for damages from fraud in the exchange of defendants' city lots for plaintiff's orange land, evidence of negotiations of plaintiff's agent for exchange of properties with other persons before the transaction with defendants *held* admissible, to show that the transaction did not come from defendants' illicit practice upon plaintiff's agent.

Department 2.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by George G. Tucker against John Beneke and George F. Hauser. Judgment for defendants, and plaintiff appeals. Affirmed.

H. A. Barclay, of Los Angeles, for appellant.

Tipton & Cailor, of Los Angeles, for respondents.

MELVIN, J. [1] Plaintiff sued for damages caused by the alleged fraud of defendants practiced in the exchange of plaintiff's property in California for certain lots of defendants in Portland, Or. After trial, judgment was entered in favor of defendants, and plaintiff appealed, September 8, 1916, from said judgment and from the order denying his motion for a new trial. Regarding the latter appeal, this court will take the usual course and dismiss it. Roberts v. Colyear, 180 Pac. 937.

According to the allegations of plaintiff's "second amended complaint," he was the owner, on March 13, 1913, of certain described real property, 10 acres in area, in Anaheim. The land was planted to oranges and a substantial dwelling house was situated thereon. Plaintiff also owned an interest in a pumping plant sufficient to supply all necessary water for use on the property and certain nursery stock. There were two mortgages on the property, and the net value, as set forth in the complaint, was $5,400.

It is further alleged that defendants then owned certain described lots in Portland, Or., which they represented to plaintiff were of the value of $7,500; that they lived in Anaheim and knew all about plaintiff's property; that plaintiff was ignorant of the values of Portland real estate; that certain negotiations looking to a trade of the Portland lots for the property in Anaheim were had; that plaintiff, being compelled to leave for Texas, gave power of attorney to Mrs. K. V. Barton, who then resided near Anaheim, to make some disposition of his property. Then follow allegations that defendants represented to Mrs. Barton that the two Portland lots were worth $7,500, and that each lot was 100 feet front by 100 feet in depth; that, believing and relying on said statements Mrs. Barton, on March 13, 1913, entered into a written agreement with defendants for an exchange of the properties, and subsequently completed such exchange, executing and delivering to defendants a mortgage for $1,750, paying an assessment of $350 for street work on the lots in Portland, and exchanging deeds; and that shortly thereafter Mrs. Barton departed for England. Defendants (it is alleged) entered into possession of the property at Anaheim, sold the nursery stock for upwards of $3,600, paying off a mortgage on the land with the proceeds. It is further averred that in March, 1915, plaintiff desired to sell the Portland lots and caused an investigation to be made, which revealed for the first time the fraud of defendants; that the lots in Portland were not worth more than $2,500 to $2,900 at the time of the exchange, and that each lot was 50 feet by 100 feet, instead of 100 feet square, as had been represented.

Judgment was prayed for $2,900, the alleged difference between the actual worth of the lots in Portland and the value of plaintiff's equity in the property in Anaheim, for $1,750, the amount of the mortgage on the Portland lots given to defendants, and for certain taxes and interest, amounting in all to $4,600.

Defendants answered, duly traversing the essential averments of the complaint. A trial was had, and the court found, among other things, as follows: But a small part of the orange stock in the nursery was budded at the time of the exchange of land and but little value was added to the Orange county land by said stock. Said property was of no greater value than $11,000, and plaintiff's equity did not exceed $3,400.

Further findings were to the effect that defendants were free from fraud; that neither of them misrepresented the dimensions of the lots in Portland; that plaintiff's attorney in fact was informed that each lot had a frontage of but 50 feet; that prior to the consummation of the exchange the escrow holder of the contracting parties held an abstract and a certificate of title of the Oregon lots, on each of which the real dimensions of the lots were delineated; and that on June 4, 1913, this certificate was shown to plaintiff. The court also found:

> "That the defendants represented that in their opinion the Portland lots were worth $7,500, and gave the basis on which their estimation was based, but that the plaintiff's attorney in fact, K. V. Barton, was informed by one of the defendants prior to the exchange that said lots would not sell for that price at that time; that the value of both the Orange county property and the Portland lots were a trading valuation."

There was a further finding that—

> "The nursery stock did not belong to the plaintiff, but went with the place in the exchange, and that the amount realized therefor was about $600."

It was found likewise that the defendants did not allege that the Portland lots were worth $7,500, but gave that estimate of the value, with their reasons therefor; that, if said lots were worth less, the fact was not known to defendants; that such representations as were made were not made by defendants with intent to deceive the plaintiff or his attorney in fact; and that neither the plaintiff nor said attorney in fact was deceived by such representations. It was also found that—

> "After the plaintiff learned that the Portland lots were each only 50 feet front by 100 feet deep, and of the alleged value of $4,200 only, he sought and obtained from the defendants an extension of time on the mortgage, and that no suit has yet been brought to foreclose the same."

[2] Appellant's counsel, while recognizing the rule that this court may not disturb findings based upon conflicting testimony, insists that there is no substantial conflict regarding the essential matters found by the

court, and that therefore this court should reverse the judgment. With this contention we are unable to agree. It is true that there was a sharp conflict of testimony regarding the transaction, and particularly with reference to the understanding of the plaintiff's attorney in fact and plaintiff himself on the subject of the size of the lots, but there was testimony contradictory of theirs upon which the court might act, and evidently did act. It is to be remembered that the court was confronted with the amazing testimony of the plaintiff that, although he received the deed to the Portland property in June, 1913, and then went to Portland and made inquiries about his lots, he did not discover that the smaller dimension of each was only 50 feet until some time in 1915. On this point he deposed as follows:

> "At Portland I had to wait several hours for the train for Lyle, Wash., and went out to find the lots. I found a real estate agent, whose name I do not remember, near the tract where the lots are. I asked him what lots were selling for along there. He said about $35 or $40 per front foot; and, as I understood lots were 100 by 100 feet each, I thought the value was about, or near, what I paid for them, $7,500."

Testifying regarding Mr. Tucker's visit to the First National Bank of Anaheim, just before the plaintiff went to Portland, Mr. Hartung, who had custody of the papers, said:

> "Mr. Tucker came to the bank in the early part of June, 1913. I delivered to him the deed of Beneke & Hauser for the Portland lots, his power of attorney to Mrs. Barton and the deed from Fletcher to him, and took his receipt. (Receipt produced, identified and introduced in evidence, dated June 4, 1913.) At that time I showed Mr. Tucker the certificate of title. He looked it over and saw the map at the back of it. He made no comment on the certificate."

Mrs. Barton testified that the lots were represented to her as being each 100 feet by 100 feet, and the attorney who drew the agreement between the parties produced a memorandum indicating his understanding of the area of the lots to be the same as hers, yet he testified that in drawing the agreement he—

> "put nothing in it as to the size of lots or description of them any more than the number of the lots and the block, thinking that the reference to the map would be sufficient to give the size."

Respondent Beneke testified positively that he told Mrs. Barton the true size of the lots and she said they were very small. This testimony alone, if believed, would support the finding that no misrepresentation as to the size of the lots was made.

Appellant makes vigorous attack upon the finding that the figure of $7,500 was given as the value according to opinion of defendants, accompanied by the basis of estimation, and that one of them told Mrs. Barton, prior to the exchange, that the lots would not sell for that price at that time, and that the value of both the Orange county property and the Portland lots were a trading valuation, but this finding is directly supported by testimony which need not be here detailed. Mr. Hauser gave that version and he was supported by the testimony of his codefendant. Both defendants detailed conversations in which they told Mrs. Barton that property near their lots had sold for prices which they believed justified their estimate, and at the trial experts in realty values at Portland gave testimony tending to support such estimates.

That plaintiff and his attorney in fact did not rely upon the representations of defendants was a finding amply supported. In January, 1913, Mrs. Barton sought information regarding the lots and received from the Bank of Portland a telegram with the statement that the lots were assessed for $1,885, "usually considered about one third actual valuation." Mrs. Barton also had a friend investigate the value of the Portland lots. He reported that they were worth from $30 to $40 a front foot, basing his figures on the estimates of five or six real estate agents in Portland.

The estimates of the value of the Portland lots as given by expert witnesses varied considerably, as did those concerning the true value of the place at Anaheim. Without going through an analysis of all the figures, it is sufficient to call attention to the fact that there was evidence justifying the court's conclusion that plaintiff was not prejudiced by reason of any false representations which might have been made.

Appellant insists that the finding with reference to the value of the stock in the nursery is so flagrantly at variance with the evidence as to necessitate a reversal of the judgment. In the oral argument counsel for plaintiff asserted that there was no testimony supporting the finding that defendants received only $600 as their share of the nursery stock, but that their admitted return from the sale of the young trees was $1,867.53, and he insisted that this discrepancy between the testimony and the findings should compel a reversal of the judgment. With this view of the matter we do not agree. It was alleged in the complaint that defendants sold the nursery stock "belonging to plaintiff." Defendants denied that any stock belonged to plaintiff, but admitted that certain young trees "went with the orange ranch," and that after defendants budded, irrigated, and cared for such nursery stock they received therefor about $600. It was shown at the trial that plaintiff had owned an interest in certain nursery stock on the place. This was transferred to defendants by plaintiff's attorney in fact, on the date of the exchange of the properties, by a writing. It was a part of the trade, and therefore the court doubtless meant by its finding that after that date the nursery stock "did not belong to plaintiff." That the stock was sold for more than defendants alleged their net return thereon to be is wholly immaterial, as the record fails to disclose its value at the time of the trade before defendants put any care and attention upon it. Such value might have been of some use in determining whether or not there was a glaring discrepancy between the values of the two parcels of land, one in Oregon and one in California, at the time of the exchange. The subsequent selling price was a matter without the issues, and the finding, even if erroneous, was immaterial, and therefore without prejudice to appellant.

[3-5] The appellant attacks the finding that after he learned the size of the lots and their value he sought and obtained from defendants an extension of time on the mortgage and "no suit has yet been brought to foreclose the same." The contention is that this finding is not within the issues and that it is not sustained by the evidence. The defendants, by their answer, alleged that within three months subsequent to the consummation of the exchange plaintiff visited Portland and was advised of the size, character, and value of the lots. This averment, under our law, is deemed denied. Thus the matter of waiver of any fraud was within the issues. The matter of laches was also at issue. We have hereinabove adverted to the evidence of appellant's examination of the papers used in making the exchange and to his visit to Portland. The court was justified in regarding such means of knowledge as actual knowledge. Simpson v. Daiziel, 135 Cal. 599, 67 Pac. 1080; Mrs. Barton wrote to Mr. Beneke on December 2, 1914, requesting an extension of time on the mortgage. Of course, if plaintiff and his attorney in fact were ignorant of the time condition when an extension of time on the mortgage was requested and granted, there would have been no room for the application of the doctrines of waiver or laches; but the court found against their theory of excusable ignorance. Therefore this case was fairly within the principles set forth in Schmidt v. Mesmer, 116 Cal. 267, 48 Pac. 54. If plaintiff knew of any fraud, or believed there had been fraud practiced by defendants, his conduct with reference to the mortgage was a waiver of the fraud. His conduct in delaying action after discovery of the facts regarding the property in Oregon amounted also to laches, which the court might find, directly or impliedly, without any pleading on the subject. Stevinson v. San Joaquin & Kings River Canal & Irrigation Co., 162 Cal. 141, 121 Pac. 398. The criticized finding amounts to a declaration that plaintiff's conduct was a waiver and also involved laches.

[6] Several assignments of errors of law were made. One of these relates to the introduction of a letter asking for an extension of time on the mortgage. It is sufficiently answered by the foregoing discussion.

[7] Nor was there error in excluding a letter written to Mrs. Barton for the purpose of proving that Mr. Keller investigated the value of the lots at Portland in March, 1915, at Mrs. Barton's request. It was purely self-serving and threw no light upon the subject of her previous knowledge or ignorance of the true state of the value or dimensions of the Portland lots.

[8] Another alleged error relates to the admission of Mr. Hartung's testimony. He was the escrow holder who delivered the papers to Mr. Tucker in June, 1913. That his testimony was, in our opinion, both relevant and important, appears sufficiently in the analysis of the findings based in part thereon.

[9] The court admitted evidence of Mrs. Barton's negotiations for exchange of properties with other persons before the transaction with defendants. Appellant assigns this as error, asserting that there was no issue justifying its admission. The complaint did allege and the answer denied that defendant Hauser, "knowing of plaintiff's desire to sell," proposed the exchange of properties, and that after Mr. Tucker's departure for Texas the offer was renewed. There were also allegations and attempted proof that confidence was placed in Mr. Beneke by Mrs. Barton and that such confidence was abused by him by his efforts to bring about an exchange. It was therefore competent for him to show, if he could, that although she saw him every day she was trying to exchange the property with another person, and that she made no effort to close the exchange with him after the first inquiries made by her in January, 1913, until March of that year.

No other alleged errors require comment or analysis.

The appeal from the order denying the motion for a new trial is dismissed. The judgment is affirmed.

We concur: LENNON, J.; WILBUR, J.

179 Cal. 358

In re ROSS' ESTATE. (L. A. 5705.)

(Supreme Court of California. Dec. 5, 1918. Rehearing Denied Jan. 2, 1919.)

1. Executors and Administrators 🔑504(2)—Accounts—Right to Question.

One to whom the heirs of an estate made conveyances purporting to transfer the legal title to all property which decedent owned has, under Code Civ. Proc. §§ 1635, 1636, sufficient interest to question the accounts of the administrators.

2. Executors and Administrators 🔑111(1)—Conflicting Claims—Right of Administrator to Bind Estate.

The administrator or executor has no right to take a part in litigation between various parties asserting conflicting rights as heirs, and he has no right to engage attorneys for either claimant, or to bind the estate in any manner on that behalf.

3. Appeal and Error 🔑151(3)—Persons Aggrieved—Personal Representative.

An executor or administrator is not a party aggrieved by a decree determining the portions which various adverse claimants shall take in the residue of the estate for distribution, and cannot appeal therefrom.

4. Executors and Administrators 🔑111(1)—Adverse Claim—Authority to Engage Counsel.

Though one claiming the entire estate of a decedent under an oral agreement with the decedent joined the administrator in a suit against the heirs, *held*, that the administrator did not have authority to employ counsel to defend against the claim, and is not on accounting entitled to allowances for such counsel fees.

5. Executors and Administrators 🔑484—Advances—Allowance.

Advances made by an administrator to an heir on account of his distributive share cannot be allowed on the administrator's accounting, but are to be allowed only as a credit against the heir's distributive share upon final distribution, and in making payments in anticipation of the decree the administrator acts at his peril, and if the heir be entitled to nothing, the administrator is entitled to no allowance.

6. Executors and Administrators 🔑498—Commissions—Allowance.

Where there be more than one, the statutory commissions must, under Code Civ. Proc. § 1618, be divided between the administrators, so where full commissions were allowed the administrator he cannot on accounting claim credit for a sum advanced to one who was administratrix, as a payment on account of her commissions.

7. Executors and Administrators 🔑513(9)—Settlements of Accounts—Effect.

The settlement of an account is not conclusive, except as to such items as are included in it and actually passed upon by the probate court; so where the court, in settling an account of the administrator, reserved an item, and the second account did not on its face give any indication that a sum set up as a balance shown by the first account was that item, the order of settlement of the second account did not adjudge the propriety of such item.

8. Executors and Administrators 🔑513(9)—Accounts—Settlement—"On Account."

Where the probate court ordered a payment to an attorney of the administrator on account of extraordinary services, *held*, that the allowance of a further sum was not precluded, for the words "on account" might well have been used to indicate that the allowance was not intended as compensation in full.

9. Executors and Administrators 🔑109(1)—Expenses—Allowance.

Where it was necessary for the administrator of an estate to maintain an office for the estate, and to have stenographic and telephonic service in handling the property, it was not improper for the probate court to allow for the expense of maintaining the office.

10. Executors and Administrators 🔑503—Accounting—Vouchers.

Where the administrator of the estate needed an office, and for that purpose employed his own office force and equipment, and made a flat charge of $15 per month as a fair proportion of the total expense to be borne by the estate, *held*, that the monthly items might be allowed under Code Civ. Proc. § 1632, up to $500, though no vouchers were produced.

Department 1.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Elizabeth Ross, deceased. From an order settling the final account of the administrator, Maggie G. Steinberger appeals. Reversed, with directions.

J. H. Merriam, of Pasadena, and G. Harold Janeway, Hunsaker & Britland, and Le Roy M. Edwards, all of Los Angeles, for appellants.

H. M. Barstow, of Los Angeles, for respondent.

SLOSS, J. This is an appeal from parts of an order settling the final account of the administrator of the estate of Elizabeth Ross, deceased. The appellant, Maggie G. Steinberger, claimed the entire estate under an oral agreement with the decedent, and had succeeded in establishing her asserted right in an action brought by her against the administrator and others. The judgment there given in her favor was affirmed by this court in May, 1917. Steinberger v. Young, 175 Cal. 81, 165 Pac. 432. The character of this litigation bears directly on the present appeal, but we need not elaborate it here, as it is fully described in the opinion cited, and again in the opinion just filed by this department in Estate of Ross (L. A. No. 5758) 176 Pac. ——, which presented the appeal of one Scanlan from two orders made in the course of proceedings for final distribution.

[1] The present appellant attacks the action of the court below in allowing certain credits to the administrator, and various items of compensation to his attorney. The administrator, respondent, makes the preliminary objection that the appellant is not an heir of the decedent or any other "person interested in the estate," and hence not entitled either to contest the account (Code Civ. Proc. §§ 1635, 1636), or to maintain an appeal from the order of settlement. Whether or not this point would be meritorious otherwise, the record shows that after the decision in Steinberger v. Young, supra, the heirs, parties defendant in that case, made conveyances purporting to transfer to the appellant the legal title to all property which Elizabeth Ross owned, or in which she had any interest, at the time of her death. Under such conveyances Mrs. Steinberger certainly had the same right to object to the administrator's account that her grantors would have had as heirs.

The items objected to are seven in number, but they may, for purposes of legal discussion, be grouped into four classes.

[2-4] 1. Items 1 and 2 were credits of $41.55 and $190, respectively, claimed by the administrator for expenses incurred by him in the defense of the action of Steinberger v. Young. The third item allowed H. M. Barstow, the administrator's attorney, $1,000 extra compensation for services in that case in the superior court, and a like sum for services on the appeal to this court.

The objection to these items is that the action of Steinberger v. Young was one involving a controversy between Mrs. Steinberger, on the one hand, and the heirs at law of the decedent, and R. E. R. Scanlan, on the other, regarding the disposition of the residue of the estate after administration; that this was a controversy in which the administrator, as such, had no concern, and that he was not, therefore, entitled to defend the action at the expense of the estate. It is settled law in this state that the administrator or executor has no right to take a part in litigation between various parties asserting conflicting rights as heirs, and that he has no authority to engage attorneys for either claimant, or to bind the estate in any manner on that behalf. Roach v. Coffey, 73 Cal. 281, 14 Pac. 840; Estate of Friedman, 168 Pac. 21. On like grounds, such administrator or executor is not a party aggrieved by a decree determining the proportions in which various claimants shall share in the residue available for distribution, and cannot appeal therefrom. Bates v. Ryberg, 40 Cal. 463; Jones v. Lamont, 118 Cal. 499, 50 Pac. 766, 62 Am. St. Rep. 251; Estate of Williams, 122 Cal. 76, 54 Pac. 386. These considerations govern the situation before us. True, the action of Steinberger v. Young was not a contest between persons claiming to have succeeded to the estate as heirs. The plaintiff there (appellant here) asserted a right to the residue remaining after administration by virtue of an agreement made by the decedent in her lifetime. But the administrator, as such, has no greater concern in a controversy of this kind than he has in a dispute between various parties claiming to be entitled by succession. Whatever might be said if the question were a new one, we think argument is foreclosed by the decisions of this court in Estate of Healy, 137 Cal. 474, 70 Pac. 455, and McCabe v. Healy, 138 Cal. 81, 70 Pac. 1008. Following the death of one Healy, and the appointment of an administrator, one Ulty McCabe had instituted an action against Healy's heirs to enforce a contract substantially similar to the one asserted by Mrs. Steinberger in her action against Young. One of the heirs sought to have the administrator removed for the reasons that he had not tried to intervene or to take a part in such action, and that the attorneys representing him as administrator were also acting as attorneys for the plaintiff, McCabe. The court held, in the first of the cases just cited, that these facts furnished no ground for removing the administrator. Referring to the action of McCabe v. Healy, the court said:

> "It is in effect a suit to determine a controversy between different heirs as to their respective rights of inheritance, and in such a controversy it is well settled that the administrator has no interest, but is a mere officer of the court, holding the estate as a stakeholder, to be delivered to those whom the court shall decide to be entitled thereto. * * * There was * * * no ground upon which he would have been authorized to seek to intervene * * * or justified in expending the money of the estate in defending the action against the plaintiff."

The second case (138 Cal. 81, 70 Pac. 1008) was an appeal from the judgment rendered in favor of the plaintiff in McCabe v. Healy. In ruling that the administrator was not a necessary party, the court said:

> "Upon sound reason it is plain he has no interest in the result of the litigation. This litigation involves solely the ownership of the residue of the estate of Matthew Healy, deceased—a matter in which the administrator has no possible interest—a question to him of indifferent concern."

These decisions are conclusive against the contention that the administrator was authorized to expend moneys of the estate in resisting the claim of Mrs. Steinberger, or that his attorney was entitled to compensation from the estate for his services in defending against her action. It is argued that Mrs. Steinberger, in instituting her action, voluntarily made the administrator a party defendant, whereas, in McCabe v. Healy the administrator was not joined. But this circumstance can have no weight in the present inquiry. If, as held in the Healy Case, the administrator was in no way concerned in the determination of the controversy, the mere fact that the plaintiff brought him into the action could not authorize him to charge the estate with the burden of the expense incurred by him in litigating a controversy which affected the heirs alone.

[5, 6] 2. The administrator was allowed credit for $590 for cash advanced by him to Anna M. Scanlan. Mrs. Scanlan was a sister of the decedent, and was, at the time the advances were made, coadministratrix of the estate. Whether the money was received by Mrs. Scanlan as an advance against her supposed interest as heir, or on account of her commissions as administratrix, the item was not properly allowed. Advances made by an administrator to an heir on account of his distributive share cannot be considered upon the hearing of an account, but are to be allowed only as a credit against the heir's distributive share upon final distribution. Abila v. Burnett, 33 Cal. 658; Estate of Willey, 140 Cal. 238, 73 Pac. 998. In making payments in anticipation of the decree of distribution, the administrator acts at his peril, and if, as in this case, it turns out upon distribution that the payee is not entitled to receive any part of the residue, the administrator must look for reimbursement to the person to whom the payment has been made. Nor can the administrator support the credit as a payment to Mrs. Scanlan on account of her commissions as administratrix. In that view, the amount would have to be deducted from the allowance to Mr. Young, since the statutory commissions can be allowed but once, and must be divided between the administrators if there be more than one. Code Civ. Proc. § 1618. Full commissions were allowed Mr. Young in the order under review, and if the $590 item stands, there will have been an overpayment of commissions to this extent.

[7] The administrator claims that the credit for payment to Mrs. Scanlan had been approved by the court on the settlement of a prior account, and that any inquiry into this item was therefore precluded. But the record hardly sustains the claim. It appears that the item was included in the first account. But the court in settling that account expresssly reserved "decision as to the advancements to Mrs. Scanlan." The item did not appear in any subsequent account. It is true that the second account began with a charge of the balance shown by the first account, in which the administrator had claimed credit for this item. But the second account did not on its face give any indication that the $590 was an item of that account, and it cannot be said that the court, by its order of settlement of the second account, adjudged the propriety of the claim of credit. The settlement of an account is not conclusive, "except as to such items as are included in it and actually passed upon by the probate court." Estate of Adams, 131 Cal. 415, 63 Pac. 838.

[8] 3. The court allowed Mr. Barstow, as attorney for the administrator, $2,750 for extraordinary services rendered prior to July 1, 1912, in the Scanlan litigation (fully described in Estate of Ross, L. A. No. 5758), and $100 for services rendered prior to that date in connection with the sale of certain real property. The appellant contends that these allowances were improper because Mr. Barstow had already received $3,500 as payment for all extraordinary services rendered prior to July 1, 1912. The record does not, however, show that the former allowance was in full for all services rendered before the date named. The order for the payment of $3,500 was made on January 31, 1913, and provided that the administrator be authorized to pay to Mr. Barstow "the sum of $3,500 on account of extraordinary services of said attorney to July 1, 1912." The words "on account" in this order may well have been used to indicate that the allowance was not intended to cover compensation in full for services to July 1, 1912. As shown by its findings, the court below so construed its former order. It is conceded that services rendered in the Scanlan litigation formed a proper subject for payment out of the estate, and it is not made to appear that the court abused its discretion in making the further allowance complained of.

[9, 10] 4. In his account the administrator claimed credit for office expenses for a period of 4½ years, aggregating $810. These items included stenographer's services, stamps, telephone calls, and the like, and the administrator made a flat charge of $15 per month for these items during the period in question. He testified that it was necessary to maintain an office for the estate, and to use a stenographer and telephone service in handling the property of the estate. For these purposes he employed his own office force and equipment, and the charge of $15 per month was estimated by him to be a fair and reasonable proportion of the total expense to be borne by the estate. The court evidently accepted his view, and we cannot say that the conclusion reached was not a proper one. It is objected that there were no vouchers for these charges. Section 1632 of the Code of Civil Procedure authorizes the allowance of "any item of expenditure not exceeding twenty dollars, for which no voucher is produced," if the item be supported by the administrator's uncontradicted oath to the fact of payment, specifying when, where, and to whom it was made. The claim of $810 may well be treated as made up of a series of separate items of $15 each, and these items were, we think, sufficiently supported by the testimony of the administrator. In view of the nature of these charges and the manner in which a proportion of the total expense was allotted to the estate, there could not well be a more definite specification of "when, where, and to whom" the payments were made. But section 1632 further provides that such allowances (unsupported by vouchers) "in the whole must not exceed five hundred dollars," and the item in question must therefore be reduced to this aggregate sum.

The order is reversed, with directions to the court below to settle the account in accordance with the views herein expressed.

We concur: RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

41 Cal. App. 153

PEOPLE v. MANUEL. (Cr. 641.)

(District Court of Appeal, Second District, Division 1, California. May 12, 1919.)

1. JURY ⚷116 — CHALLENGE TO PANEL—FORMS FOR DRAWING AND RETURN OF JURY.

Pen. Code, § 1059, as to challenge to panel for departure from forms prescribed in respect to drawing and return of jury, has no application where jury constituting panel is not a drawn jury.

2. JURY ⚷116—CHALLENGE TO PANEL—BIAS OF SHERIFF.

Bias of the officer who summoned the jurors, by Pen. Code, § 1064, made ground of challenge to panel when it is formed from persons whose names are not drawn as jurors, *held* not shown by the fact that in filling special venire for trial of a woman for forgery, women only, under Code Civ. Proc. § 190, equally competent with men, were summoned, nor by fact that they were all from a part of the county other than where the offense was charged to have been committed.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Anna Manuel was convicted of forgery, and she appeals. Affirmed.

A. S. Maloney, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

SHAW, J. Defendant appeals from a judgment which followed her conviction of the crime of forgery.

The sole error urged as ground for reversal is the ruling of the court in denying defendant's challenge interposed to the panel of jurors summoned to try the case. The ground of the challenge was that—

> "There has been a substantial departure from the form provided by law in this: That the sheriff in summoning the jury failed and intentionally omitted to draw the jury from the whole body of the county, * * * but confined himself to a certain part, namely, the city of Upland, and to a certain class, namely, women; that in so doing the sheriff * * * was biased and prejudiced in summoning this jury."

In support of the motion, it was made to appear that the court made an order directing the sheriff to summon 25 good and lawful persons from the body of the county to act as jurors in the trial of the case; that in compliance with the order the sheriff summoned 25 women, all of whom were residents of that part of the county known as Upland; that his reason for omitting men from the jury was that the county had no accommodations for keeping a mixed jury over night, and, in his opinion, a mixed jury "would not be nice, provided they were held over and they had night sessions"; that he had no prejudice or feeling against the defendant, and in summoning the jury did not omit men therefrom in order to secure a jury that would convict defendant.

[1] Section 1059, Pen. Code, provides that—

> "A challenge to the panel can be founded only on a material departure from the forms prescribed in respect to the drawing and return of the jury in civil actions, or on the intentional omission of the sheriff to summon one or more of the jurors drawn."

A sufficient answer to that part of the challenge based upon the alleged departure from the forms prescribed in respect to the drawing and return of the jury is that the jury constituting the panel challenged was not a drawn jury, and hence there could be no departure from the forms prescribed in respect to the drawing and return of the jury, within the meaning of the section quoted.

[2] Since it was not a drawn jury, defendant's right to challenge the panel is measured by section 1064, Pen. Code, which provides that—

> "When the panel is formed from persons whose names are not drawn as jurors, a challenge may be taken to the panel on account of any bias of the officer who summoned them which would be good ground of challenge to a juror."

The claim of bias on the part of the sheriff is predicated upon the fact that in filling the special venire he summoned women only who were residents of that part of the county known as Upland. There is no merit in the contention. That the persons summoned were good and lawful persons and in every way competent to act as jurors is not questioned. No difficulty appears to have been had in obtaining from those summoned a jury satisfactory to defendant; nor is any claim made that her substantial rights were in the slightest degree prejudiced by reason of the acts of the sheriff. In the absence of such showing, mere irregularities in the action of the officer in summoning persons to fill the venire would constitute no ground for the granting of a challenge to the entire panel. Wadsworth v. State, 9 Okl. Cr. 84, 130 Pac. 808; People v. Richards, 1 Cal. App. 575, 82 Pac. 691.

Considered as jurors, the law makes no distinction between men and women. Subject to qualifications applicable alike to each, they are equally competent to act as jurors. Section 190, Code Civ. Proc. Hence it cannot be said the sheriff, in summoning all women, confined himself to a certain class as distinguished from another class, any more than had he summoned all men, or a mixed jury composed of a greater number of either sex than the other.

The fact that all the jurors were residents of the vicinity of Upland furnishes no ground upon which to base the claim that the sheriff was biased. People v. Vaughn, 14 Cal. App. 201, 111 Pac. 620, where it is said:

> "The offer of the defendant was to prove that the sheriff summoned the special venire 'entirely from the city of Marysville, where the feeling and prejudice against the defendant was strong.' From this he proposed to contend that 'there must have been prejudice and bias on the part of the officer.' The conclusion would not be warranted from the circumstance relied upon."

No claim is made in the instant case that any feeling of prejudice against defendant existed among the residents of Upland; on the contrary, the very purpose of the sheriff, as shown, was to obtain a jury from a section of the county other than that in which the crime was alleged to have been committed. There is nothing in the record to which our attention is directed which even tends to show the slightest bias on the part of the officer in summoning the jurors; on the contrary, it appears that he acted with entire impartiality and without prejudice to the substantial rights of defendant.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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41 Cal. App. 138

OCKENDEN v. CUTTING. (Civ. 2862.)

(District Court of Appeal, First District, Division 1. California. May 10, 1919.)

APPEAL AND ERROR ⟹766 — ALTERNATIVE METHOD — BRIEFS — FAILURE TO COMPLY WITH STATUTE—DISMISSAL.

Where, on appeal by the alternative method, no supplement was appended to appellant's brief embracing any portion of the record, and the brief contains no part of the pleadings or excerpts from the evidence directing the court's attention to any portions thereof, as required by Code Civ. Proc. § 953c, and appellant's attention was directed thereto by the brief of respondent, and he made no effort at correction of the defect and no response to the order to show cause, the appeal will be dismissed and the judgment affirmed.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Thomas Ockenden against Henry C. Cutting. Judgment for plaintiff, and defendant appeals. On order to show cause why appeal should not be dismissed. Ordered that judgment be affirmed.

Douglas A. Nye, of San Francisco, for appellant.

Arnold W. Liechti, of San Francisco, for respondent.

RICHARDS, J. This matter is presented upon an order to show cause why the appeal should not be dismissed for failure on the part of the appellant to comply with the requirements of section 953c of the Code of Civil Procedure. The appeal was by the alternative method, and a typewritten transcript of 119 pages has been filed. The main question discussed in appellant's opening brief is the sufficiency of the pleadings and evidence to support the judgment appealed from. No supplement is appended to appellant's brief embracing any portion of the record, nor is there printed in said brief any part of the pleadings or any excerpts from the evidence (except one brief half-page) directing the court to the portions thereof upon which the appellant relies. The existence of that portion of section 953c, Code of Civil Procedure, which requires that these things be done, has been utterly ignored in this case. This court and the Supreme Court have repeatedly pointed out the necessity of a compliance with the requirements of this section of the Code before any duty devolves upon the court to so far examine into the merits of the appeal as to search through the record for that which should have been embraced in the brief. Moore v. Guajardo, 174 Pac. 92; Scott v. Hollywood Park Co., 169 Pac. 379; Chandlee v. McCalla, (Sup.) 178 Pac. 709.

The attention of the appellant having been directed by the brief of respondent to his failure to comply with the statute in this regard, and no effort at the correction of the defect having been attempted, nor any response made to the order to show cause, it is therefore ordered that the judgment herein shall be, and the same is hereby affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

41 Cal. App. 134

EGENBERGER et ux. v. NEUMAN et al. (Civ. 2766.)

(District Court of Appeal, First District, Division 2, California. May 9, 1919.)

1. Bills and Notes ⚷32, 462(1)—Actions—Parties—"Promissory Note."

While a note payable in the alternative to one of two persons is not a "promissory note," if, however, it purports on its face to be for value received, the setting forth of the note according to its terms is sufficient to entitle the plaintiff to recover as on a contract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Promissory Note.]

2. Mortgages ⚷137—Nature of Estate of Parties.

Under Civ. Code, § 2920, a mortgage is merely a contract by which specific property is hypothecated for the performance of an act, the statute changing the original character of a mortgage so it is no longer a conveyance of land, but a mere security.

3. Mortgages ⚷23—Validity—Parties.

Where a note and mortgage securing the same were made in the alternative, that is, payable to one or another, and both the payees joined in a suit to foreclose the mortgage, *held*, that the note and mortgage were not void, and foreclosure might be decreed.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by Valentine Egenberger and Katherine Egenberger, his wife, against August H. Neuman and others, and J. E. Davis and another. From a judgment for plaintiffs, the last-named defendants appeal. Affirmed.

J. M. Kinley, of San Francisco, for appellants.

Dibert & Stiefvater and Albert P. Stiefvater, all of Oakland, for respondents.

LANGDON, P. J. This is an appeal by defendants J. E. Davis and Alice M. Davis from a judgment and decree foreclosing a mortgage against them. Appellants are the holders of the legal title to the property affected by the foreclosure, title having passed to them through mesne conveyances from August H. Neuman and Ida Neuman after the lien of the mortgage had attached. The appellants demurred on general and special grounds to plaintiffs' amended complaint. Their demurrers were overruled, and upon their failure to answer judgment was entered against them.

There is but one question upon this appeal, and that is: Does the amended complaint state facts sufficient to constitute a cause of action? The argument of appellants is predicated upon the fact that the note, and mortgage securing the same, and which were set out in the amended complaint, were made in the alternative or disjunctive form—that is, they were made to "Valentine Egenberger or Katherine Egenberger."

[1] There are only two authorities cited to us directly upon this question, neither one of which is from this state. The appellants rely upon the case of Musselman v. Oakes, 19 Ill. 81, 68 Am. Dec. 583, in which it is said that a note payable in the alternative to one of two persons is not a promissory note and cannot be sued on as such. This contention may be granted; but in the instant case the action is brought to collect the debt secured by a mortgage regardless of the means by which the debt was evidenced. Furthermore, in reply to the contention of counsel based upon the Oakes Case, we may say that, while it has been held that a note payable in the alternative is not a promissory note, if, however, it purports on its face to be for value received, the setting forth of the note according to its terms is a sufficient statement of consideration to entitle the plaintiff to recover as on a contract. Walrad v. Petrie, 4 Wend. (N. Y.) 575, cited in 1 Daniel on Negotiable Instruments, § 103. The record in the present case discloses that the note stated on its face it was given for a valuable consideration.

[2, 3] However, the case of Seedhouse et al. v. Broward, Adm'r, 34 Fla. 522, 16 So. 425. is a case covering a very similar state of facts in so far as the language of the note and mortgage is concerned. In that case, as in this, the action was to foreclose a mortgage securing a note, the plaintiffs being Henry Seedhouse and Helen Seedhouse, his wife. There, as here, a demurrer was interposed on the ground that the note and mortgage were in the alternative. The court in that case pointed out that the mortgage was not a conveyance of real property, but a contract between mortgagor and mortgagee whereby a specific lien was created upon certain property; that, viewed as a contract, requiring the interposition of judicial action to enforce its provisions, there was no reason why the fact that it and the debt secured were made payable to one or the other of two parties definitely named therein should render such contract void. The court pointed out that there was some variance in the authorities as to whether in such a case the action could be maintained alone by either of the parties named as alternative payees or whether it must be instituted jointly by both of the payees, but added that the better practice was for all of the parties named as alternative payees to join in the suit to enforce such a contract. The reasoning of this Florida case applies precisely to the facts of the instant case, and to the legal effect of mortgages in this state. For in this state also the original character of mortgages has

undergone a change, and they have ceased to be conveyances except in form. They pass no estate in the lands and are mere security. Under the Code a mortgage is merely a contract by which specific property is hypothecated for the performance of an act. McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655; Fogarty v. Sawyer, 17 Cal. 589; Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765; Mack v. Wetzlar, 39 Cal. 247; Savings & Loan Soc. v. McKoon, 120 Cal. 177, 52 Pac. 305; Civ. Code, § 2920.

In the present case both parties named in the note and mortgage have joined in the suit. It would seem, therefore, that all the elements exist here to make the reasoning in the Florida case applicable.

There is no defense made on the merits, but appellants urge that the mortgage and note should have been reformed; that the plaintiffs should have pleaded the true intent of the parties and made an issue of that matter. They cite the case of Pierson v. McCahill, 21 Cal. 122. That case holds that where, in reducing an agreement to writing, a material clause has been omitted by mistake, a party seeking to avail himself of the actual contract must obtain a reformation of the writing, either by a distinct proceeding to reform it or by special pleading of mistake in an action in which the contract is sought to be used, and asking its correction as independent relief. To the same effect are the other cases cited by the appellant upon this point. This rule, however, is wholly inapplicable here. The plaintiffs are not contending that a mistake has been made, or that the instruments do not express the true intent of the parties. Under our conclusion, herein expressed, the note and mortgage as executed are not void, and, as both parties named therein as alternative payees are plaintiffs in the suit, there is no occasion to ask for a reformation of the instrument, nor to allege any other intent of the parties than the intent appearing upon the face of the instruments; the instruments are sought to be enforced as executed.

The judgment is affirmed.

We concur: BRITTAIN, J.: HAVEN, J.

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41 Cal. App. 124

FOULGER v. TIDEWATER SOUTHERN RY. CO. (Civ. 1861.)

(District Court of Appeal, Third District, California. May 9, 1919. Rehearing Denied by Supreme Court July 7, 1919.)

1. MORTGAGES 🔑153—BONA FIDE PURCHASER—WHO IS.

Where a deed granting defendant a right of way over the land involved was not recorded until after the grantor had conveyed the premises to another, and such person had mortgaged the same to a bank which recorded its mortgage, the bank was under Civ. Code, §§ 1214, 1215, a bona fide incumbrancer, and its rights are prior to those of defendant.

2. MORTGAGES 🔑536—BONA FIDE PURCHASER—EXTENT OF PROTECTION.

Where a bank which had a mortgage on lands was a bona fide incumbrancer, its mortgage having been recorded before conveyance of a right of way to defendant, *held* that a purchaser at foreclosure sale was protected by the bona fides of the bank, and his rights are superior to those of defendant, even though he learned of defendant's asserted rights prior to the consummation of his purchase.

Appeal from Superior Court, Stanislaus County; W. H. Langdon, Judge.

Action by T. M. Foulger against the Tidewater Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Arthur L. Levinsky, of Stockton, for appellant.

Hawkins & Hawkins, of Modesto, for respondent.

HART, J. This is an action to quiet title and for damages for the wrongful taking of a certain portion of the land in dispute and for injury to the remaining portion.

On February 15, 1912, one James M. Johnson and his wife deeded to H. C. Leffingwell and Ella E. Leffingwell, his wife, a certain tract of land near Modesto, in Stanislaus county, containing 10 acres. The Leffingwells, on December 17, 1913, conveyed the same land to Lottie R. Kerry and William J. Kerry, her husband. On January 16, 1914, the Kerrys borrowed from the Modesto Savings Bank $775 and executed a deed of trust, which was recorded January 26, 1914, to A. L. Cressey and J. J. McMahon, as trustees, to secure the payment of the note given for the amount of the loan. Default was made in the payment of said note and, after due proceedings, said trustees sold the property, under the terms of the deed of trust, to T. M. Foulger, the plaintiff herein, for the sum of $2,000, and executed a deed to the latter, dated July 15, and recorded July 21, 1916.

It was alleged in the complaint that, "subsequent to the execution of said deed of trust, the defendant, without any right or authority, entered upon said land and premises and constructed thereon a railroad," which runs in a diagonal line across plaintiff's land. It was also alleged that the land was farming land, that it was necessary to irrigate the same, and that the construction of the railroad cut off plaintiff's ditches and water supply; that the construction of the railroad severed plaintiff's land into two fields, and that it was necessary for him to construct a crossing over said railroad at a cost of $50; that it was necessary to siphon water across said railroad at a cost of $100; that by reason of said severance the market value of the land has depreciated $400; and that plaintiff is damaged in the sum of $250 by reason of being deprived of the use of the land occupied. Total damages in the sum of $800 were asked for.

The complaint was filed on September 3, 1917. On the 6th day of April, 1917, defendant recorded a deed from H. G. Leffingwell to Tidewater Southern Railway Company, conveying a right of way 50 feet wide across the land in question for railroad purposes, which deed was dated August 15, 1912.

T. M. Foulger, the plaintiff, was sworn as a witness, and testified that, some time prior to May 25, 1917, he examined the property in question; that at that time he saw no railroad across the land, saw nothing indicating a railroad and saw no stakes upon the ground; that, on July 15, 1916, he attended the trustees' sale of the property, and bid $2,000 for it, and in addition he was to pay the interest and taxes above that amount, amounting to $35, and that he did pay such sums for the property. He said that the railroad had been built through his land in a cut, the dirt being piled on both sides; that prior to the building of the road the land had been planted to grapes; that the grapevines had been plowed up and piled to one side; that on the east side of the track is a reservoir, about 14 by 16 feet in dimension, made of concrete. The right of way occupied about an acre of the land, and the amount on the east side of the track was about half an acre. It was necessary to pipe water under the railroad from the reservoir to the balance of the land. The witness testified as to what he thought would be the cost of piping, crossing the track, etc., and the value of the land taken and that severed.

On cross-examination the witness said that he was on the land on the 14th of July, 1916, the day before he bought it, and saw the railroad being constructed across the land, and saw a construction train being operated on the track. He immediately went to Judge Broughton, president of the Modesto Savings Bank, and asked him if he knew anything about a right of way, that they had put a railroad there since he had contracted to buy the land, and that Judge Broughton replied to him: "I knew nothing of it; they haven't got any right of way from me." That the witness investigated and found they had no right of way. That he did not go to the railroad company to see why they were on the land, but spoke to their surveyor, Mr. Lindsey, probably within a week after the sale. That Mr. Lindsey told him to go and see Mr. Bearce, president of the defendant corporation, but that he did not go to see him; he went to his attorney, who began trying to get a settlement out of the railroad. It appeared that, in the month of May, 1916, and previously to bidding on the property, having in view the purpose of purchasing it, the plaintiff visited and examined the property. At that time no work had been done on the rairoad right of way, and respondent saw no indications of a railroad or preparations to build one on and through the property. He then deposited $300, and entered into an agreement that he would bid at the trustees' sale or forfeit the $300. He stated that he bought the land after seeing the railroad there because if he did not he would have to forfeit the $300; that he would not have paid $2,000 for the property had he known the railroad was there when he "put his contract up."

J. R. Broughton, president of the Modesto Savings Bank, testified that at the date of the trust deed from the Kerrys the trustees, A. L. Cressey and J. J. McMahon, were directors of the bank; that they had nothing to do with making the loan more than approving it at the monthly meeting of the board of directors; that they are the parties who regularly act as trustees for the bank. Questioned as to what he did in making the loan, with reference to an examination of the land, the witness said: "Well, we were familiar with the quality of the land, and were satisfied it was good security for the amount we made the loan, and satisfied that the title was all right"; that they had an abstract prepared and relied upon that; that he had resided in Stanislaus county for 39 years, and for 30 years had been familiar with the quality and value of lands in the county; that at the time the loan was made to Mrs. Kerry he had no knowledge that the defendant claimed any interest in the land; that while the bank held the trust deed it never gave the railroad company a right to cross the land in question with a track.

Several witnesses testified as to the value of the land, and plaintiff rested.

The defendant called as a witness its engineer, J. C. Lindsey, who testified that, in November, 1911, a survey was made through the lands now owned by plaintiff; that the center line of the railroad was staked out with stakes each 100 feet, the stakes being approximately 8 inches above the ground; that, in July, 1915, another survey was made, and the stakes reset; that the original stakes were not there "by reason of the farmers' plowing them out and cultivating the lands"; that defendant began grading on the land in question between June 15 and July 1, 1916, the grading was completed about the 10th of July, and the track laid on the 10th, 11th, and 12th of July; on July

11th trains began running across there. The witness said that plaintiff came to him on July 16th and asked about getting payment for the right of way; witness suggested that plaintiff write Mr. Bearce regarding a settlement, and also told him that the company had a deed from a prior owner. He stated that on the 7th of July, 1916, railroad ties 6 by 8 inches, 8 feet long, were placed on the land about 2 feet apart, and that steel rails were brought onto the land on July 11th.

As to what occurred at the time of the second survey, C. G. Burnett, assistant engineer of defendant, corroborated the testimony of Mr. Lindsey.

The court found that the said savings bank took the deed of trust from the Kerrys without knowledge of the conveyance by H. C. Leffingwell to the defendant or of facts sufficient to put it upon notice of the said conveyance, and that it did not have notice at the time it took said trust deed of any claim of the defendant in and to said real estate; that said bank at the time of taking said deed of trust was an innocent incumbrancer for value, and that the said deed of trust was received by said bank in good faith and for a valuable consideration. It was further found that at the time plaintiff purchased said property at the trustees' sale he had notice of the fact that the defendant was at that time constructing across said land and premises a railroad, and knew that a railroad bed had been graded, and that ties had been placed thereon and rails had been laid upon said ties, and that railroad trains had passed over the rails. It was also found that at the trial of this action the defendant stipulated that it only claimed a strip of 50 feet wide as its right of way. Other findings were made relating to the adaptability of the land to farming purposes, the cutting of the land up into two parts by the right of way, the interference of the right of way with the proper and requisite use of a water ditch on said land for irrigating purposes, and the several items of damages suffered by the plaintiff by reason of the existence of the right of way and the maintenance of a railroad track on and over said way, etc. While, as seen, the plaintiff testified that at the time he first visited the land in contemplation of purchasing it he saw or observed no evidence of a railroad track or no indications that a track was to be built thereon, the court made no finding as to that fact.

The judgment is:

"That the plaintiff is the owner of all the land hereinbefore described, subject, however, to the easement of the defendant over and across said land upon the strip of land hereinbefore described, and the defendant has the right to maintain upon said right of way 50 feet in width a railroad."

Plaintiff was further awarded the sum of $500 as damages and his costs of suit.

[1, 2] That the deed of H. C. Leffingwell to the defendant, although delivered prior to the making and delivery of the trust deed to the Modesto Savings Bank, was not recorded until after the delivery of said trust deed to said bank, that the bank, at the time it received the trust deed, was wholly ignorant of the existence of the deed to defendant or of facts which would put it as a prudent person upon inquiry as to the fact of said conveyance or of any claim of interest by defendant in the land, and that said bank was therefore a bona fide incumbrancer for value are well-established facts in the case; the trial court having upon sufficient evidence so found. It follows, therefore, as a proposition of law, that the deed of H. C. Leffingwell to the appellant is void as to the bank. Civ. Code, §§ 1214, 1215. This, under the sections of the Civil Code just named, is determinative of this appeal, for the plaintiff is protected by and sheltered under the bona fides of the savings bank. Therefore whether plaintiff bought the property with notice of facts which, if followed up by him, were sufficient to have invested him with knowledge of the fact of the conveyance of an interest in the land to the defendant prior in date to the purchase by him, or whether he had actual knowledge of that fact, is wholly unimportant and immaterial. 27 Cyc. 1727; Logan v. Eva, 144 Pa. 312, 22 Atl. 757; Martin v. Jackson, 27 Pa. 504; Keyser v. Clifton (Tex. Civ. App.) 50 S. W. 957.

In Logan v. Eva, supra, it appeared that Mrs. Eva was the possessor in her separate right of $1,700, of which amount she turned over to her husband the sum of $1,200, to be by him invested in real estate, title to which was to be in her name. The husband bought the property with said money, but in violation of the directions of his wife and of his trust took title in his own name, and thereafter borrowed money from one Keesley and gave the latter a mortgage on said property as security for the loan. One Logan, who then had notice of the trust, purchased the property at the foreclosure sale. There, as here, it was contended that Logan, having notice of the trust in favor of Mrs. Eva or her equitable title thereto, acquired no title to the land by the conveyance to him under the foreclosure sale. The Supreme Court of Pennsylvania, refusing to sanction the contention, said:

"It is well settled that a purchaser of land is unaffected by a secret trust or equity unknown to him, and that he may pass title thereto, untrammeled by the trust, to a person who has notice of it. 'A mortgagee is regarded as a purchaser, and is protected from all secret equities and trusts of which he had no notice. Heister v. Fortner, 2 Bin. [Pa.] 40 [4 Am. Dec. 417]; Cover v. Black, 1 Pa. St. 493. Notice to a purchaser at the sheriff's sale of the mortgage comes entirely too late, if the mortgagee had no notice when the mortgage was executed.' Martin v. Jackson, 27 Pa. St. 504 [67 Am. Dec. 489]."

The court in that case further said:

> "It must be borne in mind that the rule which protects a purchaser with notice is not the outcome of a tender regard for him. It is the logical sequence of the doctrine that a bona fide purchaser, without notice of a secret equity, takes a title unaffected by it. If such a purchaser could only pass his title to persons ignorant of the trust, the market value of his property would be depreciated by the restriction, and his enjoyment of it would be very much impaired. Hence the law declares that the knowledge of his vendee is not in the way of the transmission of his title, untrammeled by the trust."

In Keyser v. Clifton, supra, it is held that—

> "The bona fides of the mortgagee as to the title passes to the purchaser at the foreclosure sale, regardless of the knowledge of the latter."

Counsel for the appellant insists that the rule enunciated in the above cases has never been and is not now the rule in California, and in support of his position cites the cases of Eversdon v. Mayhew, 65 Cal. 163, 3 Pac. 641, and Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803. Those cases, as to the facts, are wholly different from this, and they merely deal with and apply the well-settled rule that one who takes a conveyance of real property with notice of a prior equity or title of another in or to such property acquires no title thereto, or acquires the property subject to the prior equity or interest of which he had knowledge or notice when he received the conveyance. The cases are not in point here.

That the rule applied in the cases first above referred to is the California rule is clear from the provisions of section 1214 of the Civil Code. Moreover, the rule is so just and sound in principle that it ought to be the rule of decision in every jurisdiction in cases whose facts are analogous to those of the instant case.

We are persuaded that there is no merit in this appeal, and the judgment is accordingly affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(41 Cal. App. 156)

AMMEX MOTION PICTURE MFG. CO. v. ERVAY et al. (Civ. 2117.)

(District Court of Appeal, Second District, Division 2, California. May 12, 1919.)

1. Pleading 🔑127(2) — Answer — Admission of Possession of Property.

In action to recover personal property, together with damages for withholding the same, defendants' answer, denying that they took possession as alleged, or that they are still unlawfully withholding or unlawfully detaining said property, *held* as a matter of law an admission of possession at the time the action was commenced.

2. Pleading 🔑127(2) — Answer — Admission of Possession.

Answer, alleging that defendants are the owners and entitled to immediate possession, and that defendant E. has been seriously damaged by wrongful action of plaintiff in taking said property from him under Code Civ. Proc. § 509 et seq., *held* an admission by defendants that the property was in their possession at the time action was commenced.

3. Replevin 🔑72—Claim and Delivery—Joint Tort-Feasors—Evidence.

Record *held* to conclusively show that respondent E. was a joint tort-feasor both in taking and withholding of the property in question from plaintiff, and that therefore the court should have adjudged that he, as well as the other defendants, was liable for damages resulting from their withholding of the property.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by the Ammex Motion Picture Manufacturing Company against J. E. Ervay and others, doing business under the firm name and style of the Bell Motion Picture Manufacturing Company. From the judgment rendered plaintiff appeals. Reversed and remanded, with directions.

Patterson Sprigg and Dwight D. Bell, both of San Diego, for appellant.

Henning & McGee, of San Diego, for respondents.

THOMAS, J. This is an appeal by plaintiff, on the judgment roll alone, from a judgment in its favor, decreeing that defendants, or any of them, were not the owners of that certain personal property to recover which, together with damages for withholding same, this action is brought; and further decreeing that plaintiff have judgment against all the defendants, except Ervay, for $500, rental value for the use of the property.

[1, 2] While the suit was pending the property in question was delivered to the plaintiff under the provisions of section 509 et seq. of the Code of Civil Procedure. It is alleged in the complaint "that on or about the 18th day of March, A. D. 1915, the defendant J. E. Ervay forcibly, wrongfully, and unlawfully entered in and upon said premises and took possession of the same, together with all the personal property hereinafter set forth," and that "said defendants still unlawfully withhold and detain said property." The defendants by their answer deny that they took possession as alleged, or that "they are still unlawfully withholding or unlawfully

detaining said property," which, as a matter of law, is an admission of possession of the property at the time of the commencement of the action. The answer further alleges that "these defendants are the owners and entitled to the immediate possession of said property"; and, further, a specific allegation is made "that defendant Ervay has been seriously damaged by the wrongful action of the plaintiff in taking said property from him," etc., referring to the taking by the sheriff under affidavit with order indorsed thereon, and undertaking, as provided by sections 509 et seq. of the Code of Civil Procedure. This, we think, is an admission by defendants that the property was in their possession at the time of the commencement of this action.

The court also finds that—

> "At all times in said complaint mentioned the said defendants Ervay and Bell forcibly, wrongfully, and unlawfully, and without any right, entered in and upon and took possession of said premises, together with the personal property therein contained, to the exclusion of the rights of said plaintiff."

Though somewhat uncertain in its terms, how can this finding be construed, in the light of the admissions of the answer, other than as a statement that both defendants at all times had the possession and control of this property?

[3] It therefore conclusively appears from the record before us that the respondent Ervay was a joint tort-feaser, both in the taking and withholding of said property from plaintiff, and that therefore the court should have adjudged that he, as well as the other defendants, is liable for all damages resulting from their withholding of the property.

Judgment is reversed, and cause remanded, with directions to the lower court to enter judgment in accordance with the views herein expressed.[1]

We concur: FINLAYSON, P. J.; SLOANE, J.

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41 Cal. App. 109

KLEINECKE v. NORTH CONFIDENCE MINING & DEVELOPMENT CO. et al. (Civ. 1968.)

(District Court of Appeal, Third District, California. May 8, 1919.)

1. Appeal and Error 🔑1011(1)—Finding on Conflicting Evidence — Conclusiveness.

A finding on conflicting evidence, if supported by substantial evidence, is conclusive on appeal.

2. Corporations 🔑116—Stock—Option to Repurchase—Passing of Time Limit.

Where an oral option to repurchase shares of stock was limited as to time which had expired without attempt to take advantage of the option, the optionee no longer had any claim upon the shares.

3. Evidence 🔑420(4) — Stock—Agreement to Reconvey upon Payment of Indebtedness—Defeasance—Parol Evidence.

If a sale of corporate stock had been accompanied by an unconditional agreement to reconvey upon payment of an indebtedness, for which the stock was formerly collateral security, such condition as a matter of defeasance might be established by parol.

Appeal from Superior Court, Tuolumne County; George F. Buck, Judge.

Action by Ella Kleinecke against the North Confidence Mining & Development Company and another. Judgment for plaintiff, and defendants appeal. Judgment affirmed.

J. C. Webster, of Sonora, for appellants.
Frank W. Street and Horace M. Street, both of Oakland, for respondent.

CHIPMAN, P. J. Plaintiff brought the action to compel the defendant corporation to transfer to her on its books and to deliver to her a certificate for 47,156 shares of its capital stock, of which she alleged she was the owner. The cause was tried by the court without a jury, and findings and judgment were in favor of plaintiff. Defendants appeal from the judgment on the grounds that the evidence is insufficient to sustain the decision and that the decision is against law.

It appears from the findings of the court: Defendant corporation is organized and existing under and by virtue of the laws of the state of California, with a capital stock of $75,000, divided into 75,000 shares of the par value of $1 each. On July 16, 1908, defendant Chute borrowed $6,000 from plaintiff, giving to her his promissory note for said sum, payable in six months, with interest, and indorsed and delivered to plaintiff three certificates representing in the aggregate 47,156 shares of the capital stock of the defendant corporation then owned by him, as security for the payment of said note. Some payments of interest were made by defendant Chute, and he received from plaintiff an additional loan and on July 16, 1912, he executed and delivered to her his promissory note for $8,580, and plaintiff continued to hold said shares of stock as security for the payment of the latter note, the first note being destroyed. The court found that said security was on May 10, 1915, worth no greater sum than $10,000.

The plaintiff testified that in 1913 she removed from Sonora to Berkeley; that in the month of May, 1915, she visited her daughter, Mrs. C. P. Jones, in Sonora, and on the 10th of May, met Mr. Chute at the house by appointment. She testified:

> "I said to him: 'Mr. Chute, I have a proposition to make to you in regard to this stock

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[1] As modified June 7, 1919.

that I hold; I don't want it any more as security.' I had had so much trouble, and I didn't want to hold it any more with a string tied to it, I want it for my own. He said, 'Mrs. Kleinecke, anything you ask me to do I would do,' and after a few minutes he said, 'It would be necessary for you to have your papers with you to have a transaction of that kind.' I said, 'I have brought them with me for that purpose.' He said, 'This is no place to talk, so we will go inside.' We went inside the room he had occupied and there was a desk in the room; he went to the desk and sat down to it and I got the papers and handed them to him, that is, the note and other papers that were security, that is, the paper that he had written when he gave me the note stating that I was holding the certificates of stock as security. I had these two papers and gave them to him. He said, 'These papers must be destroyed.' I said, 'All right.' He said, 'You take these and destroy them.' * * * I took the note and went to the stove and burned the papers up; I went back into the room. * * * Mr. Chute said, 'If I give you this stock I want you to give me an option to repurchase it.' I said, 'Certainly, I would do that.' Then he went to work and figured up the amount that would be actually due me up to July 16, 1916, if the note hadn't been destroyed. The amount ran to something over $12,000 and I agreed to let him repurchase the stock from me for the amount of $12,000. This option to repurchase the stock to run until the 15th day of July, 1916."

Witness said Mr. Chute gave her the following form of option, which was in his handwriting:

"Know all men by these presents, that I, ——, being the owner of —— shares of stock in the ——, do hereby agree with —— to deposit the said shares —— of stock in escrow in a bank at any time he may designate within a period of (2) years from date upon the deposit by him or his assigns to my credit in said designated bank, the sum of —— dollars."

The witness said she remained in Sonora two or three days and then returned home and received from Mr. Chute a letter, dated May 16, 1915, in which he wrote:

"I will prepare that option to purchase your stock and send it to you soon. One of the parties told me yesterday, that if the weather would clear up, that the matter would soon assume a definite shape."

Under date of June 6, 1915, defendant Chute wrote to plaintiff as follows:

"I will in all probability send you form of option to sign so that you can sell your stock in a short time and I can make a commission on the sale you understand."

In a letter dated June 29, 1915, Chute wrote plaintiff that he was hoping to sell the mine, and said:

"I want you to be able to sell your stock."

On cross-examination, witness identified an affidavit made by her on August 25, 1916, in an action by C. S. Fitch against the defendant corporation, in which she claimed ownership of 52,156 shares of the stock of the corporation; and she also identified a notice dated November 24, 1915, filed in the Tuolumne county records, in which a similar claim was made. The court found that these claims were made through mistake of plaintiff's attorney, so far as 5,000 shares were concerned, she holding a certificate for that number of shares as security on another matter.

Grace Jones, daughter of plaintiff, corroborated the latter's testimony as to the burning of some papers in the stove on the occasion of the visit of Chute to the house.

It appeared that Mr. Chute did not send to plaintiff a form of option for her to execute, nor did she prepare or sign one. The option was to run to July 15, 1916. Mr. Chute not having exercised his right under it, plaintiff, some time after the right had expired, commenced the action. Defendant Chute testified in his own behalf. His testimony as to what occurred on May 10, 1915, between him and plaintiff agreed in some particulars with that of plaintiff, but as to the destruction by burning of his note and the transfer of the shares of stock of the defendant company to her in discharge of his indebtedness, his testimony is in sharp conflict, being in effect that the status of the shares was not changed but remained in pledge, and that what took place with reference to an option was, as he testified, with this understanding, that his ownership is unquestioned and that he did not sell to her this stock.

The court found that on the 10th day of May, 1915, "plaintiff accepted from defendant Richard Chute said 47,156 shares of stock in full payment of said promissory note, and plaintiff then and there surrendered said promissory note to said defendant as fully paid and discharged, and plaintiff ever since on or about May 10, 1915, has been and now is the owner and the possessor of said shares of the capital stock of said defendant," the mining company; that defendant Richard Chute has no right or interest in said shares, but that they still stand upon the books of said company in his name; that on April 18, 1917, plaintiff demanded of said mining company that it execute and deliver to her, in her name, its certificate for 47,156 shares of its capital stock, standing in the name of said Richard Chute, and that at the time said demand was made plaintiff presented to said mining company the said certificates held by plaintiff, representing said 47,156 shares, for cancellation upon the issuance of a new certificate or certificates, in the name of plaintiff, for said stock, but the said mining company refused to comply with said demand.

[1] The vital contested question of fact in the case was whether or not defendant

Chute made an absolute transfer of the shares of stock to plaintiff in discharge of his indebtedness to her. The court found, on conflicting evidence, that he made such transfer. Under the settled rule we cannot disturb the finding, as it is supported by substantial evidence.

[2, 3] Appellants contend, under the principle stated in Rohrle v. Stidger, 50 Cal. 207, and other cases cited, that the transfer of the shares, May 10, 1915, "was by way of security and that the sale was not absolute." The evidence on which the court based its finding was that the sale was absolute, and the promissory notes which constituted the consideration were surrendered and destroyed as fully paid. The option to repurchase was limited as to time of acting under it, and that time having expired without any attempt made to take advantage of it, the optionee no longer had any claim upon the shares.

Respondent makes the point that the agreement or option to purchase the stock, being for a sum over $200, is invalid because not in writing (Civ. Code, § 1624); furthermore, that there was no consideration for the agreement nor was any part of the purchase price paid. No option was ever made in writing. In one of his letters Chute said he would send plaintiff a form of option for her to sign, but he did not send it. In other of his letters he wanted her to be able to sell her stock. As already stated, the verbal option expired July 15, 1916.

If the sale had been accompanied by an unconditional agreement to reconvey upon payment of the indebtedness, such condition as matter of defeasance might be established by parol. But there was evidence justifying the finding that no such condition was part of the transaction. The option, as we have seen, was given for a stated period of time and was never sought to be availed of.

We think the findings are supported by the evidence, and that they support the judgment.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

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41 Cal. App. 131

METROPOLITAN REDWOOD LUMBER CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 2912.)

(District Court of Appeal, First District, Division 1, California. May 9, 1919.)

MASTER AND SERVANT ⚷373—WORKMEN'S COMPENSATION—INJURIES RESULTING FROM QUARREL BETWEEN EMPLOYÉS.

Personal injuries to one acting in the capacity of storekeeper, due to a personal attack upon him by a bookkeeper, an employé of equal rank, following a quarrel between them, cannot be made the basis for compensation under the Workmen's Compensation Act.

Proceedings for compensation under the Workmen's Compensation Act by Henri Gireaux, employé, opposed by the Metropolitan Redwood Lumber Company, employer, and the Ætna Life Insurance Company, insurer. Award for applicant, and employer and insurer petition for a writ of review. Award annulled.

Redman & Alexander, of San Francisco, for petitioner.

Christopher M. Bradley, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

RICHARDS, J. The following are the undisputed facts in the case. The petitioner, Metropolitan Redwood Lumber Company, maintained a store at a small town named Metropolitan in Humboldt county. Henri Gireaux, the applicant for compensation before the Industrial Accident Commission, was an employé of said petitioner in the capacity of storekeeper having in charge its stock of merchandise in its said store. One J. T. Cleary was also employed by the said petitioner as its bookkeeper in said store. The post office of the town was at the store, and the said J. T. Cleary was the postmaster, receiving in addition to his salary as one of said petitioner's employés a salary of $10 per month from the United States government for acting as such postmaster. The post office seems to have been an adjunct of the store, and the several employés of the petitioner carried the mail to and from the post office and the railway station. A discord had arisen between Gireaux and Cleary, the former having insisted on charging to the latter's account some small items of merchandise, such as candy, which the latter had taken without charging himself. Some trouble over making change between the two intensified this discord. Just prior to the collision causing the applicant's injuries he had carried the mail across to the train and was coming back to the store with the return bag of mail when he was met by Cleary, who was taking some mail to another train, but who, upon meeting Gireaux, without further or other provocation, dropped his mail and made a personal attack upon Gireaux, striking him violently and causing the injuries for which he sought compensation. So far as the petitioner herein, their employer, was concerned, the two men were of equal rank as its employés, neither being the superior of the other in his employment.

The Industrial Accident Commission by

a divided vote made the award assailed in this proceeding. The only question presented for our consideration is as to whether the said applicant was entitled to such award as for an injury arising out of his employment.

While the authorities cited by the respective parties hereto from other jurisdictions are in conflict as to the right of employés to compensation in this class of cases, we are unable to distinguish in principle between this case and the cases of Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164, and Fishering v. Pillsbury, 172 Cal. 690, 158 Pac. 215. It is true that in each of these cases, as in this case, the applicant at the time of his injuries was in the course of his employment; in each of those cases the act of the fellow employé which was the immediate cause of the injuries was a playful or, at least, not a willfully intentional act arising out of ill will on the part of the person causing said injuries; but the reasoning of the Supreme Court in each of the above-cited cases, as well as the authorities given in support thereof, apply equally to a case where the injury was intentionally inflicted. In the case of Coronado Beach Co. v. Pillsbury, supra, the learned justice writing the opinion, in his very full résumé of the authorities touching this question, calls attention to an exception to the general rule on nonliability of the employer for injuries resulting from either the playful acts or intended assaults of fellow employés, which exists where the fellow employé committing the injury did so while in an intoxicated state of frenzy and passion, which was his habitude, and which rendered it unsafe for him to be permitted to work with his fellow employés, and which condition was known to his employer, who would thus be negligent in subjecting his peaceable servants to such known risk. A second exception is also noted in the cases cited which arises in in cases where the injured employé was the superior in rank to the one causing his injuries, the assault arising out of an attempted exercise of discipline on the part of the superior employé. Neither of these exceptions can be given application to the case at bar.

The following authorities fully sustain our view that ordinarily and outside of the exceptions above noted injuries suffered by employés due to quarrels between themselves may not be made the basis of compensation under the Workmen's Compensation Acts: Jacquemin v. Turner, etc., Co, 92 Conn. 382, 103 Atl. 115, L. R. A. 1918E, 496; Stillwagon v. Callan Bros., 183 App. Div. 141, 170 N. Y. Supp. 677; Union S. M. Co. v. Davis (Ind. App.) 115 N. E. 676; Mountain Ice Co. v. McNeil, 91 N. J. Law, 528, 103 Atl. 184, L. R. A. 1918E, 494; De Fillippis v. Falkenberg, 170 App. Div. 153, 155 N. Y. Supp. 761; Tarpper v. Weston, etc., Co., 200 Mich. 275, 166 N. W. 857, L. R. A. 1918E, 507.

The recent case of Kimbol v. Industrial Accident Commission, 173 Cal. 351, 160 Pac. 150, L. R. A. 1917B, 595, Ann. Cas. 1917E, 312, to which our attention has been directed, arose out of quite a different state of facts; and, if there is anything contained in the opinion therein touching this case, it must be taken as supporting rather than opposing the views above advanced.

It follows that the award of the commission must be held to have been in excess of its jurisdiction, and must therefore be annulled. It is so ordered.

We concur: **WASTE, P. J.; KERRIGAN, J.**

(41 Cal. App. 100)

BROWN et al. v. BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY et al. (Civ. 1967.)

(District Court of Appeal, Third District, California. May 7, 1919.)

1. Master and Servant 🔑219(5)—Injuries to Servants—Assumption of Risk—Falling Walls.

The employé engaged in removing junk from burned premises assumes the risk of injury from the falling of unsupported brick wall.

2. Master and Servant 🔑155(1)—Duty to Warn Servants.

An employer is under no duty to warn employés of an obvious and apparent danger, such as the danger that an unsupported brick wall left on burned premises will fall.

3. Master and Servant 🔑101, 102(2)—Safe Place to Work.

A master is compelled to provide for his servant a place in which to work not absolutely safe but as safe as he can make it under the circumstances, and having used usual or requisite precautions to that end his duty is performed.

4. Master and Servant 🔑318(1) — Independent Contractors—Removal of Junk from Burned Premises.

Contractors to remove junk and débris from burned premises, of which they were given possession with exclusive control of the work, *held* independent contractors, so that the owners were not liable for contractors' negligence causing injury to an employé when an unsupported wall fell.

5. Master and Servant 🔑322—Independent Contractors—Latent Defects—Duty to Warn.

Owners employing independent contractors to remove junk and débris from burned premises are under duty to warn the contractors or their employés of the latent defects in unsupported brick wall left standing.

6. Master and Servant 🔑330(1) — Independent Contractors—Res Ipsa Loquitur.

The maximum of res ipsa loquitur cannot be invoked against owners sued for injuries to an employé of independent contractors having exclusive control of the removal of junk and débris from burned premises on which unsupported brick walls were left standing one of which fell on the employé.

7. Master and Servant 🔑330(1) — Independent Contractors—Burden of Proof.

In an action against owners for the death of an employé of independent contractors to remove débris and junk from burned premises on which unsupported brick walls were left standing, the burden was on plaintiff to show the accident was due to the owners' negligence.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Helena Brown and others against the Board of Trustees of the Leland Stanford Junior University and William G. Stimmel. From judgment of nonsuit, plaintiffs appeal. Affirmed.

J. M. Lee, of Red Bluff, and George R. Freeman and Frank Freeman, both of Willows, for appellants.

McCoy & Gans, of Red Bluff, and Wilson & Wilson, of San Francisco, for respondents.

HART, J. The action was brought by Helena Brown, the widow of Alexander Brown, and by ten children and grandchildren of the deceased, to recover damages for the death of said Alexander Brown, alleged to have been caused by the negligence of the defendants. The corporation, defendant, was the owner of a tract of land in Tehama county known as the "Stanford Vina Ranch," and defendant Stimmel was the superintendent thereof. Upon the close of plaintiff's case the court granted a motion made by defendants for a nonsuit, judgment followed in their favor, and plaintiffs prosecute this appeal from said judgment.

The record discloses the following facts: On and prior to August 18, 1915, there was upon the Stanford Ranch a building known as the winery, which was constructed with brick walls and which contained a large amount of machinery. This building was destroyed by fire on said date, but the brick walls remained standing.

On September 15, 1915, Daniel R. Buckley, a member of the firm of Buckley & Brownstone, tendered to defendant Stimmel, as superintendent of the Stanford Vina Ranch, the following offer, in writing:

"I hereby offer you $700.00 for all the metal and iron in the fermenting house, engine room (except boilers), distillery, and carpenter shop and the scrap pointed out in the yard near the tool washerhouse and the scrap in the boneyard. * * * As part of the consideration I agree to clean up and remove all metal and iron of every kind and description from the ruins of the buildings described above without any expense whatever to you. I agree to remove this iron and metal before October 20, 1915. Sincerely yours, Daniel R. Buckley.

"Accepted and receipt of $100.00 acknowledged. W. G. Stimmel. Supt."

The deceased, Alexander Brown, was employed by Buckley & Brownstone to assist in the work of removing the metal from said building, and on September 24th, while so employed, one of the walls of the building fell upon him and caused his death. No one was with him at the time, the nearest witnesses being from 200 to 300 feet distant.

The complaint alleged that after the fire the brick walls of the winery were left standing unsupported; that they were dangerous and menacing and were known to defendants so to be, but that they failed to guard against such danger; that defendants were careless and negligent in failing to take down such walls or to take measures to protect persons against danger. This negligence, together with the alleged fact that defendants did not warn decedent of the defective and unsafe condition of the walls, "and in carelessly and negligently permitting said decedent in or near the vicinity of the said brick wall," are alleged to have resulted in the death of decedent; and it was further alleged that Buckley, Brownstone, and the decedent had no knowledge of the defective and unsafe condition of said walls.

Arthur R. Thorpe testified that Brown, at the time the wall fell on him, was engaged in removing hoop iron from the fermenting room. T. J. Frost testified that he heard the crash when the wall fell and ran to the scene of the accident; that it was the south wall of the building that had fallen. The defendant W. G. Stimmel, called as a witness by plaintiffs, testified to the same fact, and Mrs. Helena Brown testified as to the injuries received by her husband, his age, etc., and there was also testimony as to the amount decedent was earning as wages.

The motion for nonsuit was properly granted. The evidence shows that the fire which destroyed the distillery or winery building occurred several weeks prior to the date of the accident causing the death of the deceased. As the complaint alleges, the evidence shows that the walls of the building were of brick and that said walls remained standing from and after the fire until the date of the accident. There is no evidence that there was any hidden or concealed defect in the walls by reason of which they or either of them were more likely to fall than from the mere fact that they stood unsupported. In other words, there was, so far as the evidence shows, no other danger in the walls to persons working or employed about them, or who might for any reason have been near or about them, before the accident, than such danger as was plainly obvious to any person of average intelligence and sense, viz. that they stood unsupported. The evidence does not directly show what caused the wall to fall. As to that, the only evidence is the circumstance that the walls remained standing until the work of removing the junk and débris from between them was begun and that the falling of the south wall of the distillery which caused the accident occurred while the said work was in progress. At the time of the accident the deceased had been engaged for several days in removing the junk from the burnt building.

[1] From the facts it is clear that the deceased, as readily as the defendants or any other person, by the exercise of his faculties of sight and judgment in an ordinarily diligent manner, could have observed and known of the danger to life and limb attending employment in and about the unsupported walls of the burnt building, where, at the time of the accident, he was employed. Indeed, no one but a person entirely bereft of all common sense could fail to perceive, upon mere casual observation, the danger in large brick walls standing without any support whatever, and that it would be necessary for one employed about them as the deceased was to exercise proper care for his own safety as against the contingency of their falling or toppling over while he was so employed. It is therefore very plain that the deceased, in taking and entering upon the employment while in the prosecution of which he suffered injury, himself assumed the risk of the employment. The case was not one in which the defendants, if at all liable, were required to instruct or warn the deceased of the danger of the employment to which he had been assigned.

[2] The law casts upon an employer the duty of warning or instructing his employés of the danger of the employment to which he assigns them only when such danger is concealed or hidden, or where inexperienced youths or persons are assigned to employment on, in, or about complicated and naturally dangerous machinery or mechanical contrivances. Where, as here, though, the danger attending the employment is obvious and apparent, no duty to warn or admonish employés of such danger is imposed upon the employer. See 20 Am. & Eng. Ency. of Law, p. 94, and cases cited. Labatt, in his work on Master & Servant, vol. 1, p. 522, states the rule as follows:

> "The failure to give instructions is not culpable when the servant might, by the exercise of ordinary care and attention, have known of the danger, or, as the rule is also expressed, where he had all the means necessary for ascertaining the actual conditions, and there was no concealed danger which could not be discovered."

[3] It is true that the rule is that the master is compelled to provide for his servant a place in which to work, not absolutely safe, which is often an impossibility, but as safe as he can make it under the circumstances, and when the master has used the usual or requisite precautions to that end, his duty to his servants in that respect has been performed. On the other hand, "the law demands that one who is working in a place where he is exposed to danger shall himself exercise his faculties for his own protection, and does not permit a recovery for damages resulting from a neglect of this rule." Kenna v. Central Pac. R. R. Co., 101 Cal. 29, 35 Pac. 333; Brett v. Frank & Co., 153 Cal. 272, 94 Pac. 1051; Mugford v. Atl., Gulf & Pacif. Co., 7 Cal. App. 678, 95 Pac. 674. Labatt, vol. 1, § 332, states the rule as follows:

> "A servant is not in the exercise of ordinary care unless, at each stage of his work, he makes an effective use of his bodily and mental faculties, and observes as attentively as is reasonably possible under the circumstances the condition of the instrumentalities by which his safety may be affected, and the results of their operation by himself or others, in so far as that operation may tend to subject him to danger."

[4] Thus far we have considered the case upon the theory that the defendants were the employers of the deceased or legally sustained that relation towards the deceased. We are, however, clearly of the opinion that Buckley & Brownstone, by whom the deceased was employed, were independent contractors. By their contract with the defendants they agreed, among other things, to remove the junk and débris from the burnt premises. Under the contract, they not only were entitled to and were given possession of the premises pending the completion of the contract, but had full, unrestricted, and unqualified control over the manner in which or the means by which the work of removing the junk was to be done. The defendants had no authority to say or direct how the work should be performed or the mode of doing the work contracted for. "The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for." Green v. Soule, 145 Cal. 96, 99, 78 Pac. 337, 338; 16 Am. & Eng. Ency. of Law [2d Ed.] p. 187; Buckingham v. Commary-Peterson Co., 178 Pac. 318, 325. "An independent contractor is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the

means whereby it is to be accomplished." Green v. Soule, supra.

The extent of the interest of the defendants here in the work which Buckley & Brownstone contracted to perform for them was in having the junk and débris removed from the destroyed buildings. They were not at all interested in how that work was to be done or accomplished by the parties who had undertaken it. As before stated, the means that the latter might employ to carry out their contract constituted a matter of utter indifference to the defendants—indeed, a matter with which they had no authority or right to interfere, unless the means adopted for that purpose were such as might result in the destruction of other property of the defendants.

[5] It results that the defendants could in no event be held liable for any negligence of which the contractors might have been guilty in prosecuting the work under their contract and which negligence might have been the direct cause of injury or damage to a third person or an employé. Of course, while, as the learned trial judge in his written opinion declared, a party has the right to use his own property in any way he sees fit, and the further right, if he desires, to maintain dangerous structures thereon, he must not maintain anything on his property in the nature of a trap which would injure people who are there by his invitation, "or, as the decisions express it, he is not to permit unseen dangers to those who have a right to visit his premises either upon his invitation or on business." And, if this was a case where there existed a latent or hidden defect in the walls fraught with danger to those working or being about and near the walls, or a dangerous defect other than that which was obvious to any person of common intelligence or sense, and of which defect the defendants had knowledge but of which neither the contractors nor the deceased were aware at the time they entered upon the work of removing the junk and débris from the premises, it would undoubtedly have been the duty of the defendants to warn the contractors or the deceased of the added danger following from such latent defect, and failure on their part to do so in such case might justly subject them to liability for any damage resulting from such defect. But, as shown, the record here discloses no such case.

[6] For the reason that Buckley & Brownstone were independent contractors, and at the time of the accident had exclusive control of the thing causing it, the rule of res ipsa loquitur, which counsel for the appellants undertake to invoke in this case, does not apply. That rule, often stated in the decisions, may well be repeated here, viz.:

> "Where defendant owes to plaintiff the duty to use care, and the thing causing the accident is shown to be under the management of defendant or his servants, and the accident is such that in the ordinary course of things does not occur, if those who have the management or control use proper care, the happening of the accident, in the absence of evidence to the contrary, is evidence that it arose from the lack of requisite care." 29 Cyc. 591.

The maxim merely means that when the conditions arise and exist, as indicated in the definition thereof, the burden is cast upon the defendant to explain how the accident happened, and, if he fails to do so, it must be accepted as an established fact that the accident was due to want of proper care on the part of the defendant. And it has been said that—

> "The maxim is in part based upon the consideration that, where the management and control of the thing which has produced the injury is exclusively vested in the defendant, it is within his power to produce evidence of the actual cause that produced the accident which the plaintiff is unable to present." 29 Cyc. 591; Griffen v. Manice, 166 N. Y. 193, 194, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630.

Thus it is very manifest that the rule or maxim of res ipsa loquitur is never applicable where the thing causing the accident is not under the exclusive control or management of the defendant or the party whose negligence it is charged is the efficient or proximate cause of the accident or his servants. There are many California cases so declaring, and a few of them may here be named, viz.: Judson v. Giant Powder Co., 107 Cal. 556, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146; Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 344, 73 Pac. 164; White v. Spreckels, 10 Cal. App. 287, 101 Pac. 920.

In the case at bar the evidence, as shown, discloses that Buckley & Brownstone, the contractors, and not the defendants, had control of the premises or the thing that caused the accident at the time of the accident. To them (the contractors) the burnt premises were turned over for the purpose of enabling them to perform the terms of the contract, and for that purpose they were in their possession and under their exclusive control for and during the time requisite for the completion of the contract.

[7] It follows that, if the defendants could under any view of the case be held liable for the accident and the death as a result thereof of the deceased, it was incumbent upon the plaintiffs to show that the accident was directly due to the negligence of the defendants. This burden they failed to sustain. Indeed, the circumstances, though very meager in a disclosure of the cause of the falling of the wall, tend to show, if anything at all in that particular, that it was occasioned by or through some act or acts of the employés occurring while they were engaged in remov-

ing the junk and débris from the premises. But, however that may be, we are firmly of the opinion that the evidence presented by the plaintiffs utterly failed to show that the defendants were in any sense or measure legally responsible for the unfortunate accident.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

41 Cal. App. 198

STATE NAT. BANK v. KERFOOT et al. (Civ. 2638.)

(District Court of Appeal, Second District, Division 1, California. May 13, 1919.)

LIMITATION OF ACTIONS ⚷183(1)—COMPUTATION OF PERIOD—ABSENCE FROM STATE—SUFFICIENCY OF PLEADINGS.

In an action on a note executed in another state, defendant's plea setting up the two-year statute of limitation under Code Civ. Proc. § 339, was insufficient, where it specifically admitted that defendant did not arrive within the state until a time less than two years before the commencement of the action; absence from the state being excepted in the computation of time under section 351.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the State National Bank against John S. Kerfoot, J. M. Monroe, and another. From a judgment for plaintiff, defendant Monroe appeals. Affirmed.

Morris M. Ferguson, of Los Angeles, for appellant.

Bicksler, Smith & Parke, of Los Angeles, for respondent.

CONREY, P. J. Defendant Monroe's appeal from the judgment is presented upon the judgment roll alone, which consists of an amended complaint, the answer thereto, the findings of fact and conclusions of law, and the judgment. There was no demurrer to said amended complaint. The findings recite the fact that, as alleged by the defendant, the action was commenced on or about October 11, 1913.

The plaintiff is a corporation existing and having its place of business at Oklahoma City, in the state of Oklahoma.

The action was brought to recover the balance unpaid on a promissory note made July 3, 1911, at Oklahoma City, due 90 days after date and payable at plaintiff bank at Oklahoma City. The complaint alleged that appellant, since the note became due, has been absent from the state of California about 30 days. The answer alleged that appellant left the state of Oklahoma during the latter part of October, 1911, and arrived in Los Angeles on or about November 1, 1911. and ever since that time has been within the state of California, except about three weeks in August, 1914 (which three weeks, therefore, were after the commencement of this action). The answer further pleads that the action is barred by the provisions of section 339 of the Code of Civil Procedure, it being an action to recover upon a contract founded upon an instrument in writing executed out of the state. The court found that appellant "has lived within the state of California since November 2, 1911."

The complaint further alleged that by mutual agreement of the parties to the note the time of payment thereof was extended to fall due January 25, 1913. The defendant denied this allegation, but the court found, presumably upon sufficient evidence, that, by arrangement made between the plaintiff and appellant's joint co-obligors, said co-obligors executed to defendant their promissory note for the unpaid balance of the principal note as collateral to said principal note, "in consideration that plaintiff extended the time of payment on the note sued upon herein to certain definite dates, which was done and executed."

We think that the questions argued by counsel concerning the extension of the time of the maturity of the note need not be discussed on the decision of this appeal, since at all events the note sued on was due when this action was commenced, and we are of the opinion that upon the facts admitted by appellant in his answer the statute of limitations had not run in his favor on the obligation in question. For the action was commenced within less than two years after he arrived within the state of California. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term limited by the statute, after his return to the state. Code Civ. Proc. § 351. In Dougall v. Schulenberg, 101 Cal. 154, 35 Pac. 635, the court said:

> "The defense of the statute of limitations must be specially pleaded, otherwise a complaint is good although it shows on its face that the cause of action is barred. If therefore it was necessary for the plaintiff to allege that his case was within some exception to the statute of limitations, because it was presumably barred, it was only necessary for him to do so to prevent a demurrer on that ground. It was still necessary for the defendant to plead the statute to raise any issue upon that subject. * * * This plea is equivalent to saying that plaintiff's action was not brought within two years after the cause of action accrued; or, perhaps, in this case, to the statement that the defendant had been in this state for more than two years after the cause of action accrued and before the action was commenced."

So here, defendant's plea of the statute of limitations, when considered separately from the other allegations of his answer, is equivalent to a statement that the defendant was in this state for more than two years after the cause of action accrued. But in this case that plea is qualified by the specific admission that appellant did not arrive within the state until the 1st day of November, 1911, which was less than two years before the commencement of the action.

In view of the facts above stated, we find no sufficient reason for sustaining defendant's appeal, which he argued only with reference to the matters above noted, and, which he bases solely upon the ground "that the findings do not support the judgment and that there is a failure to find upon a material issue."

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

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41 Cal. App. 146

PEOPLE v. CABALLERO. (Cr. 647.)

(District Court of Appeal, Second District, Division 1, California. May 12, 1919.)

1. Homicide ⟹228(1)—Sufficiency of Evidence—Corpus Delicti.

In murder trial, evidence tending to show that the body found in the débris of a burned building was the body of the alleged victim, and that he was killed by a shot fired by accused or one of his confederates, *held* sufficient proof of corpus delicti.

2. Criminal Law ⟹543(1)—Depositions—Admissibility in Evidence.

In prosecution for homicide, deposition of a witness for the state, consisting of testimony taken at the preliminary hearing before the committing magistrate, *held* properly introduced in evidence under Pen. Code, § 686, subd. 3, where it was shown that such witness was without the state in the United States military service; the state not being bound to produce him, and there being no process by which his attendance could have been compelled.

3. Criminal Law ⟹232 — Preliminary Hearing—Rights of Accused—Counsel.

Where the committing magistrate allowed one accused of murder a reasonable time to send for a counsel and postponed the examination for that purpose, in full compliance with Pen. Code, § 859, and no counsel then appeared, his proceeding with the hearing, under Pen. Code, § 860, without waiting further, was not abuse of discretion.

4. Criminal Law ⟹823(2)—Instructions—Comment on Facts — Cure by Other Instructions.

In murder trial, instruction commencing with the phrase, "The commission of the homicide by defendant being proved," which instruction was withdrawn when the jury was recalled, *held* not erroneous, as being a comment on the facts in violation of Const. art. 6, § 19, when considered in connection with other instructions given, irrespective of whether the court could thus cure an erroneous instruction.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Victorio Caballero was convicted of murder, and from the judgment and an order denying his motion for a new trial he appeals. Affirmed.

E. F. Du Fresne, of Manila, P. I., for appellant.

U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

CONREY, P. J. The defendant was convicted of the crime of murder and sentenced to imprisonment for life. He appeals from the judgment and from an order denying his motion for a new trial.

The court received in evidence the testimony of one W. A. Wiedenbeck, taken at the preliminary examination before the magistrate; it appearing that, at the time of the trial in the superior court, Wiedenbeck was absent from the state of California, being at that time at Camp Lewis, Wash., in the service of the government of the United States. It was shown by this testimony that on the 14th day of March, 1914, Frank Volney Johnston, the man alleged to have been killed at that time, was the manager of a store at Tecate, in San Diego county. The witness was assistant postmaster and clerk in the store. A post office was located in the store. Between 8 o'clock and half past 8 o'clock on the evening of that day, while Johnston was sitting in the post office and the witness was in the store, three men came to the door, and one of them fired a shot at the witness. Two of these men threw down the witness and tied his arms behind him, while another ran over to the post office and "covered" Johnston. When the two men had tied the witness, they ran out, and as they ran out there was one more shot fired. Then they came back and took the witness to the post office, where the safe was, and demanded that he open the safe, which, however, he did not do. During these proceedings, the witness recognized the defendant by his eyes and by his voice. The men were masked with bandanna handkerchiefs.

There was another witness who approached the store after the shots were fired and saw a man robbing the till in the store, whom he recognized as the defendant. A few minutes later the store was found to be on fire, and it was destroyed by the fire. In the débris of the store after the fire there were found the remains of a human body. The head and limbs were burned off so that

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the body could not be recognized as that of any known person. Through the heart there was a hole which the evidence tends to show was produced by a bullet. Wiedenbeck testified that he never saw Johnston again after the fire; nor is there any witness who claims to have seen him alive after that time.

[1] Appellant claims that the verdict is contrary to law, in that there was not sufficient proof of the corpus delicti. He claims that there is no proof that Johnston, the person alleged to have been murdered, was actually dead. In our opinion, there is no merit in this contention. The surrounding circumstances shown by the evidence, together with the direct testimony of Wiedenbeck to which we have referred, strongly tend to prove that the dead body found after the fire was the body of Johnston; that he was killed by a pistol shot; and that the shot was fired from a pistol in the hands of the defendant or of one of his two confederates at the time and place in question.

[2] Appellant contends that the court erred in overruling his objection to the introduction in evidence of the deposition of the witness Wiedenbeck. It is provided by the Penal Code, § 686, subd. 3, that—

> "Where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness; * * * the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the state."

[3] When the district attorney offered in evidence the testimony of Wiedenbeck taken at the preliminary examination, counsel for defendant made his objection as follows:

> "I wish to enter my objection to the introduction of that testimony on the ground that it is incompetent, and in violation of the constitutional rights of this defendant. The defendant was brought before the justice of the peace, and the defendant demanded the services of counsel, and the court denied defendant the services of counsel and went ahead with the preliminary examination."

The proceedings before the justice of the peace were shown to be as follows: On July 2, 1918, the charge against the defendant being called for preliminary examination before the justice of the peace, a shorthand reporter and an interpreter in the Spanish language were duly appointed and qualified. The complaint was read and was translated to the defendant in Spanish by the interpreter. The court asked defendant if he had an attorney, and defendant replied, "My cousin will come to my aid and secure an attorney for me." The court informed the defendant that if defendant had an attorney he was entitled to have him attend at all stages of the proceedings and that defendant was entitled to have a peace officer deliver a message to any attorney he might designate, free of charge. Thereupon the hearing was continued until the 15th day of July, 1918. At that time the defendant appeared unaccompanied by counsel, and informed the court that he was waiting for attorney Valenzuela, who had told defendant that he "had to be here." The court replied that Valenzuela knew that the case was set, as he had examined the record, and knew that the case was set for 2 o'clock; whereas it was now half past 2. The court thereupon directed that the hearing proceed. It was under these circumstances and at that hearing that the testimony of Wiedenbeck was taken. The defendant, being asked if he wanted to ask the witness any questions, replied that he had to have Valenzuela so that he could ask the questions. The result was that no cross-examination was had. In addition to the foregoing facts shown by the record of testimony and proceedings before the committing magistrate, the district attorney testified that at said time of the preliminary examination the defendant claimed that Mr. Valenzuela was his attorney. "We got Mr. Valenzuela; it was some time after half past 2, about the time of the taking up of the preliminary examination. Mr. Valenzuela came down and said he was not going to represent him, and would not represent him; he wanted him to, but he was not willing to do it;" that the defendant did not ask to have any other counsel sent for on that occasion.

The magistrate allowed the defendant a reasonable time to send for counsel and postponed the examination for that purpose, in full compliance with the requirements of section 859 of the Penal Code. Section 860 of that Code says:

> "If the defendant requires the aid of counsel, the magistrate must, immediately after the appearance of counsel, or if, after waiting a reasonable time therefor, none appears, proceed to examine the case."

We are unable to say that the committing magistrate abused the discretion vested in him when he determined that he had waited a reasonable time for the appearance of counsel for the defendant at that hearing.

The case is in very definite contrast with that of People v. Napthaly, 105 Cal. 641, 39 Pac. 29, where it was held that the court erred in refusing to set aside an information upon the ground that the defendant had not been legally committed by any magistrate before the filing of the information; it having been made to appear that at the preliminary examination before the magistrate the defendant was not represented by any counsel and that the magistrate refused to continue the examination for the purpose of enabling him to employ counsel, and entirely failed to inform the defendant of his rights as required by the provisions of the Penal Code. Counsel for appellant claims that due diligence was not exercised to produce the witness Wiedenbeck at the trial of this case. The obvious reply is that, when it was shown that Wiedenbeck was without the state of California, by showing he was at that time at Camp Lewis in the state of Washington, the district attorney was discharged from further obligation to produce the witness at the trial, since there was no legal process by which he could have compelled such attendance. We hold therefore that sufficient foundation was established for the introduction in evidence of Wiedenbeck's testimony at the preliminary examination, and that the court did not err in overruling defendant's objection thereto.

[4] An instruction, which we will call the eighteenth instruction, to the jury was as follows:

> "You are further instructed that, upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation or that justify or that excuse it devolves upon him unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter or that the defendant was justifiable or excusable."

Appellant points out that this instruction was wholly inapplicable and was not based on any fact or issue in the case. This criticism is justified by the fact that unquestionably under the evidence either the defendant was guilty of murder in the first degree or he was not guilty at all, and his sole contention was that he had not committed the crime and was not present when the acts were perpetrated. Evidently recognizing this as the true state of the case, the court, at a time when the jury had been recalled at its request for another purpose, withdrew that instruction and directed that the jury "treat that instruction as if it had never been given; give it no consideration whatever in seeking to reach a verdict."

Appellant further criticizes the instruction as being an indirect comment on the facts, in violation of section 19 of article 6 of the state Constitution, which provides:

> "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law."

The instruction given is in the language of section 1105 of the Penal Code. In People v. Grill, 151 Cal. 592, 91 Pac. 515, where the same instruction was given, it was claimed by appellant that the phrase, "the commission of the homicide by the defendant being proved," constituted an intimation or statement by the court that the fact that the defendant intentionally fired the shot had been proven. But the court said that the signification of the clause was the same as if the sentence began thus: "When, upon a trial for murder, the commission of the homicide by the defendant has been proved," etc. It was held that thus understood the clause did not constitute a statement of fact by the court. The case was there distinguished from People v. Tapia, 131 Cal. 647, 63 Pac. 1001, which is relied upon by appellant here. In People v. Grill, supra, the Supreme Court further noted that in other instructions the jury had been told that they were the exclusive judges of the facts, and that the prosecution must show defendant's guilt and every fact essential to a conviction beyond a reasonable doubt, together with other proper instructions given. Whereupon the Supreme Court said:

> "In view of these instructions, it would be impossible for any jury of ordinary intelligence to have supposed that the instruction complained of was intended to state to them that the fact that the defendant had committed the homicide had been proven."

So in the case at bar the court clearly instructed the jury that it was their exclusive province to determine the facts from the evidence; that with questions of fact, the weight of evidence, and the credit to be given to witnesses, the court had nothing to do; and that the burden was upon the prosecution to establish defendant's guilt beyond a reasonable doubt. We are of the opinion that, even if the court could not cure a supposed erroneous instruction by withdrawing the same when the jury was recalled (as appellant here contends, but which we do not concede), the instruction itself, when reasonably understood and interpreted in connection with the other instructions given, was not erroneous, and the giving thereof would not constitute ground for reversal of the judgment. In People v. Wilt, 173 Cal. 477, 160 Pac. 561, referring to an instruction like that in question here and containing the phrase "the commission of the homicide by the defendant being proved," the Supreme Court said, "Ordinarily, this language could not fairly be held to have any such signification" as that the court was intimating an opinion or belief that the homicide had been proved.

The judgment and order are affirmed.

We concur: SHAW, J.; JAMES, J.

41 Cal. App. 192

HARPHAM v. BOARD OF SUP'RS OF VENTURA COUNTY. (Civ. 2831.)

(District Court of Appeal, Second District, Division 1, California. May 13, 1919.)

1. Certiorari 🔑33(3)—Grounds—Acts of Board of Supervisors.

Where the board of supervisors exceeded its jurisdiction in determining that a petition by more than ten landowners asking for a storm water district, which had been filed, was a petition under Protection District Act 1895, as amended, and in naming for the hearing of the matter a day prior to any time within which under the statute the matter could be heard, certiorari lies at the instance of any one injured thereby.

2. Levees 🔑5 — Quo Warranto 🔑16 — Protection Districts—Nature of Organization.

A protection district organized under St. 1895, p. 247, as amended, having no corporate existence other than its name, is not a de facto corporation, and therefore a proceeding in the nature of quo warranto brought by the Attorney General under Code Civ. Proc. § 803, does not lie to test its right of existence.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Application for certiorari by G. E. Harpham to review certain proceedings of the Board of Supervisors of Ventura County, whereby a certain protection district was created. From action of the superior court in sustaining defendants' demurrer and entering judgment of dismissal upon motion of defendants, plaintiff appeals. Reversed.

G. E. Harpham, of Los Angeles, in pro. per. Don G. Bowker, Dist. Atty., and Robert M. Sheridan, Deputy Dist. Atty., both of Ventura, for respondent.

CONREY, P. J. The plaintiff made application to the superior court of Ventura county for a writ of review directed to certain proceedings whereby the board of supervisors of that county attempted to create a certain protection district known as "Sespe Protection District of Ventura County." The defendants demurred to the petition and moved for dismissal of the action. The demurrer was based upon the ground that the petition did not state facts sufficient to constitute a cause of action, and that the plaintiff did not have legal capacity to sue. The motion was made upon the ground that the petitioner "has not legal capacity to sue, in this, that plaintiff is an individual and is attacking the validity of a public or quasi public corporation, and that the legal existence of same cannot be questioned by a private individual on certiorari, but only by the state of California on quo warranto proceedings." The motion was made upon the petition and upon an affidavit setting forth various proceedings had in performing the work of the supposed Sespe protection district during the two years intervening after the district was declared to be formed and before the commencement of this action. The court sustained the demurrer without leave to amend and granted defendants' motion to dismiss and accordingly entered judgment of dismissal. The plaintiff appeals from the judgment.

The petition shows that the only petition filed before the board of supervisors was a petition signed by more than ten owners of land in a certain district in that petition described, asking for the formation of a storm water district in conformity with a certain act approved March 13, 1909 (St. 1909, p. 339), amended June 6, 1913 (St. 1913, p. 504). That petition was presented to the board of supervisors on April 7, 1916. Thereupon, on the same day, the board of supervisors passed a resolution of intention reciting that a petition had been presented praying for the formation of a protection district in accordance with an act of the Legislature approved March 27, 1895, and acts amendatory thereto, and thereupon the board by resolution declared its intention to form a protection district under said act of 1895 (Stats. 1895, p. 248 et seq.), which act has been amended at several subsequent sessions of the Legislature. Stats. 1897, p. 219; Stats. 1903, p. 328; Stats. 1909, p. 809; Stats. 1911, p. 446; Stats. 1915, p. 1493; Stats. 1917, p. 1219. The law requires that the board by its resolution of intention shall fix a time and place for the hearing of the matter, not less than 30 days after the passage of the resolution. It is only after such notice and hearing, and due disposition of the objections, if any are made, that the board may declare the protection district formed. In this case the petition shows that in its resolution of intention the board, in fixing a time for the hearing, named a day only 28 days subsequent to the passage of the resolution, and the notice was given for that day.

[1] It is apparent that, if the plaintiff is entitled to maintain a proceeding of this nature, the demurrer to his petition should have been overruled, since it states facts showing that the board of supervisors did exceed its jurisdiction in determining that the petition which had been filed was a petition under the Protection District Act of 1895, and further exceeded its jurisdiction by naming for the hearing of the matter a day prior to any time within which, under the statute, the matter could be brought to a hearing.

[2] Respondents contend that upon the showing made by them the Sespe protection district is a de facto corporation, and that its right to exist can only be determined by proceedings in the nature of quo warranto,

which proceedings must be brought by the Attorney General in the name of the people of the state. In making this contention respondents must depend upon the provisions of section 803, Code of Civil Procedure, and that part thereof which authorizes the bringing of the action by the Attorney General "against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state." The contention of respondents is answered by the fact that a protection district organized under said law of 1895 is not a public corporation. It was so held in Pasadena Park Improvement Co. v. Lelande, 175 Cal. 511, 166 Pac. 341, where the point is decided and the reasons fully stated. The court declared that the powers conferred by the act are essentially like those conferred upon the city councils and boards of trustees to create assessment districts for the improvement of streets. Such a district has no semblance of corporate existence other than that it has a name. The name thus given is nothing more than a convenient substitute for a description of the lands subject to assessment. The "protection district" exercises no corporate franchise and is in no particular a self-governing body. It has no life, no organs, no functions. A proceeding in the nature of quo warranto would not lie to test its right of existence. This being so, and since the matters complained of by petitioner involve an excess of jurisdiction by the board of supervisors in the attempt to perform certain functions of a judicial nature, certiorari will lie at the instance of a person who, like the plaintiff, has been injuriously affected thereby.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

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41 Cal. App. 195

HOCKERSTON v. HOCKERSTON.
(Civ. 2653.)

(District Court of Appeal, Second District, Division 1, California. May 13, 1919.)

1. Appeal and Error 🔑2, 870(6)—Appealable Orders.

Where order denying motion for new trial was entered on the 17th day of August, 1915, appeal from the order should be dismissed in view of Code Civ. Proc. § 963, which took effect prior to such date, but the order may be reviewed on appeal from the judgment taken within due time, in view of section 956.

2. Divorce 🔑184(12)—Excluding Corroborative Testimony—Harmless Error.

Where plaintiff's counsel, in his offer to produce evidence additional to plaintiff's testimony, stated the facts which he offered to prove and his statement contained no facts in addition to those already stated by plaintiff herself, error, if any, in not allowing plaintiff to present corroborating testimony required by Civ. Code, § 130, in divorce suits was harmless, if the facts to which plaintiff had testified were insufficient to establish her cause of action for divorce.

3. Divorce 🔑27(6)—"Extreme Cruelty."

Striking wife in sudden quarrel was not a deliberate act or cause of action on the part of defendant husband, whereby he sought to or did become guilty of extreme cruelty within the meaning of the statute authorizing a divorce.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Extreme Cruelty.]

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action for divorce by Marguerite Hockerston against Frederick Hockerston. Judgment denying divorce, and plaintiff appeals. Affirmed.

Charles M. Ackerman, of Los Angeles, for appellant.

CONREY, P. J. This is an action for divorce wherein the defendant did not appear; and the court, after hearing the evidence, entered judgment denying the application for a divorce. The plaintiff has appealed from the judgment and from an order denying her motion for a new trial.

[1] The order denying the motion for a new trial was entered on the 17th day of August, 1915. The amendment of section 963, Code of Civil Procedure, taking away the right of appeal from an order refusing such a motion, took effect on the 8th day of August, 1915. It follows that the appeal from that order should be dismissed, but the order may be reviewed on appeal from the judgment, taken within due time. Code Civ. Proc. § 956; Hirsch v. All Persons, 173 Cal. 268, 159 Pac. 712.

The complaint charged personal violence committed by the defendant against the plaintiff on one single stated occasion, and alleged that by reason thereof grievous mental suffering, anguish, and distress, and grievous physical suffering and pain, resulted to the plaintiff. The facts shown by the plaintiff's testimony were as follows: On the evening of the stated day the plaintiff came home after the defendant had arrived there. Defendant inquired why the plaintiff was not at home in time. She informed him that she had been sent for to get their deed to the property which they had purchased. The defendant said that he would call that man up and tell him he had no business calling her up at that time of day. He took up a desk telephone and attempted to call the party. The plaintiff attempted to interfere. "He said he was going to call them up and cuss them out and I would not let him phone. * * * I just held my finger on the clicker while he was talking to them. * * * And he jerked it loose from me and struck me with it." At the end of the encounter "there was the print of his hand upon my shoulder, and my hand was bleeding and my finger was black where he jerked out the knuckle, and I had several bruises on my neck. Q. Do you know how many times he struck you on that occasion? A. No, I hardly do. * * * He struck me with his fist. I do not know whether it was more than once or not, but I know I fell the three times. * * * I suppose he hit me or I would not have fallen. The most I remember was getting up after the fall. * * * He was drinking or he would not have done so. He had been drinking just enough to make him excited."

At the close of the plaintiff's testimony, and without waiting for other evidence, the court expressed the opinion that the plaintiff should go back and live with the defendant, and announced that "the decree is denied." Plaintiff's attorney inquired if the court would hear any corroboration. The court replied:

> "If you are only going to prove this same circumstance, there is no occasion to waste time on it, because there is no extreme cruelty shown in that."

Plaintiff's attorney had other witnesses present in court, but admitted that he offered to do nothing more than to corroborate the testimony of the plaintiff.

[2] In view of the fact that a divorce may not be granted upon the uncorroborated admissions or testimony of the parties (Civ. Code, § 130), it would generally be error for the court to refuse to allow the plaintiff opportunity to present corroborating evidence. In this case, however, the plaintiff's counsel, in his offer to produce evidence additional to the plaintiff's testimony, stated the facts which he offered to prove by the witnesses, and his statement contains no facts in addition to those already stated by the plaintiff herself. If, therefore, the court erred at all, the error was harmless, if the facts to which the plaintiff had testified were not sufficient to establish the plaintiff's cause of action. Let it be assumed that other witnesses had testified to those same facts, and the result of the case would not be changed.

[3] It should further be noted that, notwithstanding the judge's first announcement that "the decree is denied," the court did not treat the case as closed at that time. On the contrary, plaintiff's attorney was permitted to make his offer of further proof, and two or three additional questions were asked of the plaintiff and answered by her. The court then again announced its denial of a decree of divorce. Assuming full proof and ample corroboration of the facts testified to by the plaintiff, those facts do not show any deliberate act or course of action on the part of the defendant whereby he sought to or did become guilty of extreme cruelty within the meaning of the statute authorizing divorces upon the ground of extreme cruelty. So far as the evidence shows, the defendant may have been usually affectionate and considerate in every way toward the plaintiff, except in the instance of this sudden quarrel, wherein it seems clear that the acts of both parties to the altercation were done under the excitement of a sudden and unpremeditated disagreement. Admitting that the defendant's acts were wrong and unjustifiable, the circumstances were not such that, standing separate and alone, as they do, they constituted a cause of action for divorce. Some latitude for the exercise of discretion is permitted to the court in determining what constitutes extreme cruelty, and in this instance that discretion was not abused by the court.

The appeal from the order is dismissed. The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

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41 Cal. App. 240

MITCHELL v. EXCELSIOR WATER & MINING CO. (Civ. 1989.)

(District Court of Appeal, Third District, California. May 20, 1919.)

1. WITNESSES ⚷269(8)—CROSS-EXAMINATION.

In an action for loss of plaintiff's cattle through the failure of defendant with whom they were pastured to furnish feed and shelter, in view of the fact that plaintiff on direct examination asked defendant's stock foreman how many cattle were kept on defendant's ranges at the time referred to, defendant's questions to the foreman as to whether there was not ample feed were pertinent cross-examination.

2. EVIDENCE ⚷481(1)—OPINION—TESTIMONY OF STOCK FOREMAN.

In an action for loss of plaintiff's stock on account of defendant's negligence in failing to supply proper feed and shelter, questions by defendant to its stock foreman called on direct examination by plaintiff *held* not improper as seeking to elicit expert testimony, having to do only with whether defendant's range was adequate to feed the cattle on it, and not involving scientific inquiries.

3. APPEAL AND ERROR ⚷1058(1)—HARMLESS ERROR—EVIDENCE.

In an action for death of plaintiff's stock through the negligence of defendant in failing to furnish proper feed and shelter, exclusion of evidence of defendant's foreman as to the sufficiency of defendant's range feed to take care of the cattle *held* harmless to defendant, in view of the evidence received.

4. Trial 🔑47(2)—Proof of Defense—Objection to Testimony.

In an action for the death of plaintiff's stock through the negligence of defendant in failing to furnish feed and shelter, where defendant's foreman was called as a witness by plaintiff, who objected when defendant attempted to elicit from him the sufficiency of defendant's range pasture to take care of the stock, the objection being that the questions were not proper cross-examination, and defendant made no further effort to prove the ranges were not overstocked, defendant was not improperly kept from making proof of such defense.

5. Appeal and Error 🔑1001(1)—Review—Verdict.

Whenever the question is raised on appeal as to the side on which the evidence preponderates, and there is testimony supporting the conclusion of a jury, which testimony is not inherently improbable, the answer always must be that the jury has conclusively decided the question.

6. Animals 🔑23(2)—Grazing Live Stock—Duty of Depositary — Sufficiency of Evidence.

Evidence *held* sufficient to sustain finding for plaintiff that defendant did not supply his cattle with sufficient feed and shelter in performance of the duty of an agister or a depositary of living animals stipulated by Civ. Code, § 1834.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by C. C. Mitchell against the Excelsior Water & Mining Company, a corporation. From judgment for plaintiff, defendant appeals. Affirmed.

C. F. Metteer, of Sacramento, and W. H. Carlin, of Marysville, for appellant.

James Snell, of Grass Valley, and Edward B. Stanwood, of Marysville, for respondent.

HART, J. Plaintiff in his complaint alleged, in effect, that, in the fall of 1916, he delivered 188 head of horned cattle and one horse to defendant upon defendant's range near Smartsville, in the county of Yuba, for the purpose of being pastured during the winter of 1916–17; that, after receipt of the animals, defendant negligently and carelessly failed to furnish them with proper food and shelter, and, because thereof, the horse and 59 head of cattle died, and others of the animals were lessened in value, and as a result thereof plaintiff was damaged in the sum of $7,400.

Defendant by its answer admitted the receipt of certain animals from the plaintiff for the purpose of pasturage for a consideration, but denied any negligence or carelessness on its part, denied any damage suffered by plaintiff, and denied that any of the animals died because of any carelessness, negligence, or want of proper care on defendant's part.

The cause was tried before a jury, which rendered its verdict in favor of plaintiff for the sum of $2,000. Judgment was entered on the verdict, defendant made a motion for a new trial, which was denied, and prosecutes this appeal from the judgment.

Appellant concedes that there was a conflict in the testimony which the jury resolved in favor of plaintiff, and concedes that the cattle which died were undoubtedly worth the amount found by the jury.

The only question presented for our decision is as to certain rulings of the court in sustaining objections of plaintiff to two questions asked by defendant on cross-examination of R. E. Colling, stock foreman for defendant, who was called as a witness on behalf of plaintiff. The record on this point is as follows:

"Defendant's Counsel: Q. Mr. Colling, you have been asked about the number, taken under ordinary conditions, that range during the winter of 1916–17 was not overstocked, was it?

"Mr. Snell: The witness is not qualified to answer that.

"The Court: Make your objection.

"Mr. Snell: We object on the ground there is no foundation for the introduction of this evidence, and it is not proper cross-examination.

"The Court: Sustained.

"Mr. Carlin: Q. Is it not a fact that there was ample feed on that range to feed all that stock?

"Mr. Snell: We object on the ground that it is not proper cross-examination, and the proper foundation has not been laid for the introduction of this evidence.

"The Court: Sustained."

From the testimony introduced by plaintiff, it appears: That, for several years prior to the year 1916, he pastured stock on the ranges of the defendant. That, in the months of October and November of the year 1916, he sent to the defendant's ranges certain numbers of cattle for the purpose of pasturing them thereon, under a previously made agreement with the defendant. These cattle were taken to said ranges for the plaintiff by one Josiah Sherman, who testified that, on taking said stock to said ranges, he said to one R. E. Colling, stock foreman of the defendant, that he (Colling, acting for defendant) was to feed the cattle in case it became necessary to do so; that is to say, the defendant was to feed the cattle hay if the pasturage became short and inadequate for that purpose. That he "asked him (Colling) what the charge would be if the cattle were fed off his hay; he said 10 cents a day." Sherman then said to Colling:

"Any cattle it is necessary to feed, give it to them and present your bill to Mr. Mitchell. That was my instructions."

It further appears from the testimony that on the defendant's ranges in the fall of 1916 there were pastured approximately 1,600 head of cattle. The ranges embraced, approximately, 3,500 acres of range lands, of which something more than 400 acres were irrigated. The defendant also laid in an unusually large supply of hay in 1916 for the purpose of meeting the contingency of a cold and severe winter, the result of which, if it happened, would be a shortage of pasturage followed by the inadequacy of the range feed to supply the stock pastured thereon. It happened that, with the arrival of the first of the winter months, cold north winds prevailed, and they were followed by cold rains, sleet, and frosty weather, which continued into the month of February, 1917, with the result that the ranges became comparatively barren of feed or so short in that particular as to render them wholly insufficient to feed properly the large number of cattle then grazing thereon; the defendant being thereupon compelled to feed the stock from the hay with which it had provided itself for the purpose of meeting such a situation.

There is testimony that plaintiff's cattle, when delivered to Colling on the defendant's ranges, were in excellent condition; that later on, after having been on the ranges several weeks, they lost weight and were in bad condition; and that a number of them died. There is ample testimony to support the claim of the plaintiff, and the implied finding of the jury, that the death of the plaintiff's cattle was due to want of sufficient feed or nourishment.

The record further shows that, under date of January 1, 1917, Colling wrote as follows to plaintiff:

> "Dear Sir: Just a few lines to notify you about your stock. I told your boy to tell you, but I thought he might have overlooked it. You have 3 dead ones now and if there isn't something done in the near future you will have a heavy loss for some of them are getting very thin and need hay very bad now and we haven't but very little hay and don't know whether we can get any more or not. Hoping to hear from you by return mail, I remain,
> "Very respectfully, R. E. Colling."

To the above letter the plaintiff replied, under date of January 3, 1917, and, among other things, said in his letter:

> "Anything that needs hay, feed them. That is the way they have always been taken care of down there. If I had knew you had no hay earlier in the season, I would have made a different arrangement. * * *"

Under date of January 4, 1917, the plaintiff addressed to said R. E. Colling a letter in the following language:

> "Do not let my cattle die for want of feed, as I sent them down to be well fed and taken care of; fed them, if necessary."

On February 1, 1917, the defendant, through its secretary R. Beatty, sent to the plaintiff a letter of which the following is a copy:

> "You are hereby notified to remove your stock placed on the lands of the Excelsior Water & Mining Company, for the reason that the pasture is insufficient, owing to unusual cold weather for the past two months."

As supporting their contention that the court below committed prejudicial error in making the rulings of which they here complain and to which reference is hereinabove made, counsel for the appellant, in their brief, say:

> "Plaintiff made Mr. Colling his witness, and throughout his testimony the court will see that persistent effort was made to show that the ranges were in fact overstocked. He was shown to be fully qualified as a witness to testify to the condition of the range. He was the range foreman in charge of all the stock; had an experience of more than five years in such work, and over one year on these very ranges. He knew the ranges thoroughly, knew the number of stock on the ranges, and had ample experience to qualify him to testify as to the capacity of the ranges to feed the stock placed therein during the pasturage or feeding season."

[1, 2] We are inclined to think that, inasmuch as the plaintiff, on direct examination, asked Colling how many cattle were kept on the defendant's ranges at the time referred to, the questions constituted pertinent cross-examination. Nor do we think the questions called for expert testimony, within the strict legal concept of that phrase. While, of course, they invited the expression by the witness of his opinion of the matter to which they were addressed, they did not involve scientific inquiries or the elucidation of a subject beyond the competency of ordinary witnesses who have means and habits of observation. Colling's practical experience of several years as an agister or a foreman of a stock-grazing range undoubtedly qualified him to express a satisfactory opinion as to whether the ranges were overstocked at the times mentioned—that is, whether more cattle were taken and kept on the defendant's range lands than they, with respect to feed, were capable of accommodating in a sufficient or proper way.

[3, 4] But, in view of the evidence received, the rulings foreclosing answers to the questions were without prejudice. As shown, both the defendant and its foreman stated in letters to the plaintiff that there was not sufficient herbage produced on the ranges to supply his cattle with feed necessary to their proper sustenance. It was for that reason that the defendant notified the plaintiff to remove his stock from the ranges. It was so declared in express language in the letters from defendant and its agents to the

plaintiff. The letter to the plaintiff from Colling, dated January 1, 1917, stated that some of the latter's stock had already died. As seen, there is testimony that the cattle of plaintiff, when taken to the defendant's ranges, were in robust physical condition, but that they began to fall off in weight within a few weeks after they were placed thereon. Upon this testimony, and that furnished by the letters mentioned, the jury could reasonably and justly have determined, and undoubtedly it did thus conclude, that the cause of the death of plaintiff's cattle was the insufficiency or shortness of the feed on the defendant's ranges. If the witness had been permitted to answer the questions and had said that the ranges were not overstocked, the fact would still have remained that the defendant expressly admitted that, whatever the cause, there was insufficient feed upon the ranges to afford sufficient nourishment for the cattle. But there is still another consideration to which attention may well be directed in this connection. The defendant, in making its defense, was entitled to show, if it could, that the ranges were not overstocked, that there was sufficient feed growing on the ranges to supply in proper measure all the cattle grazing on said ranges, and that the death of certain of the cattle of the plaintiff was due to some other cause than that of starvation or want of sufficient feed. The objection to the questions referred to was not upon the ground that they called for immaterial or irrelevant testimony, nor would such ground of objection have been tenable. There was therefore nothing in the court's rulings indicating or intimating that the defendant would not have been permitted to make or to attempt to make the proof suggested. But the defendant, in its defense, made no effort to prove that the ranges were not overstocked or that there was no greater number of cattle grazing on the ranges than the feed thereon would accommodate or supply. The witness Colling, defendant's foreman, to whom the above questions were propounded by defendant when he was testifying as plaintiff's witness, was called by the defendant as a witness, but was then asked no question as to that matter. The subject-matter of the questions was peculiarly one of defense, and it would seem that defendant has little ground of complaint when, having been refused permission by the court to go into it on cross-examination of plaintiff's witness, it failed even to attempt to bring it in as a matter of defense, to which it was pertinent and appropriate.

[5] While the points above considered are conceded by counsel for defendant to present the only questions of importance here, and, indeed, in one part of their brief admit that there is a conflict in the evidence which the jury has determined against defendant, yet, nevertheless, they declare in another part of their brief that the preponderance of the evidence was in favor of appellant. Whenever the question is raised on appeal as to the side on which the evidence preponderates, and there is testimony supporting the conclusion of a jury or the findings of a trial court, which testimony is not inherently improbable, the answer must always be that the jury or the trial court has conclusively decided the question. In other words, the preponderance of the evidence in such case must always be held by a reviewing court to be with the victorious party in the court below, for the jury or the trial court has so found after subjecting all the testimony received before it to the tests whereby only may the credence and the weight to which it is justly entitled be determined. In this case, as has been herein already shown, the plaintiff and his employé, Sherman, testified that, upon the delivery of the former's cattle to defendant's ranges, said stock was in a strong and healthy physical condition, and, furthermore, declared that they, at the same time, had or entered into an express understanding or agreement with the defendant or its duly authorized agent that, in case there became, for any reason, a shortage of growing feed on the ranges, the defendant would furnish and feed plaintiff's stock with hay. The jury was apparently justified in finding, as impliedly it did find, that the defendant did not keep this agreement, and that, as a consequence, there being a shortage of growing feed on the ranges properly to feed the stock, a number of the cattle of plaintiff died from starvation or lack of sufficient or proper nourishment.

[6] The law provides (Civ. Code, § 1834) that "a depositary of living animals must provide them with suitable food and shelter, and treat them kindly." In this case the verdict implies that the defendant's conduct in the matter of the treatment of the plaintiff's cattle, or at least a portion of them, failed to measure up to the obligation imposed upon an agister or a depositary of living animals by said section, and we think, as before stated, that there is ample testimony disclosed by this record which supports the conclusion of the jury.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

41 Cal. App. 139

MONROE v. PLEASANTS et al. (Civ. 1965.)

(District Court of Appeal, Third District, California. May 10, 1919. Rehearing Denied by Supreme Court July 7, 1919.)

1. Trial ⟹397(4)—Findings—Necessity — Absence of Evidence.

There being no evidence of taxes being assessed, there is no call for finding thereon relative to the question of adverse possession.

2. Adverse Possession ⟹89—Payment of Taxes.

The requirement of the payment of taxes as an element, under Code Civ. Proc. § 325, subd. 2, of adverse possession, does not apply where no taxes have been assessed.

3. Adverse Possession ⟹95—Taxes—Burden of Proof.

The burden of proof as to assessment of taxes, which should be paid as an element of adverse possession, is on the party combating claim of adverse possession.

4. Appeal and Error ⟹1068(3)—Harmless Error—Uncertainty in Judgment.

It is immaterial to plaintiff if judgment is less certain than it might have been as to quantity of water awarded to defendants; finding that plaintiff is not entitled to any of the water flowing in the stream being amply supported.

Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge.

Action by J. J. Monroe against Mary Pleasants and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Jamison & Wylie, of Alturas, for appellant.

Daly B. Robnett, of Alturas, for respondents.

HART, J. Plaintiff brought the action to have defendants enjoined from diverting fourteen-fifteenths of the waters of Dodson creek, in the county of Modoc, and to have it decreed that plaintiff was entitled to that quantity of water from said stream for the irrigation of certain lands owned by him. He claimed to be the owner of all the waters of said stream by appropriation by his grantors, more than 40 years prior to the commencement of the action, but alleged that he had permitted defendants to use one-fifteenth of said water for the purpose of irrigating a small garden and some fruit trees. Plaintiff also claimed ownership by prescription, alleging open, notorious, and adverse possession and the payment of all taxes levied against his water rights, dams, and ditches for more than 5 years preceding the commencement of the action.

By way of separate defense, defendants alleged in their answer that defendant, Mary A. Pleasants and her grantors, for more than 38 years prior to the commencement of the action, had been the owners of certain lands, 60 acres of which were riparian to the watershed of said Dodson creek, and were entitled to the water thereof for purposes of irrigation, and that 50 inches of water, measured under a 4-inch pressure, were reasonably necessary for the irrigation of said lands. Ownership of said waters by appropriation and also by adverse possession was also alleged. The answer prayed that defendants be adjudged the owners of 50 inches of the water of said stream.

Plaintiff alleged that at the beginning of the irrigating season the creek carried 200 inches of water, while defendants denied that it ever contained more than 50 inches; all parties alleging that it diminished to practically nothing during the dry seasons.

The judgment was in favor of the defendants, and the appeal is by the plaintiff from said judgment.

The claim for a reversal of the judgment is based upon these propositions: (1) That certain findings essential to the support of the judgment are not supported by the evidence; (2) that defendants, having relied on adverse user or a prescriptive right to the water, did not prove, and the court therefore made no finding, that they and their predecessors, etc., "have paid all the taxes * * * which have been levied and assessed upon" said water right (Code Civ. Proc. § 325, subd. 2); (3) that the judgment is uncertain, in that it awarded all the water of the stream to the defendants instead of a definite number of inches.

1. The following findings are those attacked by the appellant as not supported by the evidence: (1) That the quantity of water flowing in Dodson creek does not exceed 50 inches, measured under a 4-inch pressure; (2) that at least 60 acres of the land of the defendant Mary Pleasants is irrigable from said stream and is riparian thereto, and that 50 inches of water are reasonably necessary for the growing of crops on said land; (3) that defendant Mary Pleasants, commencing with the year 1886, and for more than five years continuously thereafter, openly, notoriously, uninterruptedly, peaceably, and adversely diverted and used all the waters of said stream for the irrigation of her said lands and was so using them at the time of the commencement of the action; (4) that all of the water of said stream is necessary and indispensable to the proper irrigation of said defendant's lands; (5) that since the beginning of the year 1886 plaintiff and his grantors made no beneficial use of said waters, but that defendant Mary A. Pleasants did.

The lands of defendants are situated on Dodson creek above those of the plaintiff.

In the year 1873, one Richard C. Robinson, the original homesteader of 160 acres of plaintiff's land, filed in Siskiyou county, of which Modoc county at the time was a part, an appropriation of 100 inches of water of the flow of Dodson creek. In 1875 Robinson conveyed his right, title, and interest in the homestead and in his said water right and a certain ditch to one Charles U. Snyder, who secured a patent for the land in 1877. In 1885 Snyder became financially involved and made an assignment to one Louis Sachs of about 2,200 acres, known as the Willow ranch, including the land of plaintiff, which the latter acquired in 1905 and has owned ever since.

Walter Bonner, a witness called on behalf of plaintiff, testified that he first became acquainted with the lands of plaintiff and defendants in 1875; that he worked on plaintiff's land in 1899 and in other years; that hay had been raised on the land since 1875; and that the crop must have been irrigated by water from Dodson creek. It was stipulated at the trial that Frank Plummer and one Gillette, if present, would testify to substantially the same facts as did the witness Bonner.

J. M. Kirkpatrick testified that he had been acquainted with the land of plaintiff since 1900; that in the fall of that year he had purchased some clover and timothy hay grown on said land; that he bought the land in 1903 and sold it to the plaintiff in 1905; that while he owned it he produced hay from about 75 acres which he irrigated from the waters of Dodson creek; that he could not have produced the hay crop without irrigation.

The plaintiff testified that from the time he bought the place in 1905 he had cultivated and irrigated about 110 acres and raised wild hay thereon.

In 1878, one W. H. Vineyard homesteaded the lands now belonging to defendants and filed with the county recorder of Modoc county a notice of location of 50 inches of the waters of the stream in question, which was called in the notice "Deep Gulch." From 1878 on he used the water for irrigating a garden, orchard, and berries, and used the water for the house and stock. In 1885 Vineyard deeded his "water right and water ditches, * * * the same being the water claim located" by the notice above mentioned, to George W. Pleasants, husband of defendant Mary Pleasants, and they moved onto the land in 1886 or 1887. Mrs. Pleasants testified that at that time there was on the place a young orchard of about 35 or 40 trees, some berry bushes, and a garden spot; that they irrigated these, and that the trees bore the second year they were there; that later they enlarged the garden and also fenced in a pasture which they irrigated; that they endeavored at all times to use 50 inches of water, but had to guess at it, as they had no headgate in. She said that some of the water they used went back into the creek "and we figured that the subirrigation and the waste water would be enough for the Willow ranch lands."

Mrs. Pleasants' two sons, Clyde C. and Porter H. Pleasants, testified that defendants always used all the water for irrigation; that they raised alfalfa, grain, hay, and garden stuff and had fruit trees; and that the water was necessary for the cultivation of said crops.

At different times, while plaintiff's lands were included in the Willow ranch, Grant I. Taggart, H. Barnes, and Frank Barnes were managing the ranch. They testified that they never used the water or made any claim to it and that Mr. Pleasants was using it.

In the year 1907–08 plaintiff leased his land to one Ernest Chandler, who testified that he used such water as was permitted to come down; that he knew defendants were using the water; and that he (Chandler) needed much more water than he got.

It appeared that the flow of the water had never been measured, but several witnesses testified that there were about 50 inches of water in the stream. It is enough to say upon the point under consideration that the foregoing statement of the evidence is itself sufficient to show that the challenged findings are amply supported.

[1-3] 2. Conceding, for the purposes of this case, that to establish a prescriptive title to a water right growing out of a stream or creek to which the lands of the party claiming the right are riparian, it is necessary to observe the requirement in that respect as to land of the proviso of subdivision 2 of section 325 of the Code of Civil Procedure, and so show that all the taxes which have been levied and assessed thereon have been paid by the party claiming title by prescription and his predecessors and grantors, the answer to the contention of the appellant that the failure of the court to find that taxes had been levied and assessed on the water right and paid by defendants is fatal to the judgment is found in the fact that there is no evidence in the record that any taxes were or had ever been levied and assessed upon the water right in question, and therefore there was no call for a finding as to that proposition. Heilborn v. Last Chance Water Ditch Co., 75 Cal. 117, 123, 17 Pac. 65; Oneto v. Restano, 78 Cal. 374, 379, 20 Pac. 743; Spargur v. Heard, 90 Cal. 221, 229, 27 Pac. 198; Baldwin v. Temple, 101 Cal. 396, 404, 35 Pac. 1008; Silva v. Hawn, 10 Cal. App. 544, 551, 102 Pac. 952; Smith v. Smith, 21 Cal. App. 378, 380, 131 Pac. 890. These cases hold that the requirement of the payment of taxes as an element of adverse possession does not apply where no taxes have been assessed. "And," it is said in Oneto v. Restano, supra, "the burden of showing that taxes have been assessed is upon the party combating the claim of

possession." See, also, as to the latter statement, Baldwin v. Temple, 101 Cal. 404, 35 Pac. 1011, supra.

[4] 3. In support of the proposition that the findings and judgment are uncertain, in that the quantity of water which the defendants are thereby awarded is not specified in inches, the appellant cites the case of Riverside Water Co. v. Sargent et al., 112 Cal. 230, 44 Pac. 560. In that case, which involved a controversy as to the relative rights of the plaintiff and defendants to the use (acquired by appropriation) of water flowing in the Santa Ana river, in San Bernardino county, the court found that plaintiff was the owner of all the water flowing in said river, "except so much thereof as defendants are entitled to take and use, as hereinafter stated," and that defendants had, for more than six years before the commencement of the action, continuously diverted water from said river by means of "said dam and ditch, and has the right to take the water by those means 'to the extent of the full capacity of said ditch, and * * * during the irrigating season, * * * to wit, from the 15th day of April to the 15th day of September of each year, * * * to the extent of all the water being and flowing in said river at the place of said diversion." The judgment substantially conformed to said findings. The court, reversing the judgment, said:

> "The decisions of this court establish that in cases like the present the findings and judgment must fix the extent of the superior right, viz. the quantity of water to be allowed to the party whose claim is paramount; otherwise, the judgment fails to attain the certainty necessary to an estoppel upon the main subject of the litigation. [Citing cases.] In this instance, the court has not found the disputed quantity nor data from which it may be calculated. In view of the fact, well known, that the carrying capacity of a water ditch is subject to rapid changes, being affected by the nature of the soil through which it passes, the rapidity and consequent scouring force of its current, the care it receives, and other matters more casual, the finding here seems well devised, as said in Lakeside Ditch Co. v. Crane, 80 Cal. 182 [22 Pac. 76], to 'lead to future disputes and litigation.'"

There is a clear distinction between that case and this. Here the finding is that the plaintiff is entitled to the use of none of the waters of Dodson creek, but that the defendants, having since the year 1886 continuously used all the water thereof for beneficial purposes, are entitled to all said water, and it is further found that the quantity of water flowing in said stream does not exceed 50 inches, measured under a 4-inch pressure. The judgment follows the findings. Thus it will be noted that here there is but one right dealt with by the findings and judgment—the right of the defendants. The evidence is sufficiently ample to support the finding that the plaintiff is not entitled to any of the water flowing in said stream. Therefore, even if the judgment were less certain than it could have been made as to the quantity of water awarded to the defendants, the fact of such uncertainty is immaterial to the plaintiff. Watson v. Lawson, 166 Cal. 235, 243, 135 Pac. 961. Of course, where there are two adverse claimants of a water right, and the court finds that both are entitled to the use of the water of a stream, there should be as definite a judgment as the circumstances or conditions will permit defining the respective rights of the parties to the water or fixing the proportion of the water each is entitled to, and the manner and times of use and diversion, so that each, particularly the second or inferior claimant, may know when his right attaches. Watson v. Lawson, supra. It is clear to our minds, from an examination of the evidence, that the court has done this here. There is testimony which shows that the quantity of water flowing in the stream was fluctuating. On occasions, according to the seasons, there would be a very small or limited amount of water in the creek, while on others there would be a reasonably fair flow, not, however, exceeding 50 inches, according to the well-supported finding of the court. It would seem, therefore, that the court did the best it could do under the evidence and the circumstances by finding the maximum quantity of water flowing in the stream at any time and then finding that the defendants were entitled to all the water up to that maximum.

There is some claim that the evidence does not show that the defendants used all the water of the stream. There is some testimony that certain of the waters of the creek did flow on to the Robinson place on certain occasions. But the testimony further shows that when water from the creek did reach the Robinson land it was occasioned either by the flood water in the first part of spring and before any one could make any beneficial use of the water, or by water which naturally ran off the sloping lands of the defendants after they had made use of it.

There are no other points to be considered.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

41 Cal. App. 167

TROUT v. OGILVIE et al. (Civ. 2894.)

(District Court of Appeal, Second District, Division 2, California. May 12, 1919.)

1. Specific Performance 🔑86 — Compelling Testamentary Disposition—Character of Relief Granted.

Though specific performance in a literal sense cannot be given to compel a testamentary disposition of property after testator's death, nevertheless a court of equity may, when justified, grant substantially the same relief by treating the heirs as trustees and compelling them to convey the property in accordance with the terms of the contract.

2. Appeal and Error 🔑1071(3)—Harmless Error—Finding.

If the contract to make a testamentary disposition of property as alleged in the complaint be one that equity will not enforce, it is immaterial that the finding that no contract was made is not supported by the evidence.

3. Frauds, Statute of 🔑75—Contract for Testamentary Disposition of Property—Necessity of Writing.

A contract to make a certain testamentary disposition of property, not being in writing, was invalid, in view of Civ. Code, § 1624, as amended in 1905, and Code Civ. Proc. § 1973, as amended in 1907.

4. Specific Performance 🔑44—Contract for Testamentary Disposition—Part Performance—Payment of Money.

The payment of money by a spouse is not such a part performance of an oral contract for testamentary disposition of property as will take the contract out of the statute of frauds, so as to justify decree for specific performance.

5. Frauds, Statute of 🔑5—Oral Contract—Marriage as Consideration.

Marriage is not of itself a sufficient consideration to take an oral contract for the making of a testamentary disposition of property out of the statute of frauds.

6. Frauds, Statute of 🔑129(12) — Part Performance — Antenuptial Agreement for Testamentary Disposition — Acts Referable to Marital Obligation.

Prior to the adoption of amendments of 1905 to Civ. Code, § 1624, and of 1907 to Code Civ. Proc. § 1973, to take an oral contract out of the operation of the statute of frauds, the acts relied on must be unequivocally referable to the contract, and personal services performed by a wife in caring for husband in his illness, and other acts performed after the marriage, were referable to the marital obligation, as well as to prenuptial oral contract for testamentary disposition of property, and would not take the contract out of the statute of frauds (Civ. Code, § 155).

7. Specific Performance 🔑41 — Partly Performed Oral Contract.

In view of Civ. Code, § 1741, expressly recognizing the power of an equity court to compel specific performance of parol agreements for sale of real property, which would otherwise be invalid, under section 1624, subd. 5, it must be assumed they intended to leave their work complete, and that there is no other exception in the statute to the rule that part performance does not take oral agreements out of the statute.

8. Descent and Distribution 🔑71(1)—Determination of Heirship — Exclusive Remedy.

In suit for specific performance of a contract to make testamentary disposition of property, it is not error for court to decline to determine who are heirs of deceased, because that is a proceeding in the nature of an action to determine heirship, provided for by Code Civ. Proc. § 1664, which must be instituted in the pending probate proceedings; such remedy being ample and exclusive.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Suit by Kate C. Trout against James G. Ogilvie, administrator of the estate of John S. Trout, deceased, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Edwin A. Meserve and Shirley E. Meserve, both of Los Angeles, for appellant.

Stewart & Stewart and Harold G. Ferguson, all of Los Angeles, for respondents.

FINLAYSON, P. J. This is a suit in equity to compel specific performance of a contract to make a certain testamentary disposition of property. From a judgment in favor of defendants, plaintiff appeals.

[1] The action is of a type illustrated by a line of decisions in this state beginning with Owens v. McNally, 113 Cal. 444, 45 Pac. 710 33 L. R. A. 369. Though specific performance in the literal sense of the term, cannot be given in this class of actions, nevertheless a court of equity, where the facts justify, may grant relief substantially the same as specific performance, by treating the heirs as trustees and compelling them to convey the property in accordance with the terms of the contract.

[2] The claim of appellant is that she and John S. Trout, now deceased, in December, 1909, entered into an oral agreement whereby Trout was to make his will in appellant's favor. There is no claim that the agreement was induced by fraud on the part of decedent. The agreement, as alleged in the complaint, was substantially as follows: Trout proposed to appellant that if she would marry him and furnish a home for him during the remainder of his life, and would care for him, and would assist him with her money in paying off certain incumbrances then upon his property, and a balance owing upon property that he had agreed to pur-

chase, she should inherit and succeed to his property, and, after the marriage, "in consideration thereof, and in consideration of the payment of said sums for him," he would make a will in her favor, devising and bequeathing to her all of his property. Appellant, according to the allegations of her complaint, accepted Trout's offer, and thereafter, in performance of the agreement, married him.

The complaint alleges that defendant Ogilvie is the administrator of the estate of John S. Trout, deceased; that defendants other than Ogilvie claim to be the heirs of Trout, but that they are not; and that appellant is Trout's sole heir. The answers deny substantially all the allegations of the complaint. Evidence on behalf of appellant was introduced. Defendants offered no evidence. The court found that Trout made no contract that appellant should inherit or succeed to any of his property, or that he would make a will in her favor, but that during the marriage she advanced and paid for Trout, upon property belonging to him, and for which she has received no payment, sums aggregating $300. The court declined to determine who are the heirs of Trout. This declination was placed upon the ground that, in this action, the court has no jurisdiction to determine the question of heirship. The judgment adjudges that appellant has a lien upon a certain lot, a part of the estate of decedent, for the $300 so paid by her for decedent, and that, aside from such lien, appellant take nothing.

If the contract alleged in the complaint be one that a court of equity will not enforce, it is immaterial that the finding that no such contract was made is not supported by the evidence. The rule is that it is immaterial that there is an erroneous finding upon an issue, where, if the finding were otherwise, a different conclusion would not be necessitated. We think the contract, as alleged in the complaint, is not enforceable.

[3] Sections 1624 of the Civil Code and 1973 of the Code of Civil Procedure were amended in 1905 and 1907, respectively, by adding to each section a new subdivision (subdivision 7), whereby it is provided that an agreement to devise or bequeath property or to make any provision for a person by will is invalid if not in writing. The cases cited by appellant involved agreements entered into prior to the adoption of these Code amendments.

[4] Putting out of consideration, for the present, the fact that the agreement between appellant and Trout was made long after subdivision 7 had been added to each of these Code sections, and assuming, for the purpose of this decision only, that such an agreement, though resting in parol and made since the Code amendments, may be taken out of the statute of frauds by such acts of part performance as ordinarily would prompt a court of equity to grant specific performance of an oral contract to sell real property—and appellant cannot possibly invoke any more liberal construction of subdivision 7 of these two Code sections—still we cannot say that the acts of performance pleaded by appellant in her complaint justify the relief sought by her.

The allegation of the complaint is that, in his offer to appellant, Trout said:

> "That he would, after the consummation of said marriage and in consideration thereof, and in consideration of the payment by plaintiff of said sums for him, make a will in favor of plaintiff."

[5] This is tantamount to an allegation that the consideration for Trout's agreement to devise and bequeath his property to appellant was the marriage and the payment by appellant of the sums necessary to relieve Trout's property from the incumbrances thereon and liquidate the balance owing on property contracted for by him. It needs no authority to sustain the universally recognized rule that the payment of money is not such an act of part performance as will take a contract out of the operation of the statute of frauds. The remedy at law for a recovery of the money paid, with interest, is a complete and adequate remedy, and the payment does not work a fraud upon the party paying if the other party refuses or neglects to perform his part. The marriage, according to the allegations of the complaint, is the only other consideration for Trout's promise to "make a will in favor of plaintiff." But marriage is not of itself sufficient to take a contract out of the statute of frauds. Peek v. Peek, 77 Cal. 106, 19 Pac. 227, 1 L. R. A. 185, 11 Am. St. Rep. 244; Civ. Code, § 1624, subd. 3; Hunt v. Hunt, 171 N. Y. 396, 64 N. E. 159, 59 L. R. A. 306; Finch v. Finch, 10 Ohio St. 505.

[6] Assuming, without deciding, that appellant is not so far bound by the allegations of her complaint as to be precluded from relying upon evidence of other considerations for Trout's promise, as, for instance, personal services agreed to be and performed by her; that is, caring for him in his illness—and evidence of such services was adduced—still appellant fails to show a case for specific performance of an agreement that, when entered into, was clearly within the statute of frauds. It is true that certain kinds of service of a very personal nature have been held to be sufficient acts of part performance to justify the specific execution of an agreement to devise real property, as, for example, where the services were of such a peculiar character that it is impossible to measure their value by any pecuniary standard, and it is evident that the parties did not intend to measure them by any such standard. Prior to the adoption of the Code amendments already adverted to, such acts of part performance—

personal services of an extraordinary nature—were held to be sufficient to warrant a court of equity in granting relief tantamount to specific performance of a contract to devise or bequeath property. Owens v. McNally, supra; Flood v. Templeton, 148 Cal. 378, 83 Pac. 148. To take a contract out of the operation of the statute of frauds, however, the acts relied upon must be unequivocally referable to the contract. Acts which, though in truth done in performance of a contract, admit of an explanation without supposing a contract, are not, in general, such acts of part performance as will take the case out of the operation of the statute. 36 Cyc. 645. The acts relied upon must clearly appear to have been done in pursuance of the contract, and to result from the contract, and not from some other relation. Blum v. Robertson, 24 Cal. 142; Foster v. Maginnis, 89 Cal. 264, 26 Pac. 828; Owens v. McNally, supra, 113 Cal. 451, 45 Pac. 710, 33 L. R. A. 369; Fritz v. Mills, 170 Cal. 458, 150 Pac. 375; Peek v. Peek, supra; Van Epps v. Redfield, 69 Conn. 104, 36 Atl. 1011; Ackerman v. Ackerman, 24 N. J. Eq. 587; Phillips v. Thompson, 1 Johns. Ch. (N. Y.) 149; Pomeroy on Specific Performance, §§ 108, 109. Here the personal services performed by appellant, caring for her husband in his illness—acts performed after the marriage—are referable as well to her marital obligation as a dutiful wife as to the contract alleged in her complaint. "Husband and wife contract towards each other obligations of mutual respect, fidelity and support." Civ. Code, § 155.

It must not be inferred, merely because, for the purpose of this decision, we have assumed that there may be circumstances under which a court of equity may enforce a parol contract to devise or bequeath property, entered into since the amendment of 1905, that such assumption correctly reflects our opinion as to this very important question. On the contrary, we strongly incline to the view that, since the Code amendments in question, such contracts, if resting wholly in parol, are always unenforceable. The only case in this state, to which our attention has been called, arising out of a contract entered into after the Code amendment of 1905, is Hagan v. McNary, 170 Cal. 141, 148 Pac. 937, L. R. A. 1915E, 562. That, however, was an action at law and is not authority in a suit in equity for specific performance.

Though courts of equity, very soon after the passage of the English statute of frauds, asserted jurisdiction to decree a specific execution of verbal contracts for the sale of lands—contracts within the inhibition of subdivision 5 of our statute of frauds—nevertheless eminent judges, at different times, have seriously questioned the wisdom of allowing any exceptions whatever to the statute, and have declared their intention not to extend them beyond the established precedents. Per Field, J., in Arguello v. Edinger, 10 Cal. 158 et seq.; German v. Machin, 6 Paige Ch. (N. Y.) 293; Phillips v. Thompson, supra, per Kent, Ch. There are well-considered cases wherein it is held that the doctrine of part performance—a doctrine that is exclusively the creature of equity—applies only to contracts for the sale of land, and does not extend to contracts that are violative of some other provision of the statute of frauds. Equitable Gas, etc., Co. v. Baltimore, etc., Co., 63 Md. 297, a suit in equity for specific performance of an oral agreement not to be performed within a year; McElroy v. Ludlum, 32 N. J. Eq. 828; Osborne v. Kimball, 41 Kan. 187, 21 Pac. 163; Hunt v. Hunt, supra; Oddy v. James, 48 N. Y. 685; Turnow v. Hockstadter, 7 Hun (N. Y.) 80. See, however, McManus v. Cooke, 35 Ch. D. 681, wherein Justice Kay says:

> "The doctrine of part performance of a parol agreement, which enables proof of it to be given notwithstanding the statute of frauds, though principally applied in the case of contracts for the sale or purchase of land, or for the acquisition of an interest in land, has not been confined to those cases. Probably it would be more accurate to say it applies to all cases in which a court of equity would entertain a suit for specific performance if the alleged contract had been in writing."

See, also, Pomeroy on Specific Performance, § 101.

[7] Whatever the rule may be elsewhere, it would seem that in this state the lawmakers intended that the doctrine of part performance, as applied to parol contracts within the statute of frauds, should be confined to contracts relating to the sale of lands—contracts within the inhibition of section 5 of our statute of frauds (Civ. Code, § 1624, subd. 5). This seems to be the necessary consequence of section 1741 of the Civil Code, wherein express recognition is given to the power of a court of equity to compel specific performance of "any agreement for the sale of real property in case of part performance thereof." The Code section specifically excepts from the operation of the statute of frauds parol agreements, partly performed, and otherwise would be invalid under subdivision 5 of section 1624. If any other exception were intended, here was the place to make it. The framers of our statute deliberately added one express exception, and we must assume that they intended to leave their work complete. Furthermore, cases such as that in hand are of a class that frequently arise in fraud and abound in perjury. So far as we are informed, practically all of the cases of this class that found their way into our courts prior to the amendments of 1905 and 1907, whereby subdivision 7 was added to sections 1624 of the Civil Code and 1973 of the Code of Civil Procedure, were equitable actions for

specific performance; and if, in adding this new subdivision to these Code sections, the lawmakers did not intend to put a quietus upon all such cases where the agreement sought to be enforced rests in parol, regardless of performance on the part of the promisee, then we utterly fail to perceive what was intended to be accomplished by these most important and salutary Code amendments.

[8] In declining to determine whether defendants other than Ogilvie were heirs of Trout, the court committed no error. If, as we hold, appellant's alleged contract with Trout is invalid and unenforceable, then her sole right to receive any part of his estate is as an heir—as the surviving wife of John S. Trout. The Code has provided a special proceeding whereby any person claiming to be an heir or entitled to distribution of any part of the estate of a decedent, may file a petition in the pending probate proceeding to have the court ascertain and declare the rights of himself and all others to the estate or any interest therein. Such a proceeding is one in the nature of an action to determine heirship, and must be instituted in the pending probate proceedings. Code Civ. Proc. § 1664. The remedy thus afforded is ample and exclusive. The subject-matter of heirship is vested in the court, sitting as a probate court, wherein the probate proceeding is pending. The whole subject-matter of dealing with the estates of deceased persons is one of statutory regulation, and the policy and intent of our statute very clearly contemplates that property of decedents shall be subjected to the process of administration in the probate court. There is no other method provided by the statute whereby the existence of heirs may be conclusively established, and without doubt the jurisdiction of the superior court, sitting in probate, is both original and exclusive. Estate of Strong, 119 Cal. 655, 666, 51 Pac. 1078; Silva v. Santos, 138 Cal. 541, 71 Pac. 703. It would be an anomaly in jurisprudence if a court that is vested with full jurisdiction in matters of probate could be controlled in the exercise of that jurisdiction by the action of a co-ordinate court, or even by the same court sitting as a court of general jurisdiction.

Judgment affirmed.

We concur: SLOANE, J.; THOMAS, J.

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41 Cal. App. 158

CHAPMAN v. HICKS et al. (Civ. 2891.)

(District Court of Appeal, Second District, Division 2. California. May 12, 1919.)

1. Mortgages 🔑38(1)—Deed Absolute as Mortgage—Evidence.

Evidence *held* to sustain finding that an instrument in form a deed absolute was in fact a mortgage.

2. Mortgages 🔑32(5)—Mortgage or Deed—Test.

The test of a mortgage is whether the relation of debtor and creditor continues so that there is a subsisting debt after the conveyance.

3. Mortgages 🔑32(2)—Deed Absolute—Intention.

The intention of the parties must govern, and, if a deed is made for the purpose of securing the payment of a debt, it is a mortgage, no matter how strong the language of the deed or any instrument accompanying it may be.

4. Appeal and Error 🔑1011(1)—Mortgages 🔑38(2)—Deed Absolute—Question for Court.

Although the character of a deed absolute cannot be changed to that of a mortgage save upon clear and convincing evidence, yet where there is a substantial conflict it is primarily for the trial court to determine whether the evidence is clear and convincing.

5. Appeal and Error 🔑757(1)—Examination of Typewritten Transcript.

No duty devolves on the court on appeal to examine the voluminous typewritten transcript of the stenographic reporter in search of error.

6. Vendor and Purchaser 🔑231(15)—As Affecting Efficacy of Recordation.

The fact that the acknowledgment of an instrument in form a deed absolute was taken by a notary at a time when he had a general power of attorney from the grantee does not impair the efficacy of its recordation to import notice to subsequent purchasers.

7. Acknowledgment 🔑20(1)—Who May Take—Interested Person.

Because of the probative force accorded to certificates of acknowledgment, as well as the usual important consequences of such instruments, public policy forbids the taking of an acknowledgment by a person directly interested financially or beneficially in the transaction.

8. Acknowledgment 🔑20(3)—Who May Take—Interested Person—Agent.

Where, as in this state, the taking of an acknowledgment is deemed to be a ministerial and not a judicial act, an acknowledgment may be taken before an agent, even though he have indirectly a financial interest in the transaction.

9. Mortgages 🔑139—Deed Absolute as Mortgage—Statute.

In view of Civ. Code, §§ 2888, 2924, a deed absolute in form but in effect a mortgage does not pass the legal title, and the grantee, or more properly the mortgagee, is vested with a lien only.

10. Equity 🔑66—Quieting Title Against Mortgagee—Offer to do Equity.

Notwithstanding the lien of a mortgagee is extinguished by lapse of time, the mortgagor cannot without paying his debt quiet title as against mortgagee.

11. Equity 🔑66—Quieting Title Against Mortgagee—Offer to do Equity.

The rule that, notwithstanding the lien of a mortgage is extinguished by lapse of time, the mortgagor cannot without paying his debt quiet the title as against the mortgagee, is equally applicable to a grantee of the mortgagor who acquires the property while it is still burdened with a lien for the security of the debt.

12. EQUITY ⚷66—OFFER TO DO EQUITY.

Where, in action to quiet title against mortgagor's grantee, grantee filed a cross-complaint asking for affirmative relief, he became an actor as much as plaintiff and was bound to do equity by paying the mortgage debt, though the lien of the mortgage had been extinguished by lapse of time.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by William Chapman against G. Woods Hicks and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Charles Lantz, Howard F. Shepherd, and W. J. Davis, all of Los Angeles, for appellant.

C. Elliott Miller and C. W. Byrer, both of Los Angeles, for respondents.

FINLAYSON, P. J. This is an action to quiet title. From a judgment in favor of defendants, plaintiff appeals.

On March 7, 1905, defendant Hicks and wife executed to plaintiff an instrument, in form a grant deed, but which the court found to be in effect a mortgage given to plaintiff to secure an indebtedness of $265 borrowed by Hicks and wife from plaintiff and evidenced by a promissory note for that sum executed by the borrowers, as payors, to plaintiff, as payee, bearing date March 8, 1905, and due three months after date. Plaintiff, on March 8, 1905, executed an instrument whereby he agreed to reconvey the property to Hicks for the amount so borrowed, if it were paid on or before the maturity of the promissory note, June 8, 1905. The instrument that the court so found to be a mortgage—upon its face a deed absolute—was recorded March 8, 1905. On March 20, 1905, Hicks and wife conveyed the property by grant deed to defendant Hudson. Hicks made several partial payments on the note of himself and wife, but the evidence shows that a very substantial balance still remains unpaid. During a period extending from April 29, 1906, to April 24, 1912, several letters were written by Hicks to plaintiff's attorney in fact, Charles Lantz, relative to payment of the note—letters which plaintiff contends interrupted the running of the statute of limitations. It was stipulated at the trial that, ever since he purchased the property, defendant Hudson has not been a resident of this state; and there is some evidence, though slight and unsatisfactory, that Hudson was not only a nonresident, but has actually been absent from the state ever since shortly after the deed to him. Defendant Hicks, though served with summons, made no appearance. Hudson, in addition to an answer, filed a cross-complaint wherein he alleged ownership in himself and that the prior deed to plaintiff was, in effect, a mortgage, and prayed for affirmative relief. In its findings the court found, not only that the deed to plaintiff was, in effect, a mortgage, but that the note and mortgage given to plaintiff by Hicks et ux. were barred by the statute of limitations, and gave a judgment wherein, denying any relief whatsoever to plaintiff and granting to Hudson affirmative relief in accordance with the prayer of his cross-complaint, it adjudged that Hudson is the owner in fee simple absolute, quieted his title as against any claim of plaintiff or defendant Hicks, and canceled the mortgage.

The appeal is taken under the alternative method. Appellant, however, has not printed in his brief, or in any supplement thereto, any part of the judgment roll; nor has he printed any part of the evidence, save copies of the letters from Hicks to Lantz and a scrap of evidence given by Hicks and Lantz respecting some of the circumstances attending the execution of the instrument which the court found to be a mortgage, together with a detached modicum of the evidence of certain witnesses designed to illustrate certain objections to the admission of evidence, but which is so fragmentary that it fails to serve the purpose.

[1] There is ample evidence to sustain the finding that the instrument from Hicks and wife to appellant, though in form a deed absolute, was in fact a mortgage. On March 7, 1905, Hicks went to the office of Lantz, the attorney in fact for appellant under a general power of attorney, for the purpose of borrowing $265 from appellant through Lantz. According to Lantz, Hicks asked him if he could not borrow the money upon a mortgage. To this Lantz replied that he would not care to handle the matter upon a mortgage, but that if any arrangements were made for a loan Hicks could make an absolute deed and at a later date an agreement to reconvey would be executed. The deed to appellant, though dated March 7, 1905, was not acknowledged until March 8th—the date when the promissory note and the agreement to reconvey were executed—when it was acknowledged before Lantz, as notary public. Hicks testified:

> "I asked if I might raise some money on this property—on one of the lots. Mr. Lantz desired the two lots as stated, and I suggested giving a mortgage. He suggested it was just the same to me, the deed with a mortgage back. I finally accepted that proposition, needing money at the time. * * * I got the agreement back."

By the words "a mortgage back," the witness evidently had reference to the agreement to reconvey—an agreement in the nature of a defeasance. From this evidence it is manifest that Lantz gave Hicks to understand that, so far as the latter's interests were concerned, a deed with an agreement to reconvey, in the nature of a defeasance, would be the same as a mortgage. Though Lantz evidently did not intend that a mortgage eo nomine should be executed, and was unwilling to accept a lien in that form to secure the debt owing to his principal, nevertheless the transaction shows that there was no consideration for a sale and conveyance to appellant, but that there was a loan to Hicks and wife—a continuing, subsisting loan—and that, to secure this loan, Lantz was willing to and did accept a conveyance to his principal.

[2] The test of a mortgage is whether the relation of debtor and creditor continues so that there is a subsisting debt after the conveyance (Husheon v. Husheon, 71 Cal. 407, 12 Pac. 410; Holmes v. Warren, 145 Cal. 457, 78 Pac. 954); and where a deed, absolute on its face, is given to secure a debt, it will be held to be a mortgage even though the parties stipulate it shall be an absolute conveyance (Hodgkins v. Wright, 127 Cal. 688, 60 Pac. 431; Civ. Code, §§ 2924 and 2925).

[3] The intention of the parties must govern, and it matters not what particular form the transaction may take. If the deed is made for the purpose of securing the payment of a debt, it is a mortgage, "no matter how strong the language of the deed, or any instrument accompanying it might be." Woods v. Jensen, 130 Cal. 200, 62 Pac. 473.

[4] Although, as has often been said, the character of a deed absolute cannot be changed to that of a mortgage save "upon clear and convincing evidence" (Sheehan v. Sullivan, 126 Cal. 189, 58 Pac. 543) the rule is well settled that, where there is a substantial conflict, it is primarily for the trial court to determine whether the evidence that the instrument was intended to secure the payment of a subsisting debt is clear and convincing (Couts v. Winston, 153 Cal. 686, 96 Pac. 357). "The presumption arising from the execution and delivery of a deed absolute in form is, undoubtedly, that it is made in pursuance of an agreement to sell, and vests an absolute title in the grantee. * * * At the same time the court has been watchful against all schemes of money-lenders to deprive unfortunate debtors of their lands at less than their value, under the claim that the transaction was a purchase, and not a loan." Locke v. Moulton, 96 Cal. 22, 29, 30 Pac. 957, 959. Here the evidence that the deed was given as security for the debt is not only clear and direct, but, in truth, is without substantial contradiction. There was never any mention of a sale, or of anything but a loan. Prior to the execution of any instrument, Hicks had applied to Lantz for the loan, and had offered to mortgage his land as security, but at Lantz's suggestion he executed instead a deed, signed by himself and wife, and took an instrument, signed by their grantee, purporting to give him an option to repurchase for the amount of the loan evidenced by their promissory note, at any time before the maturity of the debt.

In vain is appellant's contention that the deed was not a mortgage because, on March 7th, when it was executed, there was no debt. The deed was made pursuant to the understanding in accordance with which the loan was made and the promissory note and the agreement to reconvey were executed. The very object of the admission of parol evidence is to show the real nature of the transaction without regard to the mode or form or sequence in which the writings are signed and delivered. "If the defeasance forms a part of the original transaction, it is not material that it be executed at the same time as the deed." Sears v. Dixon, 33 Cal. 332.

[5] Appellant objects to certain rulings upon the admission of evidence. He has not printed in his brief, or in any supplement appended thereto, enough of the evidence to enable us to pass upon the points made in his argument. The requirement of the statute in this regard has been repeatedly pointed out. Scott v. Hollywood Park Co., 176 Cal. 680, 169 Pac. 379, and cases there cited. No duty devolves upon us to examine the voluminous typewritten transcript of the stenographic reporter in search of error.

[6] Respondent Hudson took his title from Hicks with notice of the prior recorded instrument—in form a deed absolute from Hicks and wife to appellant. The fact that the acknowledgment of that instrument by Hicks and wife was taken by Lantz as notary public, even though at that time Lantz held a general power of attorney from the grantee, or, more correctly speaking, the mortgagee, appellant here, does not impair the efficacy of its recordation to impart notice to subsequent purchasers.

[7, 8] Because of the probative force accorded to certificates of acknowledgment, as well as the usually important consequences of such instruments, public policy forbids the taking of an acknowledgment by a person directly interested, financially, or beneficially, in the transaction. 1 C. J. p. 802; Lee v. Murphy, 119 Cal. 364, 51 Pac. 549, 955; Murray v. Tulare Irrigation Co., 120 Cal. 311, 49 Pac. 563, 52 Pac. 586. But, according to the weight of authority, one who is not pecuniarily or beneficially interested in the transaction evidenced by the deed or other instrument is not disqualified to take the acknowledgment merely because he is acting as the agent or attorney for the party who is beneficially interested. 1 C. J. p. 807, § 115, and note; Bank of Woodland v. Oberhaus, 125 Cal. 320, 57 Pac. 1070; First Nat. Bank v. Merrill, 167 Cal. 392, 139 Pac. 1066. And, in

fact, where, as in this state, the taking of an acknowledgment is deemed to be a ministerial and not a judicial act, such an acknowledgment may be taken before an agent even though he have, indirectly, a financial interest in the transaction, as where the acknowledgment of a deed to a bank is taken before the cashier who is likewise a stockholder of the grantee corporation. Bank v. Merrill, supra.

[9] It is not necessary to determine whether the letters from Hicks to Lantz constituted an acknowledgment or promise sufficient to keep alive the original obligation of Hicks and wife to pay the loan; nor whether, notwithstanding Hudson has been absent from the state practically ever since the execution of the deed to him, the lien of appellant's mortgage was extinguished by lapse of time so as to prevent any affirmative relief thereon in his favor as the mortgagee in the instrument so executed to him to secure his loan to Hicks et ux. Since the adoption of the Codes, a deed absolute in form, but in effect a mortgage, does not pass the legal title, and the grantee, or, more properly, the mortgagee is vested with a lien only. Raynor v. Drew, 72 Cal. 307, 13 Pac. 866; Moisant v. McPhee, 92 Cal. 76, 79, 28 Pac. 46; Locke v. Moulton, supra, 96 Cal. 21, 30 Pac. 957; Civ. Code, §§ 2888 and 2924. Having found that the deed to appellant was in effect a mortgage, and that therefore appellant, as the owner of naught but a mortgage lien, was not entitled to relief in a suit to quiet title as against the owner of the legal title (Von Drachenfels v. Doolittle, 77 Cal. 295, 19 Pac. 518; Fudickar v. Irrigation District, 109 Cal. 38, 41 Pac. 1024), the trial court would have been justified in adjudging that appellant is not the owner of the land, as alleged in his complaint. But the judgment is not thus limited. It is not simply an adjudication that appellant does not own the land. Granting to respondent Hudson affirmative relief, as sought in his cross-complaint, and treating him as an actor in the action, seeking equitable relief—as, indeed, he became upon the filing of his cross-complaint—the trial court adjudged Hudson to be the owner in fee simple absolute, that appellant and all persons claiming under him be forever barred from asserting any title to or lien upon the premises, and that the mortgage be canceled and annulled. "He who seeks equity must do equity." As a condition to affirmative relief upon his cross-complaint, Hudson is as much bound by the equitable principle enunciated in this maxim as he would be were he a plaintiff in an action seeking to quiet his title. Where equitable relief is sought by a cross-bill, the equitable tests usually applied to a bill filed by a complainant are equally applicable to the cross-complainant. 21 R. C. L. p. 502; Union, etc., Bank v. Day, 79 Neb. 845, 113 N. W. 530.

[10, 11] Though the legal title be in Hudson, and though we assume, for the purpose of the decision, that the lien of the mortgage to appellant has become extinguished by lapse of time so that appellant could maintain no affirmative action to foreclose his mortgage, nevertheless the land remains equitably burdened with the debt to secure which the mortgage to appellant was given. Hudson received his conveyance from Hicks and wife shortly after the latter had deeded the land to appellant as security for the money they had borrowed. At that time a liability to pay the debt rested upon the property as well as upon the mortgagors. No rule is more firmly established in this state than the one to the effect that, notwithstanding the lien of a mortgage is extinguished by lapse of time, the mortgagor cannot, without paying his debt, quiet the title as against the mortgagee. The rule is equally applicable to a grantee of the mortgagor who acquires the property while it is still burdened with a lien for the security of the debt. Faxon v. All Persons, 166 Cal. 707, 137 Pac. 919, L. R. A. 1916B, 1209; Bulson v. Moffatt, 173 Cal. 685, 161 Pac. 259. "When the plaintiff is himself the debtor, the applicability of the rule is apparent. No different situation is presented where the plaintiff has bought the land before the right to foreclose the mortgage has become barred. In such case, he acquired the property subject to a valid existing lien, which was, presumably, taken into account in fixing the purchase price. Such property, when he acquired it was bound by the debt, and it would be as inequitable to relieve him of the burden without payment as it would be to thus free the original debtor." Faxon v. All Persons, supra, 166 Cal. 721, 137 Pac. 925 (L. R. A. 1916B, 1209). Where the lien of the mortgage is extinguished by lapse of time, the mortgagee has nothing that the mortgagor or his grantee can redeem in an action brought in the exercise of the statutory right of "redemption," so called, as recognized by sections 2903–2905 of the Civil Code and section 346 of the Code of Civil Procedure. Under such circumstances, an action to "redeem," whether by the mortgagor or his grantee, is, in effect, merely an action to remove a cloud, and, as was said in Raynor v. Drew, supra:

> "Since a court of equity may require justice to be done as a condition of removing the cloud, why should there be any period of limitation for such an action?"

[12] The same principle applies with equal force where the grantee of the mortgagor is seeking such relief by cross-complaint filed by him in an action to quiet title brought against him by the mortgagee. Under such circumstances the cross-complainant is an actor in the action—as much so as the plaintiff himself in the suit to quiet title—and is equally bound to do equity as a condition to the obtaining of equitable relief.

Had the court specifically found that the loan to Hicks has not been wholly repaid, and had it determined the amount that remains unpaid, this court might have remanded the cause with directions to enter a decree in accordance with the views set forth in this opinion, as was done in Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225, and Boyce v. Fisk, 110 Cal. 107, 42 Pac. 473. For lack of such finding, the case must be remanded for a retrial.

Judgment reversed.

We concur: SLOANE, J.; THOMAS, J.

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41 Cal. App. 209

SLEDGE et ux. v. STOLZ et al. (Civ. 1976.)

(District Court of Appeal, Third District, California. May 15, 1919.)

1. Appeal and Error ⚷901—Presumption Against Error.

Error will not be presumed, and the burden is on appellant to show it.

2. Appeal and Error ⚷1169(3)—Overruling Demurrer.

Though by omission of an allegation a complaint does not state a cause of action, and general demurrer thereto was improperly overruled, yet where the appeal is on the record alone, and it making it manifest judgment for plaintiff, after a trial on the merits, was in no way based on or due to any defect in the complaint, the judgment will be sustained.

3. Mines and Minerals ⚷55(4)—Deed—Condition.

Where the sole consideration for a deed of mining claims, executed in pursuance of an agreement for development and the payment of royalties, was the payment of royalties provided for in the agreement, there was implied obligation to work the mine, which was therefore a condition of the deed, and which condition might be enforced by forfeiture.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by W. N. Sledge and wife against H. E. N. Stolz and others and Tuolumne Deep Channel Mining Company. From judgment for plaintiffs, the last-named defendant appeals. Affirmed.

W. S. K. Brown, of San Francisco, for appellant.

Grant & Zimdars and Wm. H. Bryan, all of San Francisco, for respondent.

CHIPMAN, P. J. This is an action tried by the court without a jury to have a decree declaring that plaintiffs are the owners of certain mining claims free and clear from any rights acquired by defendants or any of them thereto, under the certain agreement and deed mentioned in the complaint.

A general demurrer to the complaint was overruled, and defendants answered and went to trial on the merits. Findings of fact were in favor of plaintiffs, and judgment was entered in accordance therewith. Defendant Tuolumne Deep Channel Mining Company (hereinafter referred to as the mining company) appealed from the judgment on the judgment roll alone.

It is alleged in the complaint that, on August 30, 1912, plaintiffs were the owners of certain described mining property situated in Tuolumne county, and on that day entered into a written agreement with defendants H. F. Stolz and J. Cabell Brown, relative to said mining claims, which is attached to the complaint as Exhibit A and made part thereof; that, agreeably to paragraph 6 of said Exhibit A, plaintiffs executed a deed of grant of said property, and placed the same in escrow with the First National Bank of Sonora, with instructions as provided in said sixth paragraph of said Exhibit A, which said deed was, prior to November 21, 1914, delivered to said defendants Stolz and Brown; that, after August 30, 1912, and prior to January 1, 1916, said defendants Stolz and Brown transferred to defendant said mining company "all their right, title and interest under said contract Exhibit A, and all their right, title and interest of, in and to the real property described in this complaint." It is then alleged (paragraph VI) "that nothing was done by the defendants, or any of them, on said real property in accordance with the terms of the said agreement, Exhibit A, and the deed made pursuant thereto, or otherwise, or at all, excepting as follows." Then follows a statement of the work done, consisting of assessment work in 1913 and 1914; also certain drilling and prospecting on said claim which "commenced in May, 1914, and continued to November, 1914, and then ceased," and no other work was done until in September 1915, and continued until December, 1915, which work was performed by three men and no more, since which time no work of any kind has been done on said property; that plaintiffs have frequently, during the year 1916 and prior to filing the complaint (which was July 3, 1916), demanded of said defendants, "under penalty of forfeiture of all rights in said property for failure so to do that they do proceed and perform work on said premises as contemplated and as provided for by the said agreement Exhibit A and the deed made pursuant thereto, but said defendants have refused and failed, and each of them has refused and failed, to perform any work on said premises since December, 1915, of any kind," and that plaintiffs notified said defendant that a "failure so to do would result in a forfeiture of all their rights of, in and to said property, and of, in and to said contract, Exhibit A"; that nothing has been paid to plaintiffs as profits derived from working said mine, and defendants have and each of them has "completely violated the terms and conditions of said contract, Exhibit A and the deed of conveyance made pursuant thereto in failing to work said mine as provided by the terms of said contract"; that defendants, other than said above-named defendants, claim to have some interest in said property, but "all of said rights and claims are subordinate to the right and ownership of these plaintiffs of, in and to said property."

The consideration mentioned in Exhibit A is $5 "and for and in consideration of the covenants and conditions hereinafter contained to be by the respective parties hereto kept and performed." By paragraph 4, the parties of the second part (Stolz and Brown) were let into possession of the mine "for the purpose of prospecting and drilling the same to ascertain what, if any, valuable mineral bearing earth, ore or rock, or placer gold, lie within, upon or under the said property;" that if it proved "to the satisfaction of all parties of the second part that there is insufficient mineral bearing earth * * * to warrant * * * developing or operating," the agreement was, upon written notice to first parties, "to be of no further force or effect," but if found satisfactory by second parties after drilling and prospecting the mine, they were to continue the work, and "shall pay over and deliver unto the said parties of the first part, or to W. N. Sledge who for that purpose is hereby constituted the agent of the parties of the first part, twenty-five per cent. of the net profits derived from the working of all mineral bearing earth * * * by the parties of the second part," which was to be paid immediately after each clean-up, which latter "shall take place not less than twice in each calendar year." Paragraph 6, referred to in the complaint, provided:

> "That the parties of the first part will, contemporaneously with the execution and delivery of this agreement, make and execute a good and sufficient grant, bargain and sale deed of the above-described mining claims and property, which said deed shall be deposited with the First National Bank of Sonora, in the town of Sonora, state of California, with instructions to said bank to deliver said deed to the parties of the second part as soon as said parties of the second part shall have expended the sum of five thousand dollars in prospecting, drilling, developing and working said mining claims and property, and the production of a writing signed and sworn to by the parties of the second part, or by either of them, setting forth that said sum has been so expended, or by the production and exhibition to said bank of satisfactory proof of such expenditure, shall be full authority to said bank for the delivery of said deed by it to the parties of the second part, and in such event said bank is hereby instructed to deliver said deed as hereinabove provided."

The agreement then provides what shall be regarded as expenses to make up this $5,000:

> "Provided, however, that said deed after its delivery by said bank shall in no way interfere with the right of the parties of the first part to receive one-fourth of the net profits derived from the working of said claims and property thereafter, nor avoid the obligation of the parties of the second part to make such payments."

Paragraph 8 provides that second parties shall commence said work of drilling, prospecting and working said mine within one year from the date of the agreement, and that "the actual work of development and operation shall be commenced by said parties of the second part within two years from and after the date hereof, and shall diligently continue and prosecute such work until such time as said parties of the second part shall determine in their sole judgment" that further work is not profitable, "in which event this agreement shall be of no further force or effect, and any rights hereunder, except those which shall have already vested, shall cease and determine."

Defendants answered; admitted the execution and delivery of said Exhibit A and said deed mentioned in the complaint; denied that nothing was done by defendants in accordance with said Exhibit A and said deed made pursuant thereto, and denied other averments relating to the alleged ceasing of work; denied that any demand had been made upon defendants to perform the work contemplated by said agreement, under penalty of forfeiture or otherwise; alleged that defendants were let into possession in May, 1914, and thereupon commenced and continued to work said mine until November 21, 1914, when defendants Stolz and Brown transferred their interest in said contract and deed to defendant, said mining company, and that thereafter said mining company prosecuted said work, describing the work done; defendant, said mining company, alleged that since the passing of said deed to defendants Stolz and Brown said mining company has fully performed "all things required of it or of its said predecessors in interest to be done under the terms of said agreement Exhibit A; alleged that plaintiffs had full knowledge of the work being done, and at no time objected thereto and the manner in which the work was being done, and by their conduct led defendants to believe that plaintiffs had excused defendants "from strict performance as to time and manner of the covenants contained in said agreement"; that defendants have not abandoned said work, nor have they any intention of so doing; alleged that, in June, 1916, plaintiffs notified defendants to proceed with the work within ten days or suffer forfeiture, and that thereupon said mining company "immediately proceeded with its preparations to continue said work of development," describing the work which followed. In paragraph VI defendants alleged that the said deed is freed of conditions, and that said deed does not require any work to be done upon the premises herein involved by these defendants or by any of them; and alleged further, that said defendants have never at any time or at all, nor did any of them, nor do they or any of them now, deny the right of said plaintiffs to receive twenty-five per cent. of the net profits derived and to be derived from the working" of said mine, "as provided in said agreement Exhibit A"; alleged that at the time defendants took possession of said mine said property "consisted of dry and naked mining locations upon part of the public domain, of nominal, uncertain and indeterminate value," but that by the work done thereon by defendants "said mining ground has been proved to be of great value, to wit, one hundred thousand dollars"; and that defendants' vested property rights therein are of the actual value of seventy-five thousand dollars.

The court made the following findings of fact: That, on August 30, 1912, plaintiffs were the owners of the mining claims referred to in the complaint, and on said day entered into the written agreement with defendants Stolz and Brown, of which a copy is found in the complaint; "that at the same time and in accordance with the provisions of said agreement plaintiffs made and executed an instrument in writing in the form of a deed of grant, bargain, and sale of said properties, which writing in terms recited the following" (refers by way of preamble to the agreement for prospecting and working the said mining claims; recites the provision of the agreement as to placing a deed to the property with the First National Bank, of Sonora, as shown in said agreement, with instructions to deliver the same to said Stolz and Brown upon their compliance with the conditions of said agreement); "And whereas it was agreed under the terms of said agreement that the making, executing and delivering of this deed shall in no way affect the rights of the parties of the first part hereto (plaintiffs) to receive from said parties of the second part twenty-five per cent. of the net profits derived from the working and operating of said mining claims and property" (except said preamble no part of the deed is set forth in the findings or in the pleadings); that, prior to November 21, 1914, said bank delivered said deed upon there being filed with said bank on account of expenditures, as provided in said agreement, setting forth some of the items constituting said expenditures; that, after August 30, 1912, and prior to January 1, 1916, defendants Stolz and Brown transferred to defendant mining company all their interest in and title to said mining claims under said agreement and said deed. Finding VI is as follows:

> "That at no time after the execution of said agreement, did plaintiffs, or either of them, in any way hinder or prevent defendants, or any of them, from entering upon the said property or doing the work as contemplated in the said agreement; but that said defendants and each and all of them have failed to do any work upon said property or in connection therewith or therefor during the period from the execution of said agreement and up to the time of the filing of the complaint in this action, except the following, viz."

The work described consisted of assessment work in 1913, not exceeding the sum of $500, and certain borings, in 1914 and 1915, of the cost or value of $2,445, for prospecting purposes; that, "during the year 1916 and up to July 1, 1916, the date of the commencement of this action, defendants performed no work whatever upon or in connection with said properties"; that after July 1, 1916, and to the last day of the trial, September 7, 1917, the only work done consisted of some tunneling of an unsubstantial and temporary nature, some road work and surveying, not exceeding in value the sum of $500. Finding VII refers to the provision of said agreement, Exhibit A, requiring defendants to commence the work of drilling, prospecting, etc., within a certain time "and to diligently continue and prosecute such work" until defendants should determine it to be no longer profitable; "that defendants, or any of them, did not, in their sole judgment, or otherwise, determine that the further working or development of said claims and property was not profitable; but, on the contrary, defendants have always claimed and did determine to their satisfaction that the further working or development of said claims and property would be profitable." Finding VIII is that plaintiffs made demand of defendants that they proceed to perform work as required by said agreement and deed and defendants' failure to do so as alleged in the complaint. Finding IX is as follows:

> "That the only consideration to plaintiffs, or either of them, for the execution and delivery of said agreement and said instrument in form of a deed were the agreements made by the parties of the second part therein and thereby to prospect and work the said properties so that plaintiffs would receive a return therefrom in the form of the royalty therein provided for; and that plaintiffs, or either of them, have not received anything whatever from defendants, or any of them, resulting from the prospecting or working of said properties, or any of them, or otherwise"; that defendants "have wholly and completely violated the terms and conditions of said contract, Exhibit A and the deed of conveyance made pursuant thereto in failing to work said property as provided by the terms of said contract."

Finding X is to the effect that plaintiffs did not excuse defendants or any of them from performing the said work, nor did plaintiffs do anything to lead defendants to believe that plaintiffs were content or satisfied with the work being done by defendants; "that defendants claimed that they did not perform other or more work because they did not have the necessary moneys so to do; and after the delivery to them of said instrument in form of a deed defendants claimed to plaintiffs that defendants were not required to do any work under said agreement or said instrument in the form of a deed; and defendants thereafter repudiated any and all obligations on their part to do any work on said properties, or any of them, or in connection therewith after the delivery to them of said instrument in the form of a deed." Finding XI states as follows:

> "That as a result of said previous work of plaintiffs and of said borings and other prospecting by defendants, it has been determined that the said properties contain a gold-bearing gravel channel, which can be profitably worked and mined by proper methods therefor, but that the actual money value of said properties has not been determined with any definiteness, and the same is problematical."

Finding XII is:

> "That the execution of said agreement and of said instrument in form of a deed and their deliveries constituted one and the same transaction. That the consideration to plaintiffs for the execution of said agreement and said instrument in form of a deed and their deliveries was the performance of the work as specified in the said agreement so that plaintiffs might receive the profits from such work, and that the delivery of the instrument in form of a deed did not in any way alter the obligation of the defendants to perform the said work in the manner and at the times as provided for in the said agreement, so that the plaintiffs could receive their consideration therefor; and that said defendants received or acquired no rights under said instrument in form of a deed which in any way relieved them of the obligation to perform said work as provided for in said agreement; and that the work that defendant did upon said properties amounted only to prospecting work, and that they did no mining work whatsoever looking towards the extraction of mineral therefrom in a manner that might result in plaintiffs' receiving any payment or consideration for the execution and delivery of said agreement and said instrument in form of a deed; and that defendants have repudiated their obligation to do any of the work specified in said agreement, since the delivery to them of said instrument in the form of a deed."

Appellant states in its reply brief that—

> "The sole question before the court is, Does the complaint state a cause of action, and can the judgment based on it stand in law?"

Accordingly, appellant's argument is directed exclusively to the sufficiency of the complaint.

[1] Appellant overlooks the fact that the judgment roll discloses the result of the trial as shown in the findings of fact which constitute the real foundation of the judgment. Appellant also ignores certain well-established rules governing appellate courts where the appeal is on the judgment roll alone. It may not be amiss to recall some of these rules. "On appeal all intendments are in favor of the regularity of the action of the court. Error will never be presumed, and the burden is upon the appellant to show that it exists." 2 Hayne's New Trial, p. 1576. In Myers v. Canepa, 174 Pac. 903, appellants claimed that the rule does not reach an error committed in passing upon the sufficiency of a complaint where the question is raised by demurrer. In reply the court said:

> "Whatever may have been the interpretation put upon section 475 of the Code of Civil Procedure prior to the adoption of section 4½, article 6, of the Constitution, it settled that injury is no longer presumed from error, but must be affirmatively shown. Vallejo, etc., R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238. The provision is: 'No judgment shall be set aside * * * for any error as to any matter of pleading, or for any error as to any matter of procedure, unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' How can the court determine that defendants were injured by overruling the demurrer in this case in the absence of the record showing what occurred at the trial? It may have been that appellants consented to the trial upon its merits without objection to the evidence in support of the complaint, notwithstanding its defects. There may be presumptive waiver, which is a species of consent. As was said by Judge Hart in the original opinion: 'In considering an appeal supported by the judgment roll only, all presumptions and intendments are to be indulged favorably to and in support of the judgment. It must, in other words, be presumed that there was evidence sufficient to support the findings or the verdict, and that, whatever might have properly occurred at the trial to cure the defects of the complaint in any vital particular, did actually occur.' "

Said Judge Hayne:

> "If the judgment roll does not, therefore, itself disclose the error complained of, it is incumbent upon the appellant to make a showing de hors such judgment roll. This can be done in no other way than by a bill of exceptions, or in case of a new trial ordered, statement." 2 Hayne's New Trial, p. 1576.

[2] In the recent case of Ransome-Crummey Co. v. Bennett (177 Cal. 560) 171 Pac. 304, the question was directly before the court where, as here, there was a trial upon the merits after general demurrer improperly overruled and judgment, as here, on the findings, and it did not appear that the facts were such as that the complaint could not have been so amended as to obviate the objection made. The syllabus correctly states the rule as follows:

> "Though by omission of an allegation, a complaint does not state * * * a cause of action, and general demurrer thereto was improperly overruled, yet, the record making it manifest judgment for defendant, after a trial on the merits, was in no way based on or due to any defect in the complaint, it will not be sustained on the ground of insufficiency of the complaint; it not appearing it cannot be amended to obviate the defect."

[3] Appellant takes the position that the contract spoke from its date, August 30, 1912, but that the deed did not speak until the date of its delivery, "and finally fixed in law the respective rights of the parties." The court found that the only consideration to plaintiff for the execution and delivery of said agreement and deed was that plaintiffs were to receive a return from the workings of the mine "in the form of a royalty," as provided in said agreement, and "that the execution of said agreement and of said instrument in form of a deed and their deliveries constituted one and the same transaction," and, further, that "the delivery of the instrument in the form of a deed did not in any way alter the obligation of defendants to pay for the said work in the manner and at the times as provided for in the said agreement so that the plaintiffs should receive their consideration therefor." These two instruments were to be, and in fact were, executed contemporaneously. The fact that the deed was not to be delivered until after certain preliminary work was done did not, in our opinion, have the effect of putting to an end the provisions of the agreement, Exhibit A, nor was it intended to have any such effect. It is an unreasonable interpretation of the transaction "that the deed hereinbefore and in said complaint mentioned is freed from conditions, and that the said deed does not require any work to be done upon the premises herein involved by these defendants or by any of them," as alleged in the answer. The deed does not appear in the record, and we know nothing of its provisions except as appears by way of preamble above set forth.

We must look to the agreement to ascertain the consideration for the execution of the deed, for it was executed and delivered pursuant to the agreement. The two documents are inseparable. We think the transaction was one where the sole consideration for the purchase price took the form of a royalty resulting from the working of the mine. In such case there is an implied obligation on the part of the grantee to work the mine to the end that the consideration may be paid, failing in which the grantor may have the property restored to himself. The cases relied upon by appellant as supporting its contention that for breaches of conditions subsequent the grantor's remedy alone is for damages do not apply here. In Downing v. Rademacher, 133 Cal. 220, 65 Pac. 385, 85 Am. St. Rep. 160, we have a case quite similar to the case before us, where, as here, an interest in a mine was conveyed by deed, and contemporaneously a separate written agreement entered into by the parties wherein it was provided that the grantee was given the exclusive right to work and mine the mining claims, and was required so to do and deliver to the grantor one-third of all the gold or other minerals taken from the mine. Said the court:

> "There is here no question of innocent purchasers without notice. The deed and the agreement constitute one instrument, and must be read as though each referred to the other and expressly incorporated its terms. And, in legal effect, what do they amount to? As between the parties, at all events, there is no such magic in a conveyance of a title in fee which can be used to do an owner out of his property. Under this contract and deed, all Downing acquired was the right to work the mine in his own way, on condition that he deliver to Rademacher one-third of the valuable minerals obtained. The conveyance was, in effect, subject to this condition."

It was held that the sole consideration of the conveyance being for a share of the proceeds of the mine, the equities of the grantor are the same as if a conditional leasehold estate had been granted; that there is an implied obligation to work the mine, in order that the consideration agreed may be paid, and as the share of the grantor cannot be determined until the mine is worked out, the grant of the mine is conditional, for the protection of the grantor. Among other cases cited in the opinion is Richter v. Richter, 111 Ind. 456, 12 N. E. 698, mentioned as "directly in point." Explaining this case, Judge Temple said:

> "Richter executed to his son a warranty deed for a farm, for an expressed consideration of $1,000. The real consideration was a contemporaneous agreement in writing, by the terms of which the son agreed to support his father so long as he should live. A few months afterwards the son refused to perform this contract. After a demand for reconveyance, the father brought suit to compel it. The defense there was the same as here, that the consideration for the deed was the agreement, and the only remedy the father had was to sue upon it. The contract purported to be a mortgage, though the court held it could not be enforced as such. It was said: 'True, neither the deed nor the mortgage state in express terms that the estate is granted upon condition, but the word "condition" is not necessary to the creation of an estate upon condition, if it plainly appears from the words used that the intent of the parties was to create an estate of that description. Stillwell v. Knapper, 69 Ind. 558 [35 Am. Rep. 240]. In the construction of deeds, as in construing other writings, courts seek to ascertain and give effect to the real intention of the parties, as such intention may be gathered from the language of the whole instru-

ment. The intent is what the law applied itself to in deeds. Watters v. Bredin, 70 Pa. 235. If from the nature of the acts to be performed by the grantee, and the time required for their performance, it is evidently the intention of the parties that the estate shall be held and enjoyed on condition that the grantee perform the acts specified, then the estate is upon condition. This is especially so when the grantor has reserved no other effectual remedy for the enforcement of performance on the part of the grantee.' "

The principle involved in these cases was applied in Acme Oil & Mining Co. v. Williams et al., 140 Cal. 681, syl., 74 Pac. 296, which was the case of the conveyance of a leasehold interest in oil lands where the sole consideration for the lease was a royalty of ten cents per barrel of the oil produced. It was held that—

> "There was an implied covenant or condition for diligent operation of the wells, to the best advantage of both parties, which is as effective as if expressed in the lease, and is of the essence of the contract; and for a substantial breach of such implied condition, the lessor may re-enter and claim a forfeiture of the lease."

McIntosh v. Robb, 4 Cal. App. 484, 88 Pac. 517, was a mining lease case, the consideration being 10 per cent. by way of royalty of the net proceeds of any and all mining operations. The court said:

> "In contracts of this character there is an implied covenant for diligent search and operation," and the lessee is bound to proceed with mining operations with reasonable diligence.

Cases are cited in support of this principle. In the case at bar not only was this implied covenant available to plaintiffs, but it is expressly incorporated in the agreement, which latter must be read into and made part of the deed.

The court found that after delivery of the deed defendants claimed that they were not required to do any work under said agreement or said deed; "and thereafter repudiated any and all obligations on their part to do any work on said properties." Holding that view as to its obligations, appellant cannot be heard to complain that plaintiffs sought the only adequate relief open to them. Appellant's suggestion that their remedy was for damages is devoid of merit. A moment's reflection would convince the legal mind that in a case of this character damages would be difficult if not impossible of ascertainment. This fact, indeed, is one of the reasons given by the courts for enforcing the rule in these royalty cases.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

41 Cal. App. 79

MAIER v. HARBOR CENTER LAND CO.

(Civ. 2838, S. F. 8687.)

(District Court of Appeal, First District, Division One, California. May 6, 1919. On Rehearing in Supreme Court in Bank, July 5, 1919.)

1. INFANTS 🔑58(2)—DISAFFIRMANCE OF CONTRACT—RESTORATION OF CONSIDERATION —STATUTE.

If contract for the purchase of a lot by a minor was void and not subject to ratification, having been made before he reached the age of 18, the mere payment of installments after he reached the age of 18 did not remake the old contract, or make a new one to obligate him, under Civil Code, § 35, to restore the consideration as a preliminary to disaffirming the contract.

2. INFANTS 🔑58(2)—DISAFFIRMANCE OF CONTRACT—RETURN OF "CONSIDERATION."

Where a lot was sold to an infant, the seller's loss by reason of having paid commission to an agent and through deprivation of opportunity to make a valid sale was not a "consideration" to be returned by the infant as a preliminary to disaffirmance; the seller's loss being the result of its own mistake in entering a void contract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Consideration.]

On Rehearing in Supreme Court.

3. LIMITATION OF ACTIONS 🔑72(2)—STATUTE OF LIMITATIONS—RUNNING AGAINST MINOR —ATTAINMENT OF MAJORITY.

Under Code Civ. Proc. § 352, the statute of limitations (Code Civ. Proc. § 339, subd. 1) could not commence to run against the right of a minor to sue for the recovery of payments under his void contract to buy a lot, disaffirmed by him until such minor had attained his majority.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by Paul F. Maier, etc., against the Harbor Center Land Company. Judgment for plaintiff, and defendant appealed to the appellate court, which affirmed, and defendant applies for hearing in the Supreme Court. Application denied.

Faulkner & Faulkner, of San Francisco, for appellant.

Herbert Choynski and James Raleigh Kelly, both of San Francisco, for respondent.

NOURSE, Judge pro tem. This is an appeal from a judgment in favor of plaintiff for the cancellation of a contract for the purchase of a lot of land, and for the recovery of moneys paid thereunder.

The facts are that Maier, a minor under the age of 18, entered into a contract with appellant for the purchase of a lot of land for $1,200. He paid $120 as an initial installment, and from time to time thereafter paid monthly installments, taxes, and interest, amounting in all to $378.05. Before arriving at the age of 21 he disaffirmed the contract, and, through his guardian ad litem, instituted this proceeding for the cancellation of the contract and the return of the moneys paid by him.

Appellant filed an answer, counterclaim, and cross-complaint, to all of which a motion to strike out was interposed, and granted except as to certain paragraphs denying material allegations of the complaint. Thereafter an amendment to the answer was filed, setting up a denial of payment to appellant, and upon this state of the pleadings the cause proceeded to trial, resulting in findings and judgment for plaintiff and respondent herein.

Appellant concedes that the contract was void ab initio, but insists that it became vitalized by the acts of the minor after he reached the age of 18 years. In this connection it is alleged, in what is designated as the fourth special defense set up in the answer, that shortly after the execution of the contract Maier reached the age of 18; that he continued to make the installment payments thereafter; that the lot was withdrawn from the market; and that appellant has suffered a loss by reason of the minor's actions through having paid to its agent a commission for negotiating the sale and through being deprived of the opportunity of making a valid sale of this lot. In the counterclaim and cross-complaint appellant seeks recoupment of these losses.

The theory of appellant, as advanced in these special defenses, is that, though the contract is void ab initio and not subject to ratification, the subsequent payments after the minor reached the age of 18 estop him from disaffirming the contract without a restoration of the consideration. In this connection the appellant sets up the damage suffered by it as constituting the consideration which respondent should restore.

[1] There are two answers to this proposition. First, under section 35 of the Civil Code it is only when "the contract is made by the minor whilst he is over the age of eighteen" that he must restore the consideration if he elects to disaffirm. If, as conceded by appellant, the contract was void and not subject to ratification, clearly the mere payment of installments after the minor reached the age of 18 did not remake the old contract or make a new one.

[2] Second, there was no consideration to be returned. Appellant's loss is the result of its own mistake in entering into a void contract. Its loss results from the failure of respondent to divulge the fact of his incapacity. The claim is, at its best, if properly pleaded, one for damages for fraud which could never be maintained separately, and hence cannot constitute a valid defense, counterclaim or cross-complaint. As said by this court in Flittner v. Equitable Life Ass'n Soc., 30 Cal. App. 209, at page 216, 157 Pac. 630, at page 633:

> "It is the policy of the law to discourage adults from contracting with infants, and the former cannot complain if, as a consequence of their violation of this rule of conduct, they are injured by the exercise of the right with which the law has purposely invested the latter, nor charge that the infant in exercising the right is guilty of fraud."

In what is termed a second special defense the appellant sets up the provisions of subdivision 1 of section 339, Code of Civil Procedure, as a bar to the recovery of all sums paid more than two years prior to the commencement of the action. This position is supported by the allegation that at the time of the execution of the contract and up to the time of the appointment of the guardian ad litem the minor had a general guardian, who was, during such time, competent to act for him, and therefore to sue in his behalf.

The difficulty with this theory is that, irrespective of whether the minor had a general guardian, the statute gave him the power to disaffirm the contract before he reached the age of 21, or within a reasonable time thereafter. The right to sue for the recovery of the payments made by him could not accrue until he had disaffirmed the contract. It does not appear from the record when he did disaffirm except that it was "prior to the commencement of this action." But it does appear that he made a payment as late as November 23, 1915, and it is fair to assume that he did not disaffirm until after that date. The complaint was filed on June 21, 1916. Thus, if governed by the limitations of section 339, the action was commenced within time.

But, aside from this, this is not an action for money had and received, but is an action for the cancellation of a void contract, and the recovery of moneys paid in accordance with its terms. As such it does not come within the limitations of section 339.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

On Rehearing in Supreme Court.

PER CURIAM. [3] The application for a hearing in this court after decision by the District Court of Appeal of the First District, Division 1, is denied. We desire, however, to say, in respect to the claims made under the statute of limitations, that in our opinion a complete answer to all such claims is to be found in section 352 of our Code of

Civil Procedure, in view of which the statute of limitations could not commence to run prior to the attainment of his majority by the minor. Our denial of the petition is not to be taken as an approval of the matters stated in the district court of appeal opinion in regard to this subject.

All concur, except MELVIN, J., absent.

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41 Cal. App. 113

GOLDEN v. CITY OF VALLEJO.
(Civ. 1982.)

(District Court of Appeal, Third District, California. May 9, 1919. Rehearing Denied June 7, 1919; Denied by Supreme Court July 7, 1919.)

1. BOUNDARIES 🔑54(6)—NOTES OF SURVEYOR—PRESUMPTION—BURDEN OF PROOF.

The field notes of a government surveyor should be accepted as presumptively correct, and may be overcome only by a preponderance of evidence that the surveyor actually established a corner monument otherwise than as indicated by the notes; the burden of proof being on the party so contending to show that the stake and monument in the location contended for are those of the original surveyor and the designated boundary of the survey.

2. BOUNDARIES 🔑46(3) — EXTENSION OF AGREEMENT.

An agreement cannot be extended by implication or otherwise to boundaries not considered.

3. BOUNDARIES 🔑53—AGREEMENT—ESTOPPEL—NONJOINING OWNERS.

Survey to establish a boundary line between the sole owner on one side and one of several owners on the other does not estop those of the several owners on the other side who did not join in it.

4. BOUNDARIES 🔑37(3)—LOCATION OF CORNER—SUFFICIENCY OF EVIDENCE.

In ejectment, plaintiff claiming that a certain mound of rock was the location of a corner of his property, and defendant city insisting the true corner was on the other side of a creek, finding that such corner was located as claimed by defendant city *held* supported by the evidence.

Appeal from Superior Court, Solano County; R. H. Latimer, Judge.

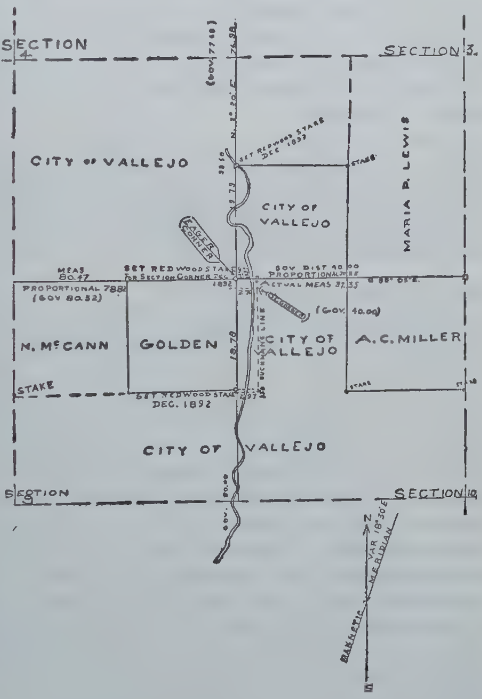
Action by William K. Golden against the City of Vallejo. Judgment for defendant, and plaintiff appeals. Affirmed.

James H. Boyer, of San Francisco, for appellant.

L. G. Harrier, of Vallejo, for respondent.

BURNETT, J. The action is in ejectment, and the vital question relates to the title to a strip of land through which flows a creek into a reservoir belonging to the water system of the city of Vallejo. Appellant owns the N. E. ¼ of the N. E. ¼ of section 9, T. 5 N., R. 3 W., M. D. M., and the respondent owns the quarter directly east. The controversy is over the boundary between these subdivisions, and the only point in dispute is as to the location of the northeast corner of Golden's property. Appellant claims that a certain mound of rock called the "O'C. corner" (or O'Connor corner) is the proper point, while respondent insists that the lower court was justified by the evidence in finding that the true corner is on the other side of the creek, where it was located in 1892 by E. N. Eager, the county surveyor of Solano county.

The following diagram illustrates these points and also the disputed tract of land, being about 180 feet in width and a quarter of a mile in length:


SECTION 4
SECTION 3.
(GOV. 77.40)
74.98
N. 1° 20' E
SET REDWOOD STAKE DEC 1892
STAKE
CITY OF VALLEJO
CITY OF VALLEJO
MARIA P. LEWIS
EAGER CORNER
MEAS 80.47
SET REDWOOD STAKE FOR SECTION CORNER DEC 1892
GOV DIST 40.00
PROPORTIONAL
ACTUAL MEAS 37.35
PROPORTIONAL 78.82
(GOV 80.52)
(GOV. 40.00)
N. McCANN
GOLDEN
CITY OF VALLEJO
A. C. MILLER
STAKE
SET REDWOOD STAKE DEC. 1892
CITY OF VALLEJO
SECTION 9
SECTION 10
GOV. 80.00
N
VAR 18° 30' E
MERIDIAN
MAGNETIC
S

The said waterway is of great importance to the city of Vallejo and it has been used as a part of its water system since 1892. No doubt this was known to Golden when he took up his part of the section in 1907, and he must have been familiar with said Eager corner and the claim of the city to this disputed tract. He waited, however, till 1914 before questioning the city's right and title to the property. This circumstance is not decisive, though, as neither estoppel nor prescription is claimed, but it can hardly be ignored in the consideration of the good faith of the parties.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Independent, however, of any delay by either party in claiming title, we are satisfied after a careful reading of the entire record that there is sufficient support for the court's finding that said northeast corner of appellant's land is located on the western side of the creek, substantially as testified to by said Eager.

The question is to be determined largely by a consideration of the expert evidence, the testimony of the surveyors who were called by the respective parties. It may be admitted that some support is furnished for appellant's theory, that the said "O'C. corner" was established by the original government survey as the common corner of said sections 3, 4, 9, and 10. There is some evidence that it was so recognized in the community for many years, and the testimony of plaintiff, himself a surveyor, O. H. Buckman, county surveyor of Napa county, and Surveyor B. L. Mincher rather favor appellant's view; but it is somewhat significant that in the testimony of Mr. Golden are found the following statements:

> "I made notes of this survey [his survey of the grounds], but I did not make a map of it. I have not these notes here; I don't know where they are. * * * The surveying work that I did there is not in accordance with the government rules for establishing lost corners."

Mr. Buckman also admitted:

> "I have not the notes of the survey I made for Mr. Golden. I have mislaid them and cannot find them."

On the other hand it is apparent that Mr. Eager and T. D. Kilkenny, city engineer of Vallejo, who made surveys of the premises, submitted full notes of their work and were thoroughly examined and cross-examined by the court and the parties.

Of course, this circumstance is not to be unduly magnified, but it could hardly be disregarded in viewing the conflicting testimony of said experts. Manifestly, we are not called upon to say whether the testimony of plaintiff's experts would have supported a conclusion in favor of his theory, but to determine whether there is any substantial support for the adverse finding of the court.

As to this "O'C. corner" Mr. Eager testified:

> "It had marks on it and they were not government markings. It was a stake with O'C. on it. If I had not made any survey at all and just came across that mound of rocks when I first made my survey in 1887, there was plenty about it to show me that it was not the government corner. The stake itself was a redwood stake, and it was a flat board, and the government corners are always stakes larger than a flat board. * * * The mound of stones at the O'C. corner was smaller than the government builds for the section corners. * * * It was not the government corner because government corners are never marked in the way this was."

And as to this, plaintiff himself testified:

> "The O'C. corner consists of a pile of rocks with a stake in it marked 'O'C.' The letters O. C. are cut into the stake. I first saw the O'C. corner with the same stake in it over 20 years ago. I am familiar with the manner in which section corners are marked by government surveyors. The O'Connor corner is not marked in that manner."

Clearly, the foregoing furnishes some evidence that the monument placed at said point was not the work of the government surveyor. It is not conclusive, but, in the absence of any positive evidence as to who placed said flat board and rocks, it is a circumstance tending to show that it was the work of another than the government surveyor and that it was done at a different time from the original survey, it being a fair inference that the government surveyor would pursue the usual course of the official surveyor in marking the corner. Or, if it be assumed that the original monument was destroyed or effaced and another put in its place by the government surveyor or some one else acting in good faith, it is not unreasonable to expect that the substituted monument would conform as nearly as possible to the original. We are to keep in mind that it is a question of probabilities whether the so-called monument or any monument was placed at that point by the government surveyor, and said circumstance was of some importance in determining that question. In other words, it is less probable that it was a government monument by reason of the fact that its construction was so different from the usual government monument that marks the corner of a township.

Another circumstance of greater significance is that it does not conform to, but rather contradicts, the calls of the original field notes. These notes show that when the surveyor in 1863 ran north between sections 9 and 10 he set the corner post for 3, 4, 9, and 10 amidst some live oak trees. Then running east between sections 3 and 10, he crossed the creek at 3 chains. That is, he had to run east from the corner to reach the creek. If we are, therefore, to give effect to this original report of the government surveyor, we must place the corner on the west of the creek, but the O'C. corner is on the east side.

As to this Mr. Buckman testified:

> "I recall that the field notes of the government survey say that you left the post and crossed the creek three chains east of the post. You could not do that if the O'Connor corner is the corner location. The O'Connor corner is east of the creek, while the corner referred to in that part of the field notes would be west of the creek."

Again, there is no chamisal at the O'Connor corner, whereas the field notes say that the surveyor in leaving the corner established by him left the "chamisal at post." As to this Mr. Eager testified:

> "There was chamisal near the post that I set and west of it. Chamisal is very scattering directly east of the post, and as you approach the creek it disappears altogether. I am familiar with the location of the O'C. corner and there is no chamisal anywhere near it, and there never was any chamisal near it to my knowledge. I located first in 1892 and I didn't find any there. I didn't find any there in 1887."

Mr. Golden admitted this in his testimony:

> "There is no chamisal right around the O'C. point; there is chamisal around the Eager corner."

The field notes also say that the corner was at a certain distance and angle from certain live oak trees 18 and 20 inches in diameter. As to this Mr. Eager testified:

> "I could not find the live oak 18 inches in diameter referred to in page 5 of the government field notes, or any stump or anything to correspond. I could not find any of the heavy trees or stumps near the O'C. corner called for in the government field notes. I made a search for them."

Again, on the line running south from the government corner, the field notes say there should be three creek crossings. From the O'C. corner a line running south to the southeast corner of section 16 would not cross the creek at all. The testimony of the surveyors shows this beyond controversy. Plaintiff testified:

> "If I drew a line from the O'Connor corner south to the southeast corner of section 9, I would not cross the creek before I got to the lake. The creek would be on the west side of the line."

Mr. Kilkenny's testimony is:

> "A line running south from the O'C. corner does not cross the creek at all; did not come within a chain of it. It runs east of the creek."

There are some other particulars in which the O'C. corner does not correspond with the calls of the original government survey, but we need not specify them.

As to the significance of the field notes in the determination of such questions there can be no controversy. In the case of Yolo v. Nolan, 144 Cal. 448, 77 Pac. 1007, speaking of the duty of a surveyor, in his effort to establish boundary lines, the Supreme Court said:

> "The field notes should be taken and from the courses * * * therein the surveyor should endeavor to fix the line precisely as it is called for by the field notes. He should endeavor to retrace the steps of the man who made the original survey. If by so doing the line can be located, it must be done, and, when so located, it must control. * * * He is not authorized to correct what the government has done."

[1] Of course, there are certain established rules for the interpretation of the field notes that must be applied in proper cases. One of these upon which appellant insists is contained in subdivision 2, section 2077, of the Code of Civil Procedure, as follows:

> "When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount."

The application of this rule, however, presupposes that the monument at the O'Connor corner was placed there by the government surveyor to mark the corner. But that was not established, and the court, in view of all the evidence, was justified in rejecting that theory. As we have already seen, there were some circumstances favoring appellant's view as to that monument, but, in view of the whole record, the probabilities are decidedly the other way. At least—and that is as far as we are required to go—in consideration of the rule that the field notes of the government surveyor are to be accepted as presumptively correct and may be overcome only by a preponderance of evidence that the surveyor actually established the corner monument at said O'C. corner, and that the burden of proof was upon plaintiff to show that said stake and monument are those of the original surveyor, and also that they were intended to locate the designated boundary of such survey (Pauly v. Broadnax, 157 Cal. 395, 108 Pac. 271), we cannot hold that the court erred in rejecting said O'C. monument as controlling.

Other important circumstances are disclosed by the record that tend to justify the court's position in reference to the O'Connor corner. Among these is the fact that if it were accepted as the true location, the Golden tract would contain 45½ acres instead of the normal area of 40 acres, and the city's corner, lying across the creek and adjacent to Golden's land, would be reduced to 34½ acres. Of course, consideration of quantity is often of little importance in the determination of boundary lines. Frequently other tests are more significant and satisfactory, but, under the peculiar circumstances of this case, the disparity between these supposedly equal subdivisions which would thereby be created, strongly confirms the action of the court in rejecting the said O'C. corner.

It was manifestly the intention of the government surveyor to make these respective subdivisions as nearly equal as possible, and this intention might properly be regarded as a decisive factor in the rejection of appellant's claim, though otherwise the evidence might be deemed sufficient to uphold it. In this connection it may be recalled that the practice in making the government survey of a township is to begin at the southeast corner and proceed from the south and east toward the north and west, and the general rule is that any deficiency in the section or fractions thereof attaches to the last part of the survey. Theoretically, at least, the interior sections, such as 9 and 10 included herein, must contain the full number of acres called for. A stronger showing than was made by appellant would be required to justify the trial court in ignoring the presumption that the government surveyor performed his duty properly in accordance with the general custom in such matters.

Respondent calls attention to some other circumstances tending to discredit the O'Connor corner, but it should not be necessary to notice them all specifically.

As to the so-called Eager corner, it was established by the said county surveyor of Solano county upon the theory that it represented what is known as a "lost corner." He testified that he applied the rule of "proportionate measurements." Whatever criticism may be made of the particular method that he pursued in locating the corner, there can be no doubt that the evidence is sufficient to warrant the conclusion that it is substantially in accordance with the original survey.

As said in Howard v. Cunningham, 171 Pac. 978, concerning the location of a government corner:

> "The whole question is one of fact, and, the trial court having determined it, that ends the matter so far as an appellate court is concerned."

This, of course, is to be taken with the qualification that there is substantial evidence to support the trial court's conclusion, and of that there can be no doubt herein. Manifestly, there were several slight mistakes made by the government surveyor and there are some inaccuracies in his survey. But there is much stronger reason for accepting the Eager corner than the O'C. corner. It corresponds more closely with the calls of the surveyor than does the other. It is true that it does not meet every requirement, but it seems reasonable and probable that it is practically at the point selected by the original surveyor. Respondent, in its brief, follows carefully the survey of Mr. Eager and points out step by step how it conforms substantially to the calls of the original field notes. As before stated, the weight of the evidence is decidedly in favor of his survey, although on the line running north the O'C. corner comes nearer satisfying the call as to natural monuments than does the Eager corner. But, as stated by respondent, as to this course, neither of the rival corners fits the government field notes with exactness. Therein a mistake was probably made in the original survey or in the record made of it, as pointed out by Mr. Eager. Be that as it may, we cannot hold that this difficulty affects in the slightest the finding of the lower court.

Much is said in appellant's brief as to monuments and the rule that gives them precedence over courses and distances. Special emphasis is laid upon the requirement of the field notes as to certain creek crossings, and it is claimed that due consideration was not accorded to this circumstance. But as to that appellant is mistaken.

Mr. Eager's explanation along that line seems quite reasonable and satisfactory. He said:

> "The principal reason I had for not accepting the O'C. corner as the common corner of 3, 4, 9, and 10 was that it was on the wrong side of the creek. The government field notes stated that it was three chains to the west of the creek, while as a matter of fact the O'C. corner was east of the creek. It did not correspond with the check of the government notes; those were the reasons that time, and, besides, I checked the course of the creek. The course of the creek south of the O'C. corner did not correspond with the government field notes. The O'C. corner would not check with the notation in the field notes which reads: 'Running north between sections 9 and 10 on a variation of 16¼ degrees east of 49.50 chains across creek 25 links wide, course southwest, enter chamisal.' The line which I established does correspond with this course, that is another reason for leaving the corner where I did. The O'C. corner does not correspond with the measurements east and west, nor with the proportional measurements. The field notes stated that the corner was 3 chains to the west of the creek, and I considered that I had got approximately that distance. There was a crossing of the creek at 3 chains south of the corner which I re-established, which corresponded with the government field notes, and the line also corresponded with the government field notes running north. * * * There is a much better monument right there than the statement of a surveyor that he followed the bed of the creek for 1,000 feet practically north and south, and that is the statement of the government surveyor that he commenced at the section corner to 3, 4, 9, and 10 and ran on a line east and at some place he crossed the creek. He says that on the line running east he positively crossed the creek at right angles. There is a discrepancy, but I think the statement that at 3 chains he crossed the creek running there is much more positive than that he got into the creek bed and ran along it. * * * That is the reason I discarded the O'C. corner and re-established the corner in a different way. If the Buckman line which runs north 1,000 feet to the bed of the creek is extended south, it should attach itself to the southeast corner of section 16, but this line running south does not correspond in any respect with the field notes. It is a blank compared with the government field notes for the 2 miles south. If I were of the opinion that it might be the correct line by north, a description of it in accordance with the field notes from the south would show that it was absolutely wrong."

He further points out that the O'C. corner fails to meet the situation as to the east and west courses and distances.

Mr. Eager's testimony seems clear and comprehensive, and it can leave little doubt, if any, that appellant has no legal title to the property in dispute.

We can see no merit whatever in the claim that respondent, by reason of acquiescence or estoppel, is precluded from disputing the correctness of the O'Connor corner.

[2, 3] It seems that in 1887 Mr. Eager was called upon to run a line between the lands of Nelson and Madison in the northerly half of sections 3 and 4. It is true that Mr. Eager at that time assumed the O'C. corner to be the true government corner. It was so represented to him by Mr. Nelson and he proceeded upon that basis. There was no question raised as to its accuracy. But it is manifest that the acquiescence and agreement of Nelson and Madison as to said corner and to the boundary line between their parcels of land, conceding that it would be binding upon them and their successors, would not preclude the city of Vallejo from contesting its accuracy in reference to an entirely different tract of land. Different tracts are in controversy here, and therefore a different line, and moreover, the United States then owned the land now owned by appellant, and the United States was not a party to the proceeding. It will not be disputed that "an agreement cannot be extended by implication or otherwise to boundaries not considered in the agreement" (Grants Pass Land Co. v. Brown, 168 Cal. 456, 143 Pac. 754), and, furthermore, "A survey for the purpose of establishing a boundary line, made between a sole owner of the land on one side, and one of the several owners of the land on the other side, does not estop the owners who did not join in it" (Spring v. Hewston, 52 Cal. 442).

[4] We are satisfied, not only that the findings of the lower court are supported, but that the equities in the case are with respondent.

The judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

180 Cal. 711

DREW v. SUPERIOR COURT IN AND FOR MENDOCINO COUNTY.

(S. F. 9086.)

(Supreme Court of California. July 8, 1919. Rehearing Denied Aug. 7, 1919.)

EXECUTION 🔑417—CONTEMPT—FAILURE OF CORPORATION OFFICER TO APPEAR FOR EXAMINATION.

Where an order is made requiring a corporation and its president to appear and answer concerning its property after an execution against the corporation has been returned unsatisfied, and the president fails to appear, an order adjudging him in contempt of court will be upheld as against a contention that under Code Civ. Proc. § 714, the order must be directed to the judgment debtor, which was the corporation, and that if the presence of its officers was required they must be summoned as witnesses under section 718; it being the president's duty as such to appear.

In Bank.

Petition by F. C. Drew against the Superior Court of the State of California in and for the County of Mendocino, for a writ of review of an order adjudging petitioner guilty of contempt of court. Order affirmed.

Samuel M. Shortridge, W. H. Metson, and R. G. Hudson, all of San Francisco, for petitioner.

Robert Duncan, of Ukiah, for respondent.

WILBUR, J. The petitioner seeks to have an order of the superior court of Mendocino county, adjudging him guilty of contempt of court, annulled. A judgment for $7,150 having been rendered in that court against the L. E. White Lumber Company, a corporation, and execution having been returned unsatisfied, an order was made by said court, requiring the corporation and the petitioner, F. C. Drew, as president thereof, to appear and answer concerning its property. The order was served upon the petitioner, who failed to appear for examination, and no appearance was made for or on behalf of the corporation. The petitioner was thereafter adjudged guilty of contempt for failing to obey said order. Petitioner claims that the court was without authority to issue the order directing him to appear and testify; that section 714, Code of Civil Procedure, provides that the order shall be directed to the "judgment debtor." Petitioner contends that the court could only require the corporation, the "judgment debtor," to attend for examination, and that if the presence of officers of the corporation was required they must be summoned as witnesses under the provisions of section 718 of the Code of Civil Procedure. It is a sufficient answer to petitioner's contention to say that it was his duty, as president of the corporation, upon being served with an order directing the corporation to appear at a time and place specified for examination, to have personally appeared at that time and place for examination, and his failure to do so, even in the absence of an express direction that he, personally, should so appear, was a contempt of the order of the court. In Wilson v. United States, 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558, the Supreme Court of the United States had under consideration a similar question as to whether or not a president of a corporation was guilty of contempt of court in refusing to produce books of the corporation in his possession, in response to a subpœna duces tecum served upon him, directing the corporation to produce said books. In passing upon that question, the court said:

> "It was further urged, * * * that the petitioner should not be held in contempt as the subpœna was not directed to him, but merely to the corporation. * * *"

In answering that contention, the court, after discussing some other matters, said:

> "Concluding, then, that the subpœna was valid and that its service imposed upon the corporation the duty of obedience, there can be no doubt that the appellant was likewise bound by it unless, with respect to the books described, he could claim a personal privilege. A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience, and may be punished for contempt. The applicable principle was thus stated by Chief Justice Waite in Commissioners v. Sellew, 99 U. S. 624, 627 [25 L. Ed. 333], where a peremptory mandamus was directed against a municipal board: 'As the corporation can only act through its agents, the courts will operate upon the agents through the corporation. When a copy of the writ which has been ordered is served upon the clerk of the board, it will be served on the corporation, and be equivalent to a command that the persons who may be members of the board shall do what is required. If the members fail to obey, those guilty of disobedience may, if necessary, be punished for the contempt. Although the command is in form to the board, it may be enforced against those through whom alone it can be obeyed. * * * While the board is proceeded against in its corporate capacity, the individual members are punished in their natural capacities for failure to do what the law requires of them as the representatives of the corporation.' See, also, Leavenworth v. Kinney, 154 U. S. 642 [14 Sup. Ct. 1198, 25 L. Ed. 336]; People v. Sturtevant, 9 N. Y. 277 [59 Am. Dec. 536]."

It follows that the petitioner was in contempt of court for refusing to obey the order directed to the L. E. White Lumber Company, of which he is president; that the court was authorized to include in its order directing the appearance of the corporation before the referee the name of the president of the corporation, and that the court was in the exercise of its jurisdiction in declaring the petitioner guilty of contempt.

The order assailed is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; MELVIN, J.; LAWLOR, J.; LENNON, J.

180 Cal. 660

FIGHIERA et al. v. RADIS. (L. A. 4912.)

(Supreme Court of California. July 1, 1919.)

1. Mortgages 🔑616 — Declaration of Trust—Action for Accounting—Issues.

In action for an accounting of defendant's proceedings under a declaration of trust and for a reconveyance of the property to plaintiffs on payment of the amount found to be due, allegations of answer *held* to put question of ownership of land in issue.

2. Appeal and Error 🔑907(3)—Review—Presumptions.

On appeal on judgment roll alone, court will presume that the parties treated the pleadings as sufficient to raise an issue upon which court made a finding.

3. Appeal and Error 🔑907(3)—Review—Presumptions.

On appeal on judgment roll alone, the court will assume that the allegations of the answer were treated as controverted and that evidence was given in support thereof.

4. Pleading 🔑139—Necessity for Cross-Complaint—Answer—Ownership of Property.

In action for an accounting of defendant's proceedings under a declaration of trust, and for a reconveyance of the property to plaintiffs on payment of amount due defendant, defendant was not required to present cross-complaint to obtain judgment awarding him ownership of property, since such relief could be had upon an answer.

5. Mortgages 🔑369(2) — Declaration of Trust — Sale of Land — Discretion of Court.

Where holder of overdue note secured by deed of trust caused land to be sold under the power of sale and made agreement with his creditor whereby creditor purchased land to hold as security for holder's note to creditor, with power to sell land upon default in payment thereof, court did not abuse its discretion in refusing to set aside creditor's sale where more than $4,800 was due on note, and value of land above a prior mortgage was only $6,000.

6. Mortgages 🔑378—Sale of Land—Power of Sale—Foreclosure.

In view of Civ. Code, § 2932, a sale under a power contained in a mortgage, if properly conducted in accordance with the power, is as effectual to convey title as would be a sale thereof under a decree of foreclosure in a regular action to foreclose the instrument as a mortgage.

Department 1.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Action by Louise N. Fighiera and husband against William F. Radis. Judgment for defendant, and plaintiffs appeal. Affirmed.

See, also, 32 Cal. App. 245, 162 Pac. 655.

Arthur C. Vaughan, of Los Angeles, for appellants.

Frank F. Oster, of Los Angeles, for respondent.

SHAW, J. The plaintiff appeals from the judgment. The record on appeal consists of the judgment roll alone.

On October 26, 1914, plaintiff owned a certain promissory note executed by one Woodford, to Ray Zug, for $30,000, due January 29, 1917, and secured by a trust deed executed to the Title Guarantee & Trust Company for certain parcels of land. The land was subject to a prior mortgage for $29,000. On October 26, 1914, plaintiffs borrowed money from the defendant, in consideration of which they executed to defendant their promissory note for $7,000, payable four months after date. At that time default had been made in the interest on the $30,000 note, and plaintiff had caused the trustee to advertise the land for sale. It was agreed between the plaintiffs and defendant that the land should be sold by the trustee under the power contained in the trust deed, that defendant should purchase the lands at such sale and receive a deed therefor from the trustee as security for the note and certain other debts, and should thereupon execute a contract stating the terms on which he was to hold the same as security for the $7,000 note and other debts of plaintiff. This is the transaction which gave rise to the controversy involved in this suit. The land was sold under the trust deed, the defendant became the purchaser by a deed dated November 28, 1914, and thereafter on December 1, 1914, executed the contract in question. This instrument recited the conveyance of the property to defendant, and declared that he held it in trust on the terms therein stated, among which were that he should make such advances as he deemed necessary for the protection and care of the property; that such advances should be a lien on the same; that, if the above-mentioned note of plaintiffs to defendant and a certain other note made by the plaintiffs to a third party were not paid, the defendant was thereupon authorized to sell the property after publishing a notice of sale for a specified time; and that out of the proceeds he should pay all his costs and advances and the two notes above mentioned and render the surplus to the plaintiff. The present action is a suit against the defendant for an accounting of his proceedings under the declaration of trust and for a reconveyance of the property to the plaintiffs on payment of the amount found to be due. In substance and effect, it is an action to redeem the property from the liens secured by the declaration of trust.

The defendant admitted the execution of the deed to him and the making of the declaration of trust by him, but denied that it was intended as a mortgage, alleging that the deed of the trust company and the declaration of trust were parts of the same transaction and that the intention was to create a trust on the terms set forth in the declaration and not to make a mortgage. The answer also alleges that by reason of the default by plaintiffs in the payment of the notes mentioned in the declaration of trust, and after the required notice, he had sold and conveyed the property in question, as authorized by the declaration of trust, to one Elmendorf; that Elmendorf thereafter had reconveyed the property to defendant; and that, ever since the execution of said deed to him by Elmendorf, he (the defendant) "had been and still is the owner in fee simple of all of said property." Also, by way of counterclaim, the answer alleged a cause of action against plaintiffs on their said notes to the defendant and an indebtedness by them to him on account of his advances and expenses as trustee of the property, and asked judgment against the plaintiffs for the balance in his favor and for the amount of the note. He also prayed for judgment declaring defendant to be the owner of the property free from the claims of the plaintiffs.

The court found generally in favor of the defendant, found the amount of indebtedness to be $4,826.53; that the defendant had sold and conveyed the property under the authority of the declaration of trust in the manner alleged in the answer, to said Elmendorf; that Elmendorf had conveyed the same to the defendant; and that the defendant was the owner thereof, free and clear of all right, title, and interest of the plaintiffs therein. The court found specifically that the contract above mentioned was a declaration of trust and not a mortgage. Judgment was rendered in accordance with these findings.

[1, 2] The plaintiffs contend that the findings and judgment that the defendant is the owner of the property and that plaintiffs have no rights therein are beyond the issues made by the pleadings. In view of the pleadings as above recited, it is obvious that there is no merit in this point. The answer alleged a sale and deed to Elmendorf made in conformity with the power contained in the contract, the subsequent conveyance to the defendant, and also that the defendant is the owner of the property. These allegations clearly put in issue the question of ownership. Furthermore, in the absence of a record of the proceedings at the trial, we would be required to presume from the general finding of defendant's ownership that the parties treated the answer as sufficient to raise an issue in regard thereto, and hence that it cannot be now attacked. Gervaise v. Brookins, 156 Cal. 112, 103 Pac. 332.

[3, 4] The question whether the pleading of the defendant was an answer in the nature of a counterclaim or one seeking affirmative relief, or a cross-complaint, is unimportant. It was styled an answer and was pleaded as such, and it is obvious, or at all events we must on the record before us assume, that the allegations of the answer were treated as controverted and that evidence was given in support thereof. It is therefore immaterial whether it was essentially a cross-complaint or an answer. The relief asked could be had upon an answer, and there was no necessity for a cross-complaint. The general cause of demurrer is also obviously without merit. If there were no other cause of action set up, the allegations concerning the indebtedness of plaintiffs to the defendant on the promissory notes and on the account were clearly sufficient. We think, however, that the allegations stated as the foundation for the other relief asked were sufficient to justify the same.

[5] Plaintiffs argue that the court abused its discretion in upholding the sale by the defendant under the declaration of trust, claiming that for various reasons it should have been set aside. This claim is based partly on facts alleged in the complaint which the court found to be untrue. The findings do not show fraud, or that any undue advantage was taken of plaintiffs. On the facts found, no abuse of discretion appears in this respect. The value of the land above the prior mortgage for $29,000 was found to be only $6,000.

[6] Plaintiffs also claim that the court erred in deciding that the contract under which the controversy arose was a declaration of trust and not a mortgage. We regard the question as wholly immaterial. "A power of sale may be conferred by a mortgage upon the mortgagee or any other person, to be exercised after a breach of the obligation for which the mortgage is a security." Civ. Code, § 2932. It is a thoroughly established proposition that a sale under a power contained in a mortgage, if properly conducted in accordance with the power, is as effectual to convey title as would be a sale there-

of under a decree of foreclosure in a regular action to foreclose the instrument as a mortgage. Fogarty v. Sawyer, 17 Cal. 591, s. c., 23 Cal. 573; Cormerais v. Genella, 22 Cal. 124; Felton v. Le Breton, 92 Cal. 465, 28 Pac. 490; Godfrey v. Monroe, 101 Cal. 227, 35 Pac. 761. The conveyance to Elmendorf would therefore be as effectual in the one case as in the other, and, if we concede that the court erred in its decision as to the character of the instrument, it would not affect the title of the defendant based on such sale. No other points require discussion. We find no cause for reversal.

The judgment is affirmed.

We concur: OLNEY, J.; LAWLOR, J.

180 Cal. 706

PEOPLE v. BELLON. (Cr. 2219.)

(Supreme Court of California. July 5, 1919.)

1. Criminal Law 🔑273—Plea of Guilty—Determination of Degree—Procedure.

Under Pen. Code, § 1192, requiring the court, on plea of guilty of a crime divided into degrees, first to determine the degree, a judicial determination based on evidence is required, and the proper procedure is to receive evidence as to such issue from the respective parties.

2. Criminal Law 🔑273—Plea of Guilty — Determination of Degree — Unsworn Statement of Defendant.

Where defendant, who had pleaded guilty to homicide, voluntarily made a statement without being sworn in proceedings to determine the degree, he cannot object to the court's determination based on such statement and other evidence.

3. Criminal Law 🔑274—Plea of Guilty—Withdrawal of Plea—Grounds.

Where defendant had pleaded guilty, and the court after hearing his statement and other evidence had determined the degree to be first degree murder without extenuation, defendant cannot withdraw his plea at the time when the court gave opportunity to present further evidence.

4. Criminal Law 🔑1168(6) — Appeal — Harmless Error—Additional Evidence.

Where the court determined that defendant, who had pleaded guilty was guilty of first degree murder without extenuation, and had sentenced him to death, defendant could not be prejudiced by reopening the case for further testimony.

5. Homicide 🔑253(6) — Sufficiency of Evidence—First Degree Murder.

Evidence that defendant, who had pleaded guilty, had killed his mother-in-law by cutting her throat when she interfered to protect her daughter against his admittedly premeditated attempt to kill her, *held* sufficient to warrant the court in holding defendant guilty of murder in the first degree without extenuation.

6. Homicide 🔑253(3) — Sufficiency of Evidence—First Degree Murder—Circumstantial Evidence.

To sustain a finding of first degree murder, it is not necessary that there should be express evidence of deliberate purpose to kill, if such purpose can be reasonably inferred from the facts and circumstances shown by the evidence.

7. Homicide 🔑22(3)—First Degree Murder—Premeditation.

There need be no appreciable space of time between the formation of the intent to kill and the killing to establish the premeditation necessary to make the offense first degree murder.

8. Criminal Law 🔑273—Plea of Guilty—Facts Admitted.

The plea of guilty of murder admits the venue and the death of the person assaulted, and those facts need not be established by evidence in proceedings to determine the degree of the offense.

9. Criminal Law 🔑1088(19) — Appeal — Record—Transcript of Preliminary Examination.

The transcript of the preliminary examination not offered in evidence in proceeding to determine the degree after plea of guilty, but admitted after judgment was pronounced and appeal taken to make it a part of the transcript on appeal, is not properly in the transcript and cannot be considered.

In Bank.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Thomas Bellon pleaded guilty to murder and was sentenced to death, and he appeals. Affirmed.

Terry W. Ward, of Merced, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, of Sacramento, for the People.

ANGELLOTTI, C. J. The defendant appeals from a judgment of death pronounced upon a plea of guilty to an information charging him with murder and the trial court's determination that the murder was of the first degree and without extenuating circumstance.

[1] Under our practice it is essential to proper pronouncement of judgment in the event of a plea of guilty of a crime distinguished or divided into degrees, such as murder or burglary, that the court first determine the degree. Section 1192, Pen. Code; People v. Jefferson, 52 Cal. 452. This the court did in the case at bar, but it is claimed that the determination was made in the entire absence of any evidence, and that in any event the evidence was not of such a nature as to support a conclusion of murder in the first degree.

While, as has been held, the proceeding to determine the degree of the crime of murder after a plea of guilty is not a trial, there being no issue joined, the statute does require, at least impliedly, a judicial determination based on evidence. See People v. Chew Lan Ong, 141 Cal. 550, 75 Pac. 186, 99 Am. St. Rep. 88. The appropriate and proper method for a court to pursue in such a case is to receive such competent evidence from the respective parties as is material to the question of degree, and, the evidence having been concluded, to pronounce its determination thereon.

[2-4] Passing for the moment the question of the sufficiency of the evidence to sustain a conclusion that there existed the willful, deliberate, and premeditated intent to kill which is essential to first degree murder, we are satisfied there was in this case no such material departure in procedure from the proper method as, under the circumstances appearing, would justify a reversal. The record shows that on October 3, 1918, the defendant, who was at all times accompanied by his attorney, entered his plea of guilty, and the court announced that it was now the duty of the court to ascertain the degree. Thereupon the defendant, without having been sworn as a witness, was examined by the district attorney and the court, both as to the circumstances of the crime and as to the things material to the statement required by section 1192a to be sent to the clerk of the state prison in cases where a prisoner is to be punished by imprisonment therein. The examination of the defendant was intended to, and did, cover both of these matters. No objection whatever was urged by either the defendant or his counsel to the course pursued in this matter. While two other persons were briefly examined, their evidence threw no light on the material question of degree. The court thereupon announced its determination that the admitted murder was murder of the first degree, without extenuating circumstances, and fixed October 7, 1918, for judgment. At that time the district attorney was allowed to introduce additional evidence. Defendant, through his attorney, insisted that, if additional evidence was to be received on the question of degree, he should be allowed to withdraw his plea of guilty and the matter should be submitted to a jury. No good reason for the granting of permission to withdraw the plea was suggested, and the court properly denied the application. Nor can we conceive of any possible prejudice to defendant in allowing further evidence on the question of degree, in view of the determination previously announced. Certainly the effect of the additional evidence could not be to invoke more serious consequences to defendant than the determination previously announced. So far as appears, the court was willing, on October 7, 1918, to hear the testimony of any witness that might be produced by either party. The testimony having been concluded, the court announced that the new testimony had been taken "for further assurance" in the matter, and had confirmed the court in the conclusion previously arrived at, thus practically making a new determination. Judgment was then pronounced. Of course, the defendant could not have been compelled to give any evidence in the matter; but, as we have indicated, he voluntarily gave his statement, no objection whatever in this behalf being suggested prior to the appeal. Of course, also, if he was to testify, he should have been sworn as a witness or required to make his affirmation or declaration as provided by section 2097, Code of Civil Procedure. Here again there was no suggestion of objection by either defendant or his attorney prior to the filing of brief on this appeal. We are satisfied that he cannot now be allowed to urge that his statement may not be regarded as evidence to be considered by the trial court in fixing the degree. Full knowledge that he was not sworn as a witness must, of course, be attributed to the defendant himself, and also to his attorney. Their acquiescence under such circumstances should be held to be a waiver of objection. See generally, on this subject, Langford v. United States, 4 Ind. T. 567, 76 S. W. 111, 4 Ann. Cas. 1021 and note. Under the circumstances, it cannot fairly be held that the statement made by defendant was a mere extrajudicial statement.

[5] As to the question of the sufficiency of the evidence given by the defendant to sustain a conclusion of first degree murder without extenuating circumstances we have no doubt. Because his wife had had him arrested and had threatened to have him "sent to the war," he journeyed from Dinuba to Merced to her brother's home, whither she had gone, a distance of many miles, with the deliberate design of killing her. He found her in bed, and, having opened a razor he was carrying, cut her "throat right there in bed." It seems that the wound thus inflicted on his wife did not produce death. The wife's mother, with whose murder defendant was charged, was occupying a bed in the same room, and apparently attempted to intercept defendant immediately after he had thus assaulted his wife. He said that she was "just grabbing" him; that "she had a shotgun right there, close to her bed there, and she grabbed me"; that he said to her, "Never mind, I don't want to do nothing to you, go back"; and that she "grabbed" him, and "I had that razor." He also testified as follows:

"Q. When you struck at your mother-in-law there with the razor, did you just mean to scare her a little; is that what you meant to do? A. No, sir; I told her not to take the gun. She had the gun there, and I cut her.

"Q. What did you strike at when you struck?

What did you strike at? A. I struck at the neck.

"Q. You struck at her throat? A. Yes."

It further appeared that with the gun he shot at his brother-in-law.

It is also true that he said, "I did not mean to kill the old lady; I told her to stay back;" that in response to a question, "You did not intend to kill your mother-in-law?" he answered, "No, sir, never in the world; if she didn't have that gun, I wouldn't touch her;" and that in response to a question, "You intended to kill her too, didn't you?" he answered, "No, sir, I did not intend to kill her; I told her to go back." But these statements as to his secret intention were not conclusive on the trial court in view of the facts as testified to by him. It may be noted that, in the light afforded by a reading of his entire testimony, these statements do not appear to us to be necessarily inconsistent with a deliberate and premeditated intent to kill at the moment of the killing, but rather to mean that he went to the house without any preconceived design to kill his mother-in-law, and did kill her only upon her attempting to interfere with him after he had made the assault on his wife.

[6] As was said in People v. Machuca, 158 Cal. 64, 109 Pac. 886, in discussing a question of sufficiency of evidence to sustain a conclusion of first degree murder:

> "It is not necessary that there should be express evidence of a deliberate purpose to kill. 'It could be inferred from such facts and circumstances in the case as would reasonably warrant an inference of its existence.' [Citing authorities.] That the deliberation which must precede the killing in order to make the murder one of the first degree need not have existed for any given length of time is thoroughly settled. [Citing authorities.]"

[7] As has often been said:

> "There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer, and, if such is the case, the killing is murder in the first degree, no matter how rapidly these thoughts of the mind may succeed each other, or how quickly they may be followed by the act of killing."

See People v. Hunt, 59 Cal. 430, 435.

It is difficult to attribute any other design than that of killing to one who knowingly strikes at the throat of another with a sharp razor with such force and strength as to cause death.

[8] It is also urged that no evidence was introduced to show the things essential to defendant's guilt of the crime of murder committed in Merced county, such as that the mother-in-law was in fact dead, or that the crime was committed in Merced county. As to this it is sufficient to say that all of these things were admitted by the plea of guilty. It was only for the purpose of determining the degree of the admitted murder that any evidence at all was essential.

[9] In considering this appeal, we have not considered the transcript of the preliminary examination of defendant, for it constitutes no proper part of the record on appeal in this case. It was not offered in evidence in the court below until after the case had been finally closed, and judgment had been pronounced and the appeal taken. It seems to have been admitted at this stage simply for the purpose of making it a part of the transcript on appeal.

Defendant's attorney, appointed by the court, with a degree of loyalty to his client's cause that is to be commended, has filed herein a very strong brief in support of the various contentions made. In some of his claims as to irregularity in the procedure below he is undoubtedly correct. But as we have indicated, we are convinced that it cannot fairly be held that there was any such departure as, in view of the circumstances detailed, would justify a reversal.

The judgment is affirmed.

We concur: LENNON, J., SHAW, J.; OLNEY, J.; WILBUR, J.; MELVIN, J.; LAWLOR, J.

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180 Cal. 667

WOODILL & HULSE ELECTRIC CO. v. YOUNG et al. (L. A. 4930.)

(Supreme Court of California. July 5, 1919. Rehearing Denied Aug. 4, 1919.)

MUNICIPAL CORPORATIONS ⚿519(6) — STREET IMPROVEMENT—LIENS—PRIORITIES.

As between different street improvement liens the one last imposed is paramount.

Department 1.

Appeal from Superior Court, Los Angeles County; H. T. Dewhirst, Judge.

Action by the Woodill & Hulse Electric Company against George Young, the J. D. Kneen Contracting Company, and the Empire Securities Company, together with a consolidated cause. From judgment for the last-named defendant, plaintiff appeals. Reversed, with directions.

Richard J. Culver, of Los Angeles, for appellant.

Crouch & Crouch, of San Diego, for respondent.

Chas. A. Gray, of San Francisco, and Arthur M. Ellis, of Los Angeles, amici curiæ.

OLNEY, J. This is an appeal from a judgment in an action to foreclose certain street assessment liens on two parcels of land. The defendants in the action were the original owners of the property upon which the plaintiff's liens were imposed, and the owner of certain other street assessment liens on the same property. These latter liens had been imposed prior to the imposition of the plaintiff's liens, and were for work done under proceedings initiated prior to the proceedings under which the plaintiff's work was done. Intermediate the imposition of the plaintiff's liens and the commencement of the action, street improvement bonds representing the assessments of the defendant lienholder were issued, default made upon such bonds, and the property sold to the lienholder to satisfy the bonds.

The original owner of the property defaulted in the action, which thereafter proceeded as between the lienholders only. The sole question presented was one of priority between the two sets of liens, and this was determined in the lower court against the plaintiff, who appeals.

The appellant's contention is that street assessment liens are liens which are imposed upon the property without the owner's consent under the taxing power of the state, that they are imposed upon the property as such so that every right or interest in the property is included in the subjection to the lien, with the result that a prior lien, even one itself for a street assessment, is subject to it. The respondent's contention is that the rule generally applicable to contractual liens applies, and that the one prior in time is prior in right.

The question as presented is a novel one in this state, unless Brady v. Burke, 90 Cal. 1, 27 Pac. 52, can be considered as determining it. The action in that case was one to quiet title, and the plaintiff claimed as the purchaser at a foreclosure sale in an action brought to foreclose a street assessment lien. Certain of the defendants claimed as the purchasers at foreclosure sales in actions to foreclose other street assessment liens. The lien foreclosed by the sale to the plaintiff was prior in time to the liens foreclosed by the sales to the defendants, but the latter existed at the time of the commencement of the foreclosure action resulting in the sale to the plaintiff, and the defendants were not made parties to that action, with the result, as claimed by them, that their rights had not been foreclosed by the sale to the plaintiff. Under these circumstances the court inquired into the validity of the proceedings under which the defendants claimed, held them to be invalid, and upon this ground affirmed the judgment quieting the plaintiff's title as against them. The liens under which the defendants claimed being held to be invalid in toto, the decision did not involve a determination of their rank, if valid, with respect to the liens under which the plaintiff claimed. In the course of the opinion, however, it is said:

> "Although the sheriff's deeds made to appellants Wood and Riggins [the defendants] antedated those of plaintiff and are based upon judgments rendered prior to those under which plaintiff claims, yet, as the liens under which plaintiff's title has its origin are older than the liens to which the deeds of appellants relate, plaintiff had the superior legal title"—citing Littlefield v. Nichols, 42 Cal. 374.

It does not appear whether there was any contention over the question of rank as between the liens, if valid, and there is no discussion of the matter in the opinion. All that appears is the statement quoted and the citation of Littlefield v. Nichols in support of it. But the liens involved in Littlefield v. Nichols were not imposed by superior public authority, but were contractual, and, furthermore, no question as to their rank was involved. The point determined was merely that, as between conflicting foreclosure or execution sales, that one was superior which was based upon the superior lien. It must be that it was to this point and to this point alone that it was cited in Brady v. Burke, supra. Our conclusion is that the bald statement in Brady v. Burke cannot be taken as a governing determination of the question now squarely presented, and that we are at liberty to determine it upon its merits.

The question has arisen in other jurisdictions and has been there decided. The decisions, however, are conflicting. Supporting the appellant's position are Morey v. Duluth, 75 Minn. 226, 77 N. W. 829; Burke v. Lukins, 12 Ind. App. 648, 40 N. E. 641, 54 Am. St. Rep. 539; Jaicks v. Oppenheimer, 264 Mo. 693, 175 S. W. 972. Supporting the respondent's position are Philadelphia v. Meager, 67 Pa. 345; Scott-McClure Land Co. v. Portland, 62 Or. 462, 125 Pac. 276; Bell v. New York, 66 App. Div. 578, 73 N. Y. Supp. 298; Des Moines Brick Co. v. Smith, 108 Iowa, 307, 79 N. W. 77.

In spite of this conflict, however, we believe that the underlying principles by whose application the question must be decided are clear and lead with certainty to the conclusion that in liens of this character, imposed on property—that is, on a thing itself regardless of ownership—by public authority for a public purpose, the one last imposed is paramount.

No question is made but that this is the well-established rule as to liens for general taxes. It is so held almost universally and has been so decided in this state. Anderson v. Rider, 46 Cal. 134, 138; Dougherty v. Henarie, 47 Cal. 9, 14; Chandler v. Dunn, 50 Cal. 15; California, etc., Co. v. Weis, 118 Cal. 489, 50 Pac. 697. The reason for it is concisely stated in Dougherty v. Henarie, supra, thus:

> "The necessity of collecting revenue for the support of the government imperatively requires that the lien for taxes shall take precedence over all other liens, and that a tax sale, followed by a proper conveyance, shall transfer the title discharged of prior tax liens. If the rule were otherwise, purchasers at tax sales would be deterred from bidding, and a large portion of the revenue would remain uncollected."

Such being the rule and the reason for it in the case of conflicting general tax liens, the question arises: What reason is there for not applying the same rule to the case of conflicting street assessment liens, or, possibly putting it more accurately, does the reason for the rule as between general tax liens apply as between street assessment liens? Now fundamentally the principle in the case of general tax liens is that the law for the purpose of insuring a payment required for a public purpose creates a lien for such payment, not upon any particular interest or set of interests in the property, but upon the property itself as such, so that all interests in it of every nature are made subject to the lien, with the result that, although there may be no explicit statutory provision, there is implicit the rule that the tax lien shall be paramount to all other prior existing liens, even to prior existing tax liens.

The case of street assessment liens under our statute comes exactly within the foregoing principle. The assessment is one for a public purpose. To insure its payment it is made a charge, not against any person, owner of property or otherwise, but against the res itself. So much has already been decided by this court. German, etc., Society v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067. In this case it was held that a street assessment lien was paramount to the lien of a mortgage. Now, the lien of a mortgage is not of the same character as a public assessment lien, and so far the decision mentioned cannot be said to be determinative of the present case. But the reasons given for the decision are exactly those for the rule as between conflicting tax liens, viz. that for the purpose of insuring a payment required for a public purpose a lien is placed on property paramount to all existing interests therein. It is said:

> "Whether the power to tax for street improvements is to be referred to the general taxing power and the power of eminent domain, or, as some courts have suggested, to the police power, is not very important. Whatever its source may be, it exists beyond question by reason of its nature and objects, and that it partakes of the nature of the taxing power must be admitted. The power to levy a tax for general purposes, which shall be a lien superior to all other liens, prior or otherwise, is not doubted, and it is not because it is called a tax, but because of its object and the necessity for raising revenue in order to execute the functions of government. In modern times, whatever may have been the demands of society in an earlier period of the development of government, the necessity for improving the streets of cities and towns, while perhaps less important in degree than the general objects of government, is yet important and necessary to the welfare of the whole community, and in our opinion the principles on which the system of general taxation depends, and which govern in the enforcement of tax levies for general purposes, are also applicable to taxation for the improvement of streets, the construction of sewers, and other like public work. It is a mistaken assumption that the improvement of a particular street in a city is solely for the benefit of adjoining property owners; the benefit accrues to the public generally, and the power to compel such improvements is essential to the well-being of communities. The bond act expressly provides that the lien of the bonds shall be 'a first lien upon property' (Stats. 1893, § 4, p. 36); and section 5 also makes the provisions of the law for the collection of delinquent state and county taxes applicable to sales under the bond act (Pol. Code, § 3788). The intention seems to be clearly manifested that the bond lien shall be prior to all liens. The view we take of the statute makes it unnecessary to inquire as to the effect of the lien which attaches upon the recording of the warrant. If we are to protect prior mortgages against the lien, how can we in reason take from the owner his title, which antedates the mortgagee's interest?"

The assessments in question here were not levied under the same act as those in German, etc., Society v. Ramish, supra, and the statutory provisions are not exactly the same. But the essential thing, the intent to make the lien a paramount one upon the property, is present in both statutes. Sections 23, 63, and 66 of the act of April 7, 1911; Stats. 1911, p. 730.

Such being the character and purpose of street assessment liens, and that character and purpose being the same as those of general tax liens, so far as this phase is concerned, it necessarily follows that the rule as to priority between conflicting tax liens should be the rule as to priority between conflicting street assessment liens.

Much might be said by way of amplification. Much is said and exceedingly well said, in Jaicks v. Oppenheimer, 264 Mo. 693, 175 S. W. 972, but we quote only the following:

> "When the two kinds of taxes are considered for the purpose of determining this question it will be found that there is not such an inherent difference between them as to place the liens of special taxes merely in the category of ordinary liens. It is true general taxes are levied for the support of the government and in that sense general taxes are the more important of the two and ought to take precedence over special taxes, so that the lien of a general tax ought to be prior to the lien of a special tax, even though the latter be prior in point of time. But that is not the question here. The question now is as to the rule of priority as between the different liens of different special taxes. And the precise inquiry now at hand is: What essential or inherent difference is there in the nature

of special taxes which deprive their lien of a rule accorded to the lien of general taxes? Both are created by acts of the sovereign power exercised for the public good. In both the taxing power operates in rem, that is, on the property itself without regard to different or conflicting interests of ownership; in fact, in total disregard of any liens or interests attached thereto. The proceedings to collect both are proceedings in rem. And 'the general and universal rule is that in proceedings in rem to enforce the payment of taxes the last tax levied and sought to be enforced is superior and paramount to the lien of all other taxes, claims, or title. 2 Cooley on Taxation (3d Ed.), 875."

The principal reasons advanced in opposition to the foregoing view are: (1) That it permits the municipality or other public authority to give one party a lien, and then, without his consent and against his will, displace and perhaps destroy it by creating another lien in favor of another party; and (2) that it will defeat the purpose of the statute by preventing contractors from taking work through fear of subsequent liens.

As to the first of the reasons, it will occur immediately that it is equally applicable to liens for general taxes where admittedly the subsequent lien is the superior. No reason is apparent why the holder of a street assessment lien should be more favored than a purchaser at a tax sale. But the real fallacy in the argument lies in its overlooking the fact that all property and every interest in property, no matter how acquired or what its origin, must be held subject to the right of subsequent taxation, both general and special, and that any foregoing of this right by the state must be most exceptional. Yet there is just such an exception if the interest of a street assessment lien—an interest which is purely private property although public in its origin—is not to be subjected to subsequent liens for public improvements. There is, in fact, no more displacement or destruction of the earlier lien by the imposition of the later than there is r displacement or destruction of any other right in the property by the imposition of a street assessment lien.

The second objection, that the doing of public work will be hampered because contractors will be reluctant to undertake work if their liens are to be subject to liens for subsequent work, is, we believe, almost entirely fanciful. The same reason would apply to any acquisition of property which could not be concealed from the taxing authorities, and as yet there has not been observed any great reluctance to purchase real estate, which cannot be so concealed, or to loan money secured by lien upon it, although it is well understood that real estate and any mortgage lien upon it may at any time be subjected to assessment for public work.

On the other hand, to hold that a street assessment lien is superior to any subsequent lien of the same character would most certainly interfere with the making of public improvements and seriously tend to frustrate the purpose of the statute. The lien of the assessment exists for two years, and if suit to foreclose is brought the lien exists until the termination of the suit. If such a lien is superior to any similar subsequent lien, there would be nothing to prevent the owner of property assessed from purchasing the lien, concealing the fact of purchase, having suit brought to foreclose the assessment, and then tolling the suit along indefinitely, thereby prolonging the apparent lien, and quite effectually deterring any bidding for work which could be paid for only by an assessment subordinate to the lien already on the property. If bonds are issued to represent the assessment, as was done in this case, the possibility of obstructing the making of public improvements is still greater, for the life of the bonds is ten years, and during this whole period any contractor doing public work payable by assessment must take a second lien.

Finally, the point is made by amici curiæ, arguing in support of the respondent's position, that the statute provides that the "assessment shall be a first lien * * * until * * * fully paid. * * *" They argue that, if the assessment is to be a first lien until paid, it necessarily follows that any subsequent lien must be subordinate to it. But this result is but one horn of a dilemma which presents itself, if we assume that the language quoted was intended to include the case of conflicting liens under the statute. The language is just as applicable to an assessment for subsequent work as to the one first imposed. In other words, the statute declares equally as well in the case of the second assessment as in the first that the lien shall be a first lien. But such lien can be first only if it is superior to the lien of the first assessment. The only escape from the dilemma thus presented is to conclude that the statute intended that, when once a lien for street work is imposed on property, no further improvement of a similar character can properly be made until such lien has been discharged by payment. Such a result, of course, would be subversive of the very purpose of the act, and it is inconceivable that it was intended.

The true answer to the dilemma is that the language quoted was not intended to apply to the case of conflicting liens, both under the same statute. It cannot so apply, since it would make both liens, though in conflict, first liens, a manifest impossibility. The correct construction of the statute is that by the language quoted nothing more was intended than to declare the general proposition that a street assessment lien should be a first lien on the property. The result is that the statute contains nothing governing the ranking of conflicting liens, each imposed under the statute, and such ranking must be determined by the general principles applicable to liens of that character. As to those general principles we have no doubt. Such liens, so far as any phase of the matter here material is concerned, are essentially tax liens imposed by public authority for a public purpose upon a res, and the same compelling reasons which have led to the practically universal recognition of the rule that a subsequent lien for general taxes is superior to a prior lien of the same sort lead to the same conclusion with regard to street assessment liens. It follows that the conclusion of law of the trial court that the assessments and bonds of the defendant Empire Securities Company are respectively liens prior and superior to the liens of the plaintiff is incorrect.

The judgment is reversed, and the lower court is directed to enter judgment subjecting to foreclosure the interests of the Empire Securities Company in the property as well as the interests foreclosed by the present judgment.

We concur: SHAW, J.; LAWLOR, J.

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180 Cal. 683

FIDELITY SAVINGS & LOAN ASS'N v. RODGERS et al. (L. A. 4924.)

(Supreme Court of California. July 5, 1919. Rehearing Denied Aug. 4, 1919.)

1. Interpleader 🔑40 — Sufficiency of Complaint.

Complaint in interpleader under Code Civ. Proc. § 386, is not required to state facts showing that both adverse claims are well founded, but is sufficient if it shows that the claimants claim same thing, that their claims are adverse to each other, and that plaintiff cannot safely determine for himself which claim is right and lawful.

2. Banks and Banking 🔑119 — General Deposit — Relation of Parties — Debtor and Creditor.

Under Civ. Code, §§ 1818, 1878, a general deposit for exchange or credit creates the relation of debtor and creditor, the title to the money passing to the person with whom it is deposited, and he becoming debtor of depositor for amount thereof.

3. Assignments 🔑49—Bills and Notes 🔑4, 66—"Bill of Exchange"—Acceptance —Obligation of Drawee.

Instrument reading: "Received of F. Savings & Loan Association $3,500. * * * Charge to account of S. Pay to Z."—signed and executed by S., who had made general deposit with F. Savings & Loan Association, and delivered to Z., was in legal effect, a bill of exchange under Civ. Code, § 3171, and not an assignment, and under section 3193 did not create legal obligation from F. Savings & Loan Association to Z. until accepted by former in writing.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assignment, Bill of Exchange.]

4. Assignments 🔑49—Equitable Assignment—Bill of Exchange—Consideration.

If an order for payment of money deposited by drawer as a general deposit with drawee had been delivered to payee for a valuable consideration, it would have operated as an equitable assignment of drawer's demand against drawee for the amount deposited, and could have been enforced as such.

5. Assignments 🔑49—Equitable Assignment—Bill of Exchange.

An order or writing for the payment of money at the delivery of property which does not by its legal effect constitute an assignment, and which is executed as a gift and for no other consideration, will not be upheld or enforced as an equitable assignment.

6. Assignments 🔑49—Equitable Assignments—Bill of Exchange—Gift.

Where drawer gave payee bill of exchange in trust for purpose of supplying him with funds with which to construct building for charitable purposes, and there was no actual present transfer by way of verbal gift, accompanied by a delivery of the means of obtaining possession or a symbolical delivery of possession, so as to make a valid gift under Civ. Code, § 1147, there was no equitable assignment, but, in absence of acceptance by drawee, merely an uncompleted attempt to make gift of money in trust for charitable purposes.

7. Gifts 🔑42—Uncompleted Attempt to Make Gift.

An uncompleted attempt to make a gift does not vest any right to the thing in the donee, and it cannot be enforced by action in the courts.

Department 1.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action in interpleader by the Fidelity Savings & Loan Association against Mary C. Rodgers, executrix of the last will and testament of Sarah Rounds, and Z. L. Parmelee. Judgment for last-named defendant, and first-named defendant appeals. Reversed.

Slosson & Mitchell, of Los Angeles, for appellant.

Milton K. Young, of Los Angeles, for respondent.

SHAW, J. This action was begun by the filing of the complaint of the plaintiff asking that the defendants be required to interplead and litigate among themselves their several adverse and conflicting claims to the sum of $3,500 in possession of the plaintiff, and which it offered to pay into court for the party found to be entitled thereto. Such an action is authorized by section 386 of the Code of Civil Procedure.

[1] The objection of the appellant Rodgers that the complaint in interpleader is insufficient, because it does not state facts showing that the claims of Parmelee, the other defendant, is well founded is of no force. If this was required, it would result in an absurdity which would defeat the right in any case to maintain such an action. The claims being adverse, both parties defendant could not have the right to the thing. If the plaintiff who calls them in must state a good case for one, he must, for the like reason, state a good case for the other, and as both could not have the right to the thing, this would be impossible. If his statement showed that one had the right and the other had not, a plaintiff could not support the interpleader, for he would then show his ability to decide the matter and thus put himself out of court. Because of these considerations, the Code requires nothing more of him in this respect than to show that the parties to be called in make claims on him for the same thing, that the respective claims are adverse to each other, and that he cannot safely determine for himself which claim is right and lawful.

The two defendants appeared, and each filed a separate answer setting up the respective claims to the money. The court below made findings, and gave judgment declaring the defendant Parmelee entitled to the money. From this judgment defendant Rodgers, as executrix of the estate of Sarah C. Rounds, deceased, appeals.

The court found the facts to be as follows: Before the demands were made upon it, Sarah C. Rounds deposited with plaintiff a sum of money exceeding $3,500. She made an order in the following words:

> "Los Angeles, Cal., Nov. 8th, 1915.
>
> "Received of Fidelity Savings & Loan Association $3,500.00 thirty-five hundred and no/100 dollars. Charge to account of Sarah C. Rounds. Pay to Z. L. Parmelee. Sarah C. Rounds."

On November 9, 1915, she executed and delivered said order to defendant Z. L. Parmelee. This was given to him in trust to collect the money from the plaintiff and apply the same in constructing a building at Gardena, Cal., to be used as a school for Spanish and Mexican boys and to be known as the "Sarah C. Rounds Industrial Building." There was no other consideration for the order. Before the execution of this order, the plaintiff furnished the form on which it was written and approved the same as the proper form and instrument for transferring $3,500 from the account of said Sarah C. Rounds to the said Parmelee. On November 9, 1915, and again on November 12, 1915, Parmelee presented said order to the plaintiff and demanded payment thereof, but payment was refused each time by plaintiff for the reason that plaintiff had been warned by some friend of Mrs. Rounds that she was not of sound mind. This was not true. The court found that she was of sound mind. Sarah C. Rounds died on December 8, 1915, one month after the date of said order. Defendant Rodgers is the executrix of her estate, and as such demanded the money from plaintiff.

[2] Neither the pleadings nor findings show the corporate character of plaintiff, nor the business in which it was engaged. It does not appear that it was a bank of any kind; consequently we cannot consider any rules of law applicable exclusively to banking transactions. Nowhere in the record is it expressly stated whether the money deposited by Mrs. Rounds with plaintiff was received by it as a mere bailment of the identical money, or as a credit in her favor. The expressions used, however, show that it was regarded and treated by her as an "account" in her favor against the plaintiff, to be paid out by it on her order, and as both parties have discussed the case solely upon the theory that it was a general deposit for exchange or credit, we will assume that such was its character. The effect of such a deposit is to create the relation of debtor and creditor between the two parties concerned; the title to the money passing to the person with whom it is deposited, and such person becoming the debtor of the depositor for the amount thereof. Civ. Code, secs. 1818, 1878; Shoemaker v. Hinze, 53 Wis. 116, 10 N. W. 86; Talladega Ins. Co. v. Landers, 43 Ala. 115.

[3-5] The instrument executed by Mrs. Rounds to Parmelee was therefore an order by a creditor to a debtor to pay the debt, or a part thereof, to a third person. Although it contains many unnecessary words, it is, in legal effect, a bill of exchange. Wheatley v. Strobe, 12 Cal. 92, 97, 73 Am. Dec. 522; Civ. Code, § 3171. It does not purport to transfer to Parmelee the title to the money mentioned, nor to the debt or obligation of the plaintiff to repay the same to her, but merely directs the plaintiff to pay to Parmelee the said sum of money. Consequently it is not in form, or in legal effect, a present assignment to Parmelee of the right or title to the money or to the obligation therefor. Cashman v. Harrison, 90 Cal. 302, 27 Pac. 283; Lawrence Natl. Bank v. Kowalsky, 105 Cal. 43, 38 Pac. 517. Being in legal effect a bill of exchange, it did not create a legal obligation from plaintiff to Parmelee until it was accepted by the plaintiff and such acceptance could not be made except in writing. Civ. Code, § 3193; Wheatley v. Strobe, supra. It was not accepted in any manner; consequently it does not constitute a direct obligation on the part of plaintiff to pay the money to Parmelee. It is executory in character, a mere order directing that the

money be paid by plaintiff to Parmelee, but accomplishing no transfer of title until the intended transaction should be completed by a transfer of the possession, or, it may be, by the written acceptance of the plaintiff. If it had been given for a valuable consideration, it would have operated as an equitable assignment of the demand of Mrs. Rounds against the plaintiff for the sum of money, and could have been enforced as such. Wheatley v. Strobe, supra; Pope v. Huth, 14 Cal. 406; Pierce v. Robinson, 13 Cal. 121; Joyce v. Wing, 87 Cal. 424, 25 Pac. 545; Curtner v. Lyndon, 128 Cal. 36, 60 Pac. 462. But it was intended as a gift in trust, and was without valuable consideration. It is the settled doctrine that an order or writing for the payment of money or the delivery of property, which does not by its legal effect constitute an assignment and which is executed as a gift and for no other consideration, will not be upheld or enforced as an equitable assignment. Pullen v. Placer County Bank, 138 Cal. 175, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19; Brokaw v. Brokaw, 41 N. J. Eq. 221, 4 Atl. 66; 5 Cor. Jur. p. 931.

[6, 7] From the foregoing it is clear that the transaction shown by the facts found, and enforced by the judgment, was nothing more than an uncompleted attempt by Mrs. Rounds to make a gift of the money to Parmelee, in trust for charitable purposes. There is nothing to show any actual present transfer by way of verbal gift accompanied by a delivery of the means of obtaining possession, or a symbolical delivery of possession, so as to make a valid gift under section 1147 of the Civil Code. It does not appear that Mrs. Rounds and Parmelee had any conversation about the matter, or that there was any communication between them other than the said written order. An uncompleted attempt to make a gift does not vest any right to the thing in the donee, and it cannot be enforced by action in the courts. The court below was in error in its conclusion that Parmelee was entitled to the money.

The judgment is reversed.

We concur: LAWLOR, J.; OLNEY, J.

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180 Cal. 700

TIFFANY v. PACIFIC SEWER PIPE CO.
(L. A. 4902.)

(Supreme Court of California. July 5, 1919.)

MASTER AND SERVANT ⚿30(3)—EMPLOYMENT—RIGHT TO DISCHARGE—SATISFACTORY TO EMPLOYER.

Contract of employment of expert glazeman, giving employer right to discharge if for any reason it is unable to turn out enameled and glazed brick in quantities equal to the present quality "and satisfactory to" it, implies a complete satisfaction involving its judgment, and authorizes discharge if for any reason quality or quantity is not satisfactory to it; its decision thereon being conclusive.

Department 1.

Appeal from Superior Court, Los Angeles County; G. W. Nicol, Judge.

Action by James Tiffany against the Pacific Sewer Pipe Company. Judgment for plaintiff, and defendant appeals. Reversed.

Swanwick & Donnelly, of Los Angeles, for appellant.

Donald Gallagher, of El Paso, Tex., for respondent.

SHAW, J. Plaintiff sued for damages caused by an alleged wrongful discharge of plaintiff from the defendant's service. The court below made findings and entered judgment in favor of the plaintiff for $3,617.17, being the full amount prayed for in the complaint. Defendant appeals.

The defendant was engaged in the business of manufacturing glazed brick. Plaintiff was employed by the defendant as an "expert glazeman" for the term of three years beginning February 10, 1914, under a contract in writing made on February 12, 1914, and modified on May 12, 1914. The first contract provided that Tiffany should be employed by the defendant as expert glazeman for one year at $3,000 a year, with the privilege to defendant of changing the employment to three years at $2,000 per year at any time within six months, "providing a product satisfactory to the defendant" was obtained within 60 days from the date of the contract. Tiffany began work, and continued until May 12, 1914, on which date a modification of the contract was made, whereby the defendant employed Tiffany for three years from February 10, 1914, at $175 per month, upon the following condition:

> "In consideration of the above provisions Mr. Tiffany will not hold the Pacific Sewer Pipe Company liable under said contract, in case for any reason the Pacific Sewer Pipe Company are unable to turn out enameled and glazed brick in quantities equal to the present quality and satisfactory to the Pacific Sewer Pipe Company.
>
> "In the latter case Mr. Tiffany is to have ninety days notice before making a change."

Tiffany was discharged on May 10, 1915, without notice. The court found that up to that time plaintiff had fully performed his contract with a reasonable degree of skill, and that the defendant, after the making of the contract, was at all times able to turn out enameled and glazed brick in quantities equal to the quality which was being turned out on May 11, 1914, and which was satisfactory to said defendant. It is claimed that this finding is contrary to the evidence.

In the making of brick, the mud or clay is first pressed and molded to the shape desired, the glaze or enamel is then applied, and when a sufficient quantity to fill a kiln is thus prepared the bricks are placed in the kiln and burned to the required degree. The principal duty of the plaintiff was to prepare and mix the glaze or enamel so that it would, when burned, have the hardness and other qualities necessary to make it durable and the brick salable. The glaze or enamel was a liquid into which the bricks were dipped so as to form a coat of the liquid on their surfaces.

It will be observed that the conditions expressed in the modification above quoted embraced three propositions: First, that the defendant should be able to turn out enameled and glazed brick in quantities; second, that the brick turned out should be equal to the present quality. This obviously refers to the provision of the first contract that the three years' employment would be made if "a product was obtained within sixty days from its date which was satisfactory to the defendant." It appears from the evidence that at the time the second contract was made Tiffany was producing a quality of enameled and glazed brick which satisfied the defendant and induced it to enter into the second contract. The third proposition embraced in the added condition was that the enameled and glazed brick produced by the service of plaintiff should not only be equal in quality to that being produced on May 12, 1914, but also that in quantities and quality it should be "satisfactory to the Pacific Sewer Pipe Company." It is contended that there is no evidence to show that the defendant was satisfied with either the quantity or the quality of the enameled and glazed brick produced by the plaintiff for the defendant thereafter. The law governing the rights of the parties under a contract which requires one party to do something which is satisfactory to the other party is thus stated in 13 Corpus Juris, at page 675:

> "Contracts in which one party agrees to perform to the satisfaction of the other are ordinarily divided into two classes: (1) Where fancy, taste, sensibility, or judgment are involved; and (2) where the question is merely one of operative fitness or mechanical utility. In contracts involving matters of fancy, taste, or judgment, when one party agrees to perform to the satisfaction of the other, he renders the other party the sole judge of his satisfaction without regard to the justice or reasonableness of his decision, and a court or jury cannot say that such party should have been satisfied where he asserts that he is not." Section 768.

The next section declares:

> "The rule stated in the preceding section is also applied to cases of operative fitness or mechanical utility when the contract clearly provides that performance shall be satisfactory to the promisor."

Similar statements will be found in 9 Cyc., at pages 618, 619, and 620.

A different rule applies where the contract provides for the construction of a building or the like, in accordance with plans and specifications fixed by the contract, to the satisfaction of the owner or of an architect employed by him. In these cases it is usually held that if the contract is performed as required by the plans and specifications, the person whose judgment is invoked must accept the performance, and his mental condition as to satisfaction is immaterial. In such cases the question whether the work is satisfactorily done or not arises after the contract has been executed, either in whole or in part, and the satisfaction refers to that which is already done. Elliott states the rule to be that such a contract does not justify the promisor in arbitrarily, unreasonably, and capriciously claiming that he is not satisfied, in order to evade liability, "and the courts in doubtful cases, especially when the thing furnished is so attached to the real property of the buyer that its value would be lost to the seller, either wholly or in great part, unless paid for, are inclined to construe such a stipulation as one to furnish such a thing as ought reasonably to satisfy the buyer. But where there is nothing to justify the contrary construction, the general rule is that the party to be satisfied is the judge of his own satisfaction, subject only to the limitation in most jurisdictions that he must act in good faith, and if he does so act and is really dissatisfied, he may reject the work or the article on the ground that it is not satisfactory to him. This rule is particularly applicable where the subject-matter of the contract involves personal taste or feeling, as where an artist agrees to paint a portrait of another or some member of his family, to the satisfaction of such other or the like, but, as shown by the authorities cited in the last preceding note, the rule is not confined to such cases." 3 Elliott on Contracts, § 1881. "It has been held that a contract for personal services, so long as they are satisfactory to the employer, may be terminated by him whenever he is dissatisfied in good faith. * * * Similar rulings have been made in cases of contracts to manufacture or furnish articles to the satisfaction of the other party, even though a reasonable man would or ought to have been satisfied." Id. § 1882.

The decisions in this state have not attempted to state the rule with reference to cases like the present. In Coplew v. Durand, 153 Cal. 278, 95 Pac. 38, 16 L. R. A. (N. S.) 791, which involved a building contract, there were elaborate plans and specifications, as is usual in such cases, and the work was "to be done to the entire satisfaction of the owner and the architect." Before each payment was made a certificate was to be obtained signed by the architect. After the work was done both owner and architect stated that they were satisfied with it, but the architect refused to make a certificate. It appeared that the work was done conformably to the plans and specifications. The court merely held that under the circumstances the refusal of the certificate was unreasonable, and that the contractor was entitled to recover as if it had been issued. In Gladding, etc., Co. v. Montgomery, 20 Cal. App. 279, 128 Pac. 792, the District Court of Appeal remarked that "a stipulation in a contract to perform to the satisfaction of one of the parties only calls for such performance as should be satisfactory to a reasonable person." This remark also referred to a building contract and with reference to portions of the work already done. Furthermore, it was an obiter dictum, the question not being involved in the case. In Bryan Elevator Co. v. Law, 31 Cal. App. 205, 160 Pac. 170, a building contract was also under consideration. The plaintiff agreed to construct an elevator in the defendant's building, that its operation "shall give satisfaction in every particular," and that if the controlling device proved unsatisfactory, plaintiff would replace it with another "satisfactory to the owner." The court followed the rule applying to building contracts in general, and held that the contract only called "for such performance as should be satisfactory to a reasonable person." In other cases, where the question of judgment was involved, the opposite rule has been applied. In Parkside Realty Co. v. MacDonald, 166 Cal. 426, 137 Pac. 21, a real estate contract, the seller agreed to make the title satisfactory to the buyer and his attorneys. The court said that the question was "not whether the title was in fact a good and marketable one, but whether it was acceptable to respondent and his attorneys," citing Allen v. Pockwitz, 103 Cal. 88, 36 Pac. 1039, 42 Am. St. Rep. 99, and Church v. Shanklin, 95 Cal. 627, 30 Pac. 789, 17 L. R. A. 207. The two cases cited involved a similar question and were to the same effect.

The contract in the present case was an executory one. The question does not involve the acceptance of any work already done by Tiffany under his employment. He was discharged from further employment because the defendant was not satisfied with the quality of his work. There is no sufficient evidence to support the finding that the defendant was satisfied with his work. During the time of his service many kilns of brick were burned which were glazed by him, and there is evidence as to some of these that the defendant's manager expressed himself satisfied. But there is no evidence, and no declaration or admission by any person authorized to speak for the defendant that it was satisfied with his work as a whole. The contract authorized the defendant to discharge the plaintiff if his work was not satisfactory as a whole, although at times he might be producing brick of the finest quality. The object of the defendant in employing the plaintiff was to obtain glazed and enameled brick for sale to its customers. The quantity of good brick produced out of each kiln, that is, the proportion of good brick to bad brick therein, was an important matter to them. For example, there is evidence that one customer agreed to buy 1,815 glazed brick known as "bull-nosed," that is, with one or more corners rounded, that the glaze was mixed and applied by plaintiff, and 15,000 bricks were so glazed and burned in order to obtain 1,815 good ones. Other evidence fixed the number burned for that job at 5,000 to obtain the required number. Quality was also important, for if the glaze was not rightly mixed it would scale off, or crack, after being burned, and if the color or transparency was not satisfactory to purchasers the brick would not be as easily sold. All these matters would, of necessity, be determinable by the taste or judgment of the defendant's managers. And as their experience in the business was an essential element in the exercise of that judgment, it could not have been intended that some other person's judgment should determine the question of satisfactory performance. An express stipulation or necessary implication would be necessary to give such a contract that meaning. This contract neither declares it directly, nor requires it by implication. The terms of the contract imply that the defendant was not compelled to be satisfied if the quality produced equaled that which was being produced at the time the contract was made. The addition of the phrase, "and satisfactory to the Pacific Sewer Pipe Company," implied a complete satisfaction, and authorized the defendant to reject the brick or discharge Tiffany under the terms of the contract if for any reason of any character the quality or quantity of the product was not satisfactory. We think the contract falls within the rule applicable to cases where the judgment of the promisor is involved, and that his decision that he is not satisfied is conclusive on the other party and upon the court to which the question is presented.

The judgment for the amount awarded cannot be supported without the finding in question. None of the other findings supplies its place. The appeal must therefore be sustained.

The judgment is reversed.

We concur: OLNEY, J.; LAWLOR, J.

180 Cal. 688

LAWRENCE v. PREMIER INDEMNITY ASSUR. CO. et al. (L. A. 4918.)

(Supreme Court of California. July 5, 1919.)

1. Appeal and Error 🔑1040(13)—Harmless Error—Overruling Demurrer.

In action against corporation and directors for conversion of plaintiff's stock, plaintiff was not prejudiced by overruling of special demurrer to answer alleging that it had been agreed that the stock should be retained by the corporation's treasurer until plaintiff should perform "certain services," where plaintiff in fact knew exactly what services were referred to.

2. Appeal and Error 🔑553(2)—Notice of Presentation of Reporter's Transcript for Certification.

Where the record was prepared under Code Civ. Proc. § 953a, the objection that proper notice was not given of presentation to the trial judge for certification of the reporter's transcript, in that notice was given by mail and specified a time for presentation but two days removed, cannot be sustained; for it is sufficient that the clerk give notice by mail, and, as the statute requires only that the time specified be "within" five days of the notice, if the time allowed be too short for sufficient examination of the transcript, a request may be made to the court for further time.

3. Trial 🔑396(3)—Finding Not Responsive to Issues.

In action against corporation and directors for conversion of plaintiff's stock, the issue presented by the pleadings and evidence being whether plaintiff was the unconditional owner of the stock or whether plaintiff was to have his stock only upon his performance of his contract to sell stock, a finding that he had agreed to deposit the stock as security for performance of his stock-selling contract was not responsive to the issue presented by the pleadings and evidence.

4. Evidence 🔑442(1)—Parol Agreement—Minutes of Directors' Meeting.

In action against corporation and directors for conversion of plaintiff's stock, the issue presented by the pleadings and evidence being whether plaintiff was the unconditional owner of the stock or whether plaintiff was to have his stock only upon his performance of his contract to sell stock, testimony that at the directors' meeting at which issue of plaintiff's stock was authorized it was agreed that the stock was to be plaintiff's only upon his performance of services, was not inadmissible under the parol evidence rule, as varying the terms of the minutes of such meeting which were in evidence, as there was no element of estoppel, and only a part of the full transaction appeared in the minutes.

5. Evidence 🔑158(26) — Best Evidence — Minutes of Directors' Meeting.

Testimony as to contents of minutes of directors' meeting is incompetent.

6. Evidence 🔑352(1)—Admissions—Corporation Minute Book.

The books of a corporation, including its minute book, are competent evidence against it as admissions.

7. Evidence 🔑442(1), 444(2)—Parol Evidence—Proposal.

When a proposal, even in writing, is made and accepted, it is permissible to show it was accepted with conditions or qualifications, or that accompanying the acceptance and in reality forming part of it terms in addition to those set forth in the proposal were exacted by acceptor.

8. Evidence 🔑408(1) — Parol Evidence — Receipts.

Unless a receipt either purports to be or the evidence shows it is the written memorial of the full understanding between the parties, the parol evidence rule has no application.

9. Evidence 🔑444(2) — Parol Evidence —Receipts.

Where plaintiff's receipt from a corporation for a sum in payment for stock purported only to require the issuance of the certificate for the shares as soon as a certificate book was had, and plaintiff's evidence showed that the receipt did not cover the entire understanding, evidence by defendants that there were conditions or terms upon which plaintiff was to have the stock was properly admitted.

Department 1.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by John D. Lawrence against the Premier Indemnity Assurance Company and others. From judgment for defendants, plaintiff appeals. Reversed.

Hamilton & Lindley and George B. Watson, all of San Diego, for appellant.

E. S. Torrance and Charles P. Pritchard, both of San Diego, for respondents.

OLNEY, J. The Premier Indemnity Company and the San Diego Land & Mortgage Company are the same corporation. This action is against it and three of its five directors to recover for the alleged conversion by them of 175 shares of the corporation's stock belonging to the plaintiff. The defendants had judgment in the lower court, and the plaintiff appeals.

[1] Two preliminary matters should be disposed of before considering the merits of the case. The first of these is the contention of

the appellant that the lower court erred in overruling a special demurrer to an affirmative defense pleaded by the answers. The complaint alleged in brief that the plaintiff was the owner of the stock in question, that such ownership was evidenced by a stock certificate issued by the corporation in the name of the plaintiff, and that the defendants converted it to their own use on a certain day. The answers, among other things, pleaded that the stock certificate had been made out under an agreement with the plaintiff that it was to be retained in the possession of the treasurer of the corporation until "said plaintiff should have performed certain services that he had theretofore agreed to perform for said corporation," and that he had not performed these services and had wrongfully secured possession of the certificate. The answers contained nothing showing what the "certain services" were which it was alleged the plaintiff was to perform and a special demurrer was directed to this point. Apparently the demurrer was good. Certainly respondent's counsel in his brief before us makes no attempt to show the contrary, but relies upon the proposition that the plaintiff has not been prejudiced by the ruling, if erroneous. His position in this respect is sound. The plaintiff was in no wise misled or prejudiced. He knew in fact exactly what services the defendants claimed he should have performed and had not. He had been president and a director of the corporation, and as such had himself been present at the directors' meeting when the dispute between him and the three defendant directors came to a head and when the alleged act of conversion was committed by the passage of resolutions canceling his stock for the nonperformance by him of services called for by a previous contract in writing. At the trial it was the same services whose performance was relied upon as justifying the action of the defendants. Under these circumstances the plaintiff was not taken by surprise, and no prejudice was worked upon him by not requiring the answers to state with particularity the services in question, although as a matter of correct pleading this should have been done.

[2] The second preliminary matter to be considered is the contention on behalf of respondent that the reporter's transcript—the record having been prepared under section 953a, Code of Civil Procedure—cannot be considered, because proper notice of its presentation to the judge of the trial court for certification was not given. The objections to the notice are not that no notice was received, for it apparently was, and counsel appeared at the time specified, but are that it was given by mail and specified a time for presentation but two days removed. The notice which is required is one by the clerk of the court, and not by the parties. The sections of the Code requiring notice to a party to be given by personal service where the attorneys have their offices in the same city do not apply. There is no provision requiring notice by the clerk to be given by personal service, and such requirement of a public official would be burdensome in a degree out of all proportion to any advantage and should not be exacted. It is enough for the clerk to give notice by mail. As to the objection to the time of notice, it is sufficient to point out that the requirement of the statute is simply that the time specified be within five days of the giving of the notice. If the time allowed be too short for a sufficient examination of the transcript, a request should be made to the court for further time. No complaint is made in this case that the transcript is not correct or that sufficient time for its examination was not in fact allowed before its final certification.

Passing now to the merits, it appears that the defendant corporation was organized in San Diego in the spring of 1911 for the purpose of engaging in the business of accident insurance. The plaintiff was the primary organizer of the company and was its president and a director. On March 21, 1911, he made a contract in writing with the company whereby he assigned to it certain manuscript books on insurance, and policy and other forms, for use in the company's proposed business. He also agreed to devote his entire time to completing the organization of the company, to obtaining the requisite authorization to do business from the state insurance commissioner, and to securing subscriptions for its entire capital stock. In return for the things so assigned and the services to be performed by him, the contract provided that he was to receive 25 per cent. of the company's entire capital stock, or 500 shares. Of these 500 shares a certificate for 200 was to be made out practically at once, but to be held by the treasurer of the company until all of its capital stock had been paid up. The remaining 300 shares were not to be issued until the agreement had been fully performed by the plaintiff.

The company could not write insurance until it had 25 per cent. of its capital stock paid in and could not continue to write insurance unless all its capital stock was paid in within a year from the time of filing its articles (section 584, Pol. Code). About the 1st of October, 1911, the company made application to the state insurance commissioner for a permit to do business on the ground that 25 per cent. of its stock had been paid in. The commissioner in reply wrote the company, saying that the examination of his department showed that 25 per cent. of the capital stock had been paid in, and that he considered it his duty to issue the permit; that, however, the contract with the plaintiff was uncertain as to whether he was to be entitled to his 25 per cent. of the stock when the company should receive its first permit or when all the capital stock was paid in, and suggesting that this uncertainty should be cleared up. To this the plaintiff replied by letter, saying, in effect, that the contract meant that he was to give his services to the company from January 23, 1911 (the date of filing of the company's articles of incorporation), to January 23, 1912 (the date by which all the capital stock of the company had to be paid in), and that he was to receive his stock only when all of his services had been performed. The contract was in fact somewhat uncertain on its face in the particular pointed out by the commissioner, and this letter of the plaintiff must be taken as removing the uncertainty and establishing the fact that he was to receive his stock only upon the company being completely organized and its capital stock fully paid in, and that this was to be done by January 23, 1912.

The letter of the commissioner also pointed out that, when it became necessary for the company to show that its capital had been fully paid in, a question would arise as to whether this could be shown as to the plaintiff's 25 per cent., and the company might at that time be considerably embarrassed. Then followed some other tart correspondence between the plaintiff and the commissioner, the outcome of which was a decision by the plaintiff and the other directors to make a new arrangement between the plaintiff and the company. The essential point in dispute between the parties is as to what this new arrangement was.

The arrangement was made at a meeting of the directors on October 11th, but was not covered into a single and complete written instrument. The defendants were permitted over the objection of the plaintiff to show that a part of the arrangement was purely oral and what such part was. Passing by the objection of the plaintiff to this testimony and assuming its truth, as we must in view of the finding of the trial court, what took place between the plaintiff and the defendants was substantially this:

The plaintiff called an informal meeting of the directors on October 10th to consider the objections by the insurance commissioner to his contract. He stated to the directors that the commissioner had advised that it would be satisfactory to him if the company would get rid of the plaintiff's contract and show that the 200 shares, the certificate for which had been issued in the plaintiff's name and deposited with the treasurer of the company as provided in the plaintiff's contract, had been paid for. The plaintiff then proposed that the contract be rescinded; that the company pay him $20,000 for his services to date; that he immediately purchase the 200 shares for $20,000, and leave the shares with the treasurer of the company until he had completed his original contract in all particulars. After some discussion the directors agreed to this, except that the 200 shares were cut to 175. The understanding as accepted by the plaintiff with regard to payment for the stock and its delivery was testified to on behalf of the defendants as follows:

> "Dr. Kendall [one of the directors] then said: 'The company will issue their check to you for $17,500, and you are to give the company a check for $17,500. The understanding is that Mr. Vogt is to hold the new shares of stock just the same as he is holding the 200 shares of stock, until you have fully completed your contract and sold all of the balance of the stock. If you do not complete the organization of the company, you are not to get anything. We are doing this to help you get the temporary license.'"

The following day a formal meeting of the directors was held to carry out the plan agreed upon. The minutes show merely that the plaintiff made an offer in writing to cancel his contract upon receiving $17,500 for services to date, and that this offer was accepted and the payment to the plaintiff authorized. No mention is made of the fact that the plaintiff was to return the payment to the company by way of payment for 175 shares, or that the certificate for these shares was to be held by the treasurer for delivery to the plaintiff only upon his completing the requirements of his original contract. The minutes of the meeting were prepared the day following by the plaintiff and the attorney for the company, and the latter testifies that he suggested that they should show that the treasurer was to hold the new shares until the completion by the plaintiff of his contract, but the plaintiff stated that, while such was the understanding, it was not necessary for the minutes to show it. Incidentally it may be remarked that the testimony is that the plaintiff was leaving San Diego that evening to see the insurance commissioner and wished a certified copy of the minutes to exhibit to him.

At the same time two checks were drawn, one by the company to the plaintiff for $17,500, and the other by the plaintiff to the company for the same amount, and both were handed to the treasurer of the company, who retained them thereafter. The plaintiff was also given a receipt for $17,500 specifying that it was in full payment for 175 shares; the certificate therefor to be delivered to the plaintiff as soon as the certificate book should be received from the press. This receipt was prepared by the attorney for the company under the direction of the plaintiff, and the attorney testifies that he objected to including the provision for the delivery of the certificate to the plaintiff without any apparent limitation or condition, and that the plaintiff insisted on the receipt reading as it was finally signed, and stated he wished it to show to the insurance commissioner.

Subsequently, under date of October 25th, the certificate was made out and delivered by the secretary to the plaintiff. The treasurer testifies that such delivery was without his knowledge and contrary to instructions given the secretary; that upon learning of it he requested the secretary to get the certificate from the plaintiff and the secretary agreed to do so; that later the secretary refused to ask the plaintiff for it, and then the treasurer did so himself and was refused; and that he thereupon made a written demand upon the plaintiff without result.

In the meantime the plaintiff had failed to sell the capital stock of the company, and the time for so doing had expired. After this, and shortly after the demand in writing on the plaintiff for the return of the certificate, a meeting of the directors was held at which the plaintiff was present, and at which resolutions were adopted by vote of the three directors who are made defendants in this action, demanding the return of the certificate by the plaintiff, and declaring the shares represented by the certificate to be forfeited because of the failure of the plaintiff to fulfill his contract. The date of this meeting was May 4, 1912. Two days later the resignation of the plaintiff as president was accepted. Later the secretary was instructed to and did cancel the shares on the books of the company, and some months thereafter this action was commenced, the plaintiff relying upon the action of the directors in declaring the stock forfeited and having it canceled upon the company's books as a conversion.

The foregoing are, as we have stated, the facts, either admitted or as shown by the evidence, on behalf of the defendants. On the other hand, the position of the plaintiff and the evidence on his behalf are that the arrangement of October 11, 1911, was not as testified to on behalf of the defendants, in this, that his ownership of the 175 shares was not to be conditional upon his performing services called for by his original contract, but the original contract was cancelled in toto, and he was to own the shares unconditionally.

[3] From what we have already said concerning the pleadings in the discussion of the special demurrer to the answers, it is apparent that the issue presented by the pleadings is the same as that presented by the evidence, namely: Was it or was it not a part of the arrangement of October 11th that the plaintiff was to have his stock only upon his performance of the services specified in his original contract? This being the issue, the court found, in brief, that the plaintiff was the owner of the shares on May 4, 1912, the date of the alleged conversion; that, however, he was not entitled to possession of the certificate and had wrongfully obtained such possession; that by the agreement of October 11, 1911, under which he acquired the shares, he had agreed to deposit the certificate with the treasurer of the company as security for the performance by him of an obligation to sell all of the company's stock and complete its organization by January 23, 1912, which he had not done; and that the defendants had not converted the plaintiff's stock by the resolutions declaring it forfeited and by its cancellation on the company's books.

These findings are attacked by the plaintiff as not supported by the evidence, and it is plain from the foregoing statement of the issue presented and the evidence with relation to it that they are not. The court evidently believed the testimony of the defendants as to the arrangement of October 11th, but there is nothing in that testimony to justify the conclusion that the plaintiff was the owner of the stock and that it was to be deposited with the treasurer of the company as security—that is, pledged. The testimony was to the effect that the plaintiff was not to have the stock unless he performed his obligations under the agreement of October 11th; in other words, that his ownership was conditional upon his performance. It makes no difference whether the condition to which his ownership was subject was one precedent or subsequent. In either case, if the defendants' testimony is true and there was a condition, that condition had been broken on May 4, 1912, the date of the alleged conversion, and the plaintiff was not the owner of the stock and had lost all right to it. This is a very different thing from the plaintiff being the owner, but having pledged his stock as security, and the rights of the parties in the one case are substantially different from what they would be in the other.

On the other hand, according to the evidence for the plaintiff, he was the absolute owner of the stock free of any condition or pledge. On the evidence there are but two alternatives in the case, depending on whether the story of the plaintiff or that of the defendants is believed. One is that the plaintiff was at the time of the alleged conversion the absolute owner of the stock; the other is that at that time he had no right to it whatever. Neither alternative is found, but something quite different, and the result is that the finding is not responsive to the issue presented by the pleadings and the evidence, and is not supported by the latter, and the judgment must be reversed for a new trial.

[4] On the trial a question of evidence arose which was the subject of contention throughout and has been discussed at some length before us. It is certain to arise again on a second trial, and we deem it expedient to determine it now. For the purpose presumably of showing the plaintiff's ownership of the stock, there was introduced on his behalf the minutes of the meeting of October 11, 1911, the stock certificate in favor of the plaintiff, and the receipt of the company for $17,500 in payment for the stock. To the defendants' counter testimony to the effect that the minutes did not show the whole transaction and understanding and that the stock was to be the plaintiff's only upon certain

conditions, the plaintiff interposed an objection on the ground that such testimony was incompetent under the "parol evidence" rule as varying the terms of a written instrument.

The rule forbidding the varying of the terms of a written instrument is based fundamentally upon the hypothesis that the writing or set of writings is one which the parties have agreed upon as being the final and complete expression of their understanding, that, as Prof. Wigmore and others put it, there has been an integration. Wigmore on Evidence, §§ 2401, 2425, 2429. With respect to the agreement of October 11, 1911, no writings of this character appear in the present case. The first writing is the minutes of the directors' meeting of October 11, 1911, which set forth the purported sale of the shares to the plaintiff, but contain no mention of there being any condition attached to the plaintiff's right to them. Plaintiff's counsel contend that testimony showing that something took place at the meeting other than as shown by the minutes is not admissible under the "parol evidence" rule. But minutes of a meeting are not a written instrument. Their function is merely to act as a written record of what took place at the meeting. That record may be true or it may not be, and in the absence of the element of estoppel, as where a party has acted in justifiable reliance upon the minutes, it is permitted to the corporation or to any one else to show what actually did take place at the meeting. Gilson, etc., Co. v. Gilson, 51 Cal. 341; Boggs v. Lakeport, etc., Ass'n, 111 Cal. 354, 43 Pac. 1106; 7 R. C. L. § 126. In the present case there is no element of estoppel, and it was permissible for the defendants to show the full transaction, although but a part of it appeared in the minutes.

[5] It may possibly be worth while to point out that testimony showing that the minutes are not a full or true record of what took place at the meeting is not the same as testimony as to the contents of the minutes. Testimony of the latter sort is not competent, not, however, because it comes within the "parol evidence" rule, but because it is an endeavor to prove the contents of a writing by evidence other than the writing itself; in other words, because the testimony comes within the "best evidence" rule, a rule applicable to proving the contents of any writing, no matter what its character. Of this sort was the testimony held incompetent in Barrell v. Lakeview Land Co., 122 Cal. 129, 54 Pac. 594, and Spangenburg v. Nesbitt, 22 Cal. App. 274, 134 Pac. 343, cited by plaintiff's counsel.

[6] Plaintiff's counsel also cite in support of their position decisions such as San Pedro Lumber Co. v. Reynolds, 121 Cal. 74, 53 Pac. 410, holding that the books of a corporation, including its minute book, are competent evidence against it as admissions. Such evidence is, of course, admissible and is entitled to weight, but that is very different from making it conclusive so as to preclude any showing supplementing or countering it.

[7] The second writing is the written proposal of the plaintiff submitted to and accepted by the meeting of October 11, 1911. But when a proposal, even one in writing, is made and accepted, it is permissible to show that it was accepted with conditions or qualifications, or that accompanying the acceptance and in reality forming part of it terms in addition to those set forth in the proposal were exacted by the acceptor. Because of the fact that the writing is a proposal merely, something more must be shown before it can be considered that there is a contract. That something is an acceptance, and the acceptance is just as much a part of the contract as the proposal, and anything which is a part of the acceptance may be shown, even though the proposal be in writing and the acceptance be not. So far as the "parol evidence" rule goes, the essential distinction between a writing which purports to be a proposal merely and one which purports to be the contract of the parties is that the first does not purport to be the written memorial of both parties as to their understanding, and the second does, with the necessary result that in the latter case, but not in the former, the writing and nothing else is to be taken as expressing the contract. It follows that in the present case it was permitted to the defendants to show that their acceptance of the plaintiff's written proposal was conditional upon the plaintiff agreeing, or contained as a part of it that he should agree, that the 175 shares, a certificate for which was to be issued in his name, should be his only conditionally.

[8, 9] The third writing is the receipt of the company for $17,500 in payment for the shares, which specifies that the certificate is to be delivered immediately upon the certificate book coming from the press. Writings which are receipts, but which also contain contractual terms, have been held to be written contracts, not to be altered or added to, where either they purport to be, or the evidence shows that they are, the written memorial of the full understanding between the parties. Of this character is usually a bill of lading issued by a carrier acknowledging the receipt of the goods to be transported and specifying the terms of the transportation. But, unless the receipt appears to be of this character, the "parol evidence" rule has no application to it. So far as contractual terms are concerned, the receipt in the present case purports only to require the issuance of the certificate for the shares as soon as a certificate book was had. No presumption can arise from this that the receipt was intended to cover the entire understanding or in particular that there was no understanding as to what should be done with the certificate when issued. In fact, the evidence for the

plaintiff himself shows that the receipt did not cover the entire understanding; for according to that evidence, the understanding included as well the cancellation of the plaintiff's original contract and of the certificate for 200 shares theretofore made out and deposited with the treasurer of the company. It follows that the evidence introduced by the defendants to show that there were conditions or terms upon which the plaintiff was to have the stock was properly admitted.

The only other point presented to which reference need be made is as to whether the acts of the defendants in declaring the plaintiff's stock forfeited and having it canceled on the books of the company amounted to a conversion, when according to the findings the stock was pledged to the company as security and the plaintiff had not performed the obligations for which it was so pledged. Inasmuch as there was in fact no pledge under any view of the evidence it is not necessary to determine this point. The question whether the acts of the defendants would amount to a conversion if the plaintiff were the owner of the stock free of any pledge or hypothecation is not presented or discussed on this appeal, and as to it we express no opinion.

Judgment reversed.

We concur: SHAW, J.; LAWLOR, J.

(180 Cal. 617)

COLE v. CITY OF LOS ANGELES et al. (WADE, Intervener). (L. A. 5761.)

(Supreme Court of California. June 20, 1919.)

1. Municipal Corporations ⚿926—Bonds—Validity—Rate of Interest.

Where ordinance calling special bond election, pursuant to St. 1915, p. 99, stated amount of principal of indebtedness proposed to be incurred and specified maximum rate of interest at 6 per cent., and voters authorized bonds at the maximum rate, that the council fixed the rate of interest at less than the maximum specified, would not invalidate the bonds, in view of section 14 of said chapter as to provisions of the act being liberally construed.

2. Municipal Corporations ⚿935—Bonds—Validity—Ratification.

Since the legislative body of the city of Los Angeles adopted as the mode and manner of issuing the bonds in question, Act April 20, 1915 (St. 1915, p. 99), and regularly pursued the statute, with reference to the fixing of interest in election notices, and the bonds were ratified by both the state Legislature and the city council, the judgment of the trial court, refusing to enjoin issuance of the bonds, was correct.

In Bank.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Seward Cole against the City of Los Angeles and others. Judgment for defendants, and plaintiff and C. H. Wade, intervener, appeal. Affirmed.

John Dennison, of Los Angeles, for appellant Cole.

Kemp, Mitchell & Silberberg, of Los Angeles, for appellant Wade.

Albert Lee Stephens, W. B. Mathews, Ray C. Eberhard, Lewis E. Whitehead, and Wm. B. Himrod, all of Los Angeles, for respondents.

WILBUR, J. The plaintiff, a taxpayer, owning property within municipal improvement district No. 1 of the city of Los Angeles, brings this action against the city of Los Angeles, its mayor, the members of the city council, the city clerk, and city treasurer, to enjoin a bond issue of $1,020,000, in pursuance of an election held by the citizens of said district authorized by an ordinance of said city. Judgment was rendered in favor of the defendants, from which plaintiff appeals, relying upon two points:

"First, that the ordinance calling the election failed to comply with the statute authorizing the creation of municipal improvement districts;" and, second, that "the statute of 1915 under which the bonds were issued is not applicable to the city of Los Angeles."

The statute under which the bond election was held was enacted in 1915. Stats. 1915, c. 79, pp. 99–102. Section 5 of that act provides, among other things, that—

"The ordinance or resolution calling such election, shall also recite * * * the nature of the improvement work or public utility, contemplated thereby, the estimated cost thereof, the amount of the principal of the indebtedness to be incurred therefor and the rate of interest to be paid on said indebtedness. * * * The maximum rate of interest to be paid on such indebtedness shall be six per centum per annum, payable semiannually."

The ordinance of the city (No. 34860, New Series) calling the special election under said statute recites in section 3 thereof:

"That the estimated cost of such proposed improvement is $1,020,000; that the amount of the principal of the indebtedness proposed to be incurred is the sum of $1,020,000, and the maximum rate of interest to be paid on said indebtedness shall be six per centum (6%) payable semiannually."

[1] The point raised is that this provision of the ordinance fails to comply with the requirement of the statute that the ordinance calling the election shall recite "the rate of interest to be paid on such indebtedness." A similar situation was presented to the Supreme Court of Florida in Hillsborough Co. v. Henderson, 45 Fla. 356, 33 South. 997. By the law there referred to it was required

that the resolution "shall determine the rate of interest to be paid on the bonds. The resolution submitted provides for bonds 'bearing interest at a rate of not more than four per centum per annum, with interest payable semiannually.'" That court, in passing on the question involved, said:

> "Is the provision that the interest shall not exceed a certain rate a compliance with the requirement that the rate shall be determined? To determine is defined as meaning 'to ascertain definitely' or 'to settle,' and it is in this sense that the word is used in the statute. A provision which leaves for future determination the precise rate of the interest to be paid, merely limiting the range of the discretion to be exercised by those who shall ultimately fix it, cannot be said to determine the rate."

That statute required the legislative body by its resolution "to determine" the rate of interest, and the decision of the court is based upon the use of the word "determine," while in the law here under consideration the ordinance was required "to recite" the rate of interest to be paid on the indebtedness; the purpose of the recital evidently being to inform the voters with reference to that matter. In a number of recent cases ordinances similar to that here involved were held to be a sufficient compliance with a statute similar to that under consideration. In the case of City of Cheyenne v. State, 17 Wyo. 90, 96 Pac. 244, the statute authorizing the bonded indebtedness required that the proposition submitted to the electors "shall specify the amount of bonds proposed to be issued, the rate of interest and the purpose for which it is proposed to issue the bonds." The proposition as submitted to the electors stated that the bonds, if voted, should "bear interest at a rate not exceeding 5 per cent. per annum." Upon a suit to compel the issuance and delivery of the bonds upon a bid therefor, which had been accepted by the city, it was held that the form of the proposition submitted was authorized by the statute. The court there said, among other things:

> "* * * We are unable to understand how any voter could be misled by reason of the rate of interest being specified as not to exceed 5 per cent. per annum. It is impossible to conceive that a voter who voted for the bonds under the proposition as submitted, at least from the view of a taxpayer or citizen, would have voted against them had the proposition been more precise and definite as to the rate by stating it at 5 per cent. per annum, leaving no discretion in the city authorities with reference to the rate. * * * At least the voters approved the proposition, indicating that the bonds might bear interest at 5 per cent. per annum, and this rate is within the statutory limit. It was subsequently provided that the bonds shall bear that rate of interest, and we think the statute should not be given such a literal or technical construction as would render the approval of the bonds otherwise regular inoperative upon the ground suggested."

To the same effect is the decision in Town of Lumberton v. John Nuveen Co., 144 N. C. 303, 56 S. E. 940. In a number of late cases, upon an analogous point, it has also been held that the specification of a maximum amount of bond issue is a sufficient compliance with the statute requiring that the amount of bonds proposed to be issued shall be stated. City of Oswego v. Davis, 97 Kan. 371, 154 Pac. 1124; Arbuckle v. McKinney (Ky.) 97 S. W. 408; Fishblatt v. Atlantic City, 78 N. J. Law, 134, 73 Atl. 125.

Appellant relies upon the case of Skinner v. City of Santa Rosa, 107 Cal. 464, 40 Pac. 742, 29 L. R. A. 512. That case, so far as it affects the question involved herein, merely held that the city council, having fixed the rate of 4 per cent. interest payable annually, and stated that rate in the election notice, could not thereafter make said interest payable semiannually, thereby in effect increasing the rate of interest. In other words, the effect of that decision was that the city council, having presented to the voters the proposition of issuing bonds at 4 per cent. annual interest, could not thereafter, in disregard of the proposition authorized by the electors, change the rate of interest; while in the case at bar there is no such question involved, for the reason that the statement contained in the election notice fixed 6 per cent. as the maximum rate of interest, thus giving notice that the city council would thereafter fix that or a less rate of interest. In the case of Skinner v. Santa Rosa, the council attempted to issue bonds at a higher rate of interest than was authorized by the people, and in the case at bar the council have fixed a less rate of interest than the maximum authorized by the people.

The case of Hollywood Union High School District v. Keyes, 12 Cal. App. 172, 107 Pac. 129, is also relied upon by appellant. In that case the statute under consideration was construed by the court of appeals to require that the notice of election should state whether the interest was payable annually or semiannually. The notice involved in that case did not specify whether the interest should be annual or semiannual, and hence it was held that it did not comply with the statute authorizing the holding of the election.

The statute authorizing the issuance of the bonds in question in this case contained the following section:

> "Sec. 14. The provisions of this act shall be liberally construed to effect the purpose thereof."

The voters of the improvement district have authorized the bonds to the amount of $1,020,000 and have specified as the maximum rate of interest 6 per cent. In pursuance thereof the council have duly fixed the rate of interest at less than the amount authorized, so that the burden imposed upon the taxpayers is less than that which they expressed themselves as willing to incur. It would be a narrow rather than a liberal construction to hold that such a proceeding, altogether to the advantage of the taxpayer who voted the maximum rate, would invalidate the bonds.

The charter of the city of Los Angeles (article 1, § 2, subd. 51) contained the following provision:

> "Sec. 2. The City of Los Angeles, *in addition to any other powers now held by, or that may hereafter be granted to it under the Constitution or laws of the state,* shall have the right and power: * * *
>
> "(50) The City of Los Angeles shall have and it is hereby given and it hereby reserves unto itself and the people of the city hereby reserve unto it, and the people of the state of California hereby grant unto it, *and said city may hereafter exercise each and every of the powers which a municipal corporation might or could exercise under the Constitution of the state of California.*" (Italics ours.)
>
> Stats. 1913, page 1636.

This section was amended in 1917 (St. 1917, p. 1691) by the addition of the following grant of powers in a new subdivision (51) as follows, to wit:

> "(51) To make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this charter."

This charter amendment was made in pursuance of the new provision of section 6 of article 11 of the Constitution of California, as amended November 3, 1914, authorizing cities theretofore organized to amend their charters, so as to become empowered thereunder—

> "to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters."

It is contended by appellant that after such amendment the general laws of the Legislature concerning "municipal affairs" did not apply to Los Angeles city. In discussing the effect of this amendment appellant quotes the following statement from Civic Center Ass'n v. Railroad Comm., 175 Cal. 441, 166 Pac. 351:

> "The result is that the city has become independent of general laws upon municipal affairs. Upon such affairs a general law is of no force with respect to Los Angeles. If its charter gives it powers concerning them, it has those powers; if its charter is silent as to any such power, no general law can confer it."

Appellant claims, and respondent concedes, that the creation of the improvement district in question and the issuance of improvement bonds thereof is a "municipal affair," within the meaning of the Constitution. Sunset Tel. & Tel. Co. v. Pasadena, 161 Cal. 265, 118 Pac. 796.

Appellant therefore contends that the statute in question—

> "no longer has any force or effect with respect to Los Angeles, and that all proceedings subsequent to the ratification of the charter with respect to the issuance of said bonds was void."

This would only include ordinances numbered 37960 and 37961, New Series, adopted February 27, 1918. By the former all unissued bonds for this improvement were canceled, and by the latter a new issue bearing 5½ per cent, was ordered sold.

For the same reason it is claimed by appellant that the general law of May 4, 1917 (Stats. 1917, p. 229) is ineffective, although its terms are sufficiently broad to ratify the bonds in question.

If the effect of the amendment to the charter (section 2, subd. 51) is to make the municipality thereafter independent of the state Legislature in its municipal affairs and vests in the legislative body of the city the supreme and plenary legislative power on the subject of municipal affairs within the limits of the municipality (a question we do not need to determine), and if the issuance of the bonds in question is a municipal affair, as is conceded, it follows that the council had authority to fix the terms of the bonds and the conditions of their sale, including the interest they should bear, subject only to constitutional restrictions, and no claim is made that any constitutional provision is violated by the mode and manner in which it is proposed to issue and sell said bonds. However, we do not think that it can be said that the law of 1915 does not apply for the reason that the legislative body of the city in the ordinance establishing the district expressly predicated its right to proceed upon the statute in question. It is recited in said Ordinance No. 34752, New Series:

> "Whereas, a petition was filed in the office of the city clerk of the city of Los Angeles on the 1st day of September, 1916, requesting that proceedings be taken in pursuance of an act of the Legislature of the state of California, entitled 'An act to provide for the formation of districts within municipalities for the acquisition or construction of public improvements, works and public utilities, for the issuance, sale and payment of bonds of such districts to meet the cost of such improvements, and for the acquisition or construction of such improvements,' approved April 20, 1915."

And it is provided in section 1:

> "That it is the intention of the council of the city of Los Angeles to call an election * * * for the purpose of submitting to the qualified electors of said district the proposition of authorizing the issuance and sale of bonds of such district in the manner prescribed in said act approved April 20, 1915."

And in Ordinance 34860, calling an election for the issuance of said bonds, it is again recited that a petition has been filed requesting that proceedings be taken under the act in question, and reciting that in pursuance of said petition the council passed its Ordinance 34752—

> "containing the matters prescribed by said act, and declaring the intention of the city council to call an election," etc., "authorizing the issuance and sale of bonds of such district *in the manner provided for in said act.*" (Italics ours.)

In Ordinance 35007, New Series, it is recited:

> "Whereas, in pursuance of an act of the Legislature of the state of California entitled [then follows the entire title of the act of 1915 in question] and of Ordinance 34860, New Series, a special election was held in that certain territory; * * * whereas, according to the returns of such election, * * * more than two-thirds of all the voters voting at said election did vote in favor of incurring the bonded indebtedness: * * *" It was ordained as follows: "Sec. 1. That bonds of said municipal improvement district No. 1 of the city of Los Angeles be issued in accordance with an act of the Legislature of the state of California entitled: [Then follows the complete title of the act of April 20, 1915.]"

The ordinance also provides for the form of the bond, in which it is stated:

> "Under and by virtue of an act of the Legislature of the state of California, entitled [then follows the complete title of the act], municipal improvement district No. 1," etc., "promises out of the funds hereinafter described to pay to the bearer," etc.

In Ordinance 37961, adopted after the charter amendment in question (article 1, § 2, subd. 51), the act in question is again referred to by title as the act controlling the matter of the issuance of the bonds in question. The form of the bond therein provided for also refers to the act in question. If the legislative body of the city of Los Angeles is supreme in municipal affairs by virtue of the constitutional and charter provisions above referred to, and if, without affirmative action on the part of the legislative authority of the city, no general law with relation to municipal affairs has any binding effect therein, it is nevertheless true that the legislative body of the city has power to adopt any state law applicable to its municipal affairs, and that in the matter of the issuance of these bonds that was effectually done by the ordinances and proceedings above referred to. Having thus elected in the first instance to proceed under and by virtue of the statute in question, the city was bound to pursue that authority, unless by subsequent legislative act they made proper changes therein.

There is no doubt that failure to correctly state the amount of interest in the notice of election complained of, if it be a defect, could be cured by legislative ratification. City of Redlands v. Brook, 151 Cal. 474, 91 Pac. 150; City of Venice v. Lawrence, 24 Cal. App. 350, 141 Pac. 406; City of Sacramento v. Adams, 171 Cal. 458, 153 Pac. 908; Givens v. County of Hillsborough, 46 Fla. 502, 35 South. 88, 110 Am. St. Rep. 104. But it is contended that the curative act of the Legislature has no application to the city of Los Angeles and to the particular bond issue in question for the reason that it, too, is a general law. The purpose of the law ratifying the bond issue in question was to confirm the proceedings, so as to enable the city to present to the buyers of the bonds in question a duly authorized contract on behalf of the improvement district. It would seem, then, that the act of ratification was not strictly a municipal affair, because it relates to a contract with third persons. If, however, the act of ratifying a bond issue of this sort is a municipal affair, Ordinance No. 37961 of the city of Los Angeles, passed after the charter amendment, authorizing the issuance of bonds in pursuance of the election in question, would constitute such ratification, and if, on the other hand, the ratification is not a municipal affair, a point we need not determine, we have a proper ratification by the state Legislature.

[2] It follows then, that the legislative body of the city of Los Angeles, adopted as the mode and manner of issuing the bonds in question, the act of the Legislature of the state of California, approved April 20, 1915; that such statute was regularly pursued with reference to the fixing of interest in the election notice; that the bonds were ratified both by the state Legislature and the city council, and the judgment of the superior court refusing to enjoin the issuance of the bonds was correct.

In view of the conclusion we have reached, it is unnecessary to pass upon the claim of respondent that a previous judgment between a taxpayer and the officials of the respondent city, refusing to enjoin the issuance of these bonds, is res adjudicata.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; MELVIN, J.

SHAW, J. (concurring). I concur in the judgment, and generally in the opinion of Justice WILBUR. But with regard to his discussion of the effect of the charter amendment of 1917, adding subdivision 51 to section 2 (Stats. 1917, p. 1691), making the city independent of general laws relating to municipal affairs, I think that all that need be said is that it did not purport to be and is not retroactive upon things already accomplished under a general law; that it took conditions as they were at the time, and did not invalidate improvement districts already formed, nor elections already held for the issuance of bonds by such districts, under such a law, nor revoke the authority given at such election, nor ordinances already adopted in pursuance thereof. With regard to the subsequent ordinance increasing the rate of interest on the bonds unissued, and directing a cancellation and reissue in order to effect the alteration, it appears to be fully authorized by the extraordinarily comprehensive and complete grant of municipal powers to the city, embraced in the amendment of 1913, quoted in the opinion of Justice WILBUR adding subdivision 50 to section 2 of the charter (Stats. 1913, p. 1636), if any further authority was needed than would be implied from the fact that the prior proceedings stood unaffected and were valid.

I concur with Justice SHAW: OLNEY, J.

I concur: LAWLOR, J.

(180 Cal. 714)

COLEMAN v. LOS ANGELES COUNTY.

(L. A. 4915.)

(Supreme Court of California. July 9, 1919.)

1. Equity 🔑415 — Judgment 🔑231 — "Decree."

A "decree" is the judicial decision of a litigated case by a court of equity, the word "judgment" applying to courts of law, and "decree" to courts of equity, though the former term is used in a larger sense to include both.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Decree; Judgment.]

2. Action 🔑22 — Definition — Legal and Equitable Scope of Term.

The term "action" is alone sufficient to include both forms, legal and equitable, of civil remedies, in view of Code Civ. Proc. § 22.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Action.]

3. Words and Phrases—"Law."

The term "law" in its broad sense includes equity.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Law.]

4. Taxation 🔑821(2) — Invalid Title — Refund to Purchaser—County's Liability.

In view of prior rights and remedies of purchaser of land sold for taxes, and general scheme of legislation concerning such sales, as provided by Pol. Code, § 3898, subd. 5, as amended by St. 1913, p. 560, whenever a purchaser's title is adjudged to be void, the purchaser being entitled to be reimbursed by the property owner in the full amount of taxes, penalties, and costs paid out and expended by him, the amount to be paid by the county is the difference between the taxes, etc., paid by and to the purchaser and the amount bid by the purchaser at the sale.

5. Taxation 🔑319(2) — Presumption of Official Duty—Validity of Assessments.

In the absence of evidence or allegation, the presumption is that assessments and tax levies included in the amount required to be paid by the purchaser at a tax sale at the time of purchase were valid.

6. Taxation 🔑821(2) — Invalid Title — Reimbursement of Purchaser—Rights of County.

Under Pol. Code, § 3898, subd. 5, as amended by St. 1913, p. 560, the amount to be paid by the county to a purchaser of land for taxes who has been unable to maintain his title in litigation is fixed by the law, not by the decree in the litigation between the owner and the purchaser at the tax sale, a litigation to which the county is not a party, so that the decision of the court as to the amount payable from the property owner to the purchaser is not conclusive on the county.

7. Taxation 🔑821(4) — Invalid Sale — Refund by County.

The purchaser of land for taxes, who is unable to maintain his title against the owner in litigation, must either waive his right to appeal, or the time for appeal must expire, or an appeal, if taken, must be determined, before the purchaser can claim any refund from the county, under Pol. Code, § 3898, subd. 5, as amended by St. 1913, p. 560.

8. Counties 🔑213—Invalid Tax Sale—Refund—Claim Against County—Necessity of Presentation Before Action.

Under Pol. Code, § 3898, subd. 5, as amended by St. 1913, p. 560, and section 3804, claim against a county by a purchaser of land for taxes, whose title has been held invalid for refund pursuant to subdivision 5 of section 3898, was a necessary prerequisite to filing of a complaint.

Department 2.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Sarah M. Coleman against the County of Los Angeles. From judgment for defendant, plaintiff appeals. Affirmed.

Tanner, Odell & Taft, of Los Angeles, for appellant.

A. J. Hill, County Counsel, of Los Angeles, Hugh Gordon, Deputy County Counsel, of Los Angeles, for respondent.

WILBUR, J. In this action the plaintiff, a purchaser at a sale by the tax collector of Los Angeles county, having been defeated in an action against the owner of the property, seeks to recover from the county the money paid by her to the tax collector as the purchase price thereof. Judgment was rendered against the plaintiff after a general demurrer was sustained to the complaint, and she appeals.

The tax sale was conducted under the provisions of section 3897 of the Political Code. This action is based upon subdivision 5 of section 3898 of the Political Code as amended in 1913 (St. 1913, p. 560), which is as follows:

> "Whenever, in any action at law, it shall be determined by a court that the sale and conveyance provided for in this and the preceding section are void for any reason and that the purchaser from the state may not be finally awarded the property so purchased, no decree of the court shall be given declaring a forfeiture of the property until the former owner, or other party in interest, shall have repaid to the purchaser the full amount of taxes, penalties and costs paid out and expended by him, to be determined by the court, in pursuit of the state's title to the property so sold. The said purchaser may also present a claim against the county, in the manner provided by law, for a refund of the amount paid into the county treasury as the purchase price of such property in excess of the amount for which he may have been reimbursed for taxes, penalties, and costs as herein provided, and such excess shall be refunded in accordance with section 3804 of this Code."

Plaintiff brought an action to quiet title against the owner of the premises, and in that action it was adjudged that the assessment upon which the sale to the state in 1907 was based was void, and that for that reason the purchaser was not entitled to any reimbursements for taxes, penalties, and costs paid out or expended by her. She, therefore, brought this action against the county for the full amount paid by her at the tax sale, to wit, $516.

[1-4] The question involved depends upon the proper construction of subdivision 5, section 3898, and particularly the meaning of the last sentence thereof concerning the amount to be paid by the county.

Appellant contends that as she "did not recover anything from the record owners, the whole amount that she had paid to the state was 'in excess' of any amount that she received, and that the Code should be liberally construed so as to cover, not only a case where the record owner would be compelled to pay taxes lawfully assessed, though otherwise invalid, leaving a balance to be recovered of the state, but also to cover a case where it was impossible for the court to order any amount paid." On the other hand, it is claimed by respondent that the appellant has not brought herself within the meaning of the express provisions of the statute. "It seems conclusive," says the respondent, "that the provision for refund made in this amendment is limited to those cases where particular circumstances existed. First, there must be a decree 'declaring a forfeiture of the property' as against the purchaser at tax sale. Secondly, there shall be a reimbursement by the owner of the amount paid by the said purchaser as taxes, penalties and costs at such sale. * * *" In considering the effect of the Code amendment giving new remedies to the purchaser at a tax sale it is essential to consider the rights and remedies of such purchaser before the enactment of the statute as well as the general scheme of legislation concerning such sales as provided by the amendment of 1913. Previous to this amendment the purchaser at a tax sale had no remedy against the county or state to recover money paid to the county or state at a tax sale. Loomis v. County of Los Angeles, 59 Cal. 456; Brooks v. Tulare County, 117 Cal. 467, 49 Pac. 469; Holland v. Hotchkiss, 162 Cal. 366, 123 Pac. 258, L. R. A. 1915C, 492; Moyer v. Wilson, 166 Cal. 261, 135 Pac. 1125. In an equitable action or in a statutory action under section 738, Code of Civil Procedure, brought against the purchaser at the tax sale, if the sale was found to be illegal and void the court required the owner of the property to pay the taxes legally assessed against the property as a condition precedent to declaring the sale void and clearing the owner's title. Holland v. Hotchkiss, 162 Cal. 366, 123 Pac. 258, L. R. A. 1915C, 492. This right, however, did not exist where the purchaser was seeking affirmative relief in the action. As was said in Moyer v. Wilson, supra:

> "Where the purchaser under a sale which is not effective to pass title proceeds against the owner, the latter may stand upon his strict legal rights, and defend his title without tendering payment of any tax."

It was also held that where the assessment itself was void, as well as the sale, that no payment would be required from the owner as a condition precedent to the quieting of his title. In order to determine the proper amount payable by the property owner and by the county to a purchaser, it is also necessary to consider the general scheme for tax sales.

Since 1895 tax sales to individual purchasers for state and county taxes have ceased, all sales being made to the state. For five years the owner is entitled to redeem his property from said sale by paying the original amount of the tax, with penalties and costs, and also all taxes subsequently assessed against the property with penalties. Sales were not made to the state for taxes levied after the first sale. Pol. Code, §§ 3813, 3814. After the deed to the state, upon application and authorization, the property would be sold by the tax collector to the highest bidder for cash. "No bid," however, "shall be received or accepted at such sale for less than the amount of all the taxes levied upon such property and all costs and penalties for every year delinquent as shown upon the delinquent rolls for said years to the date of the execution of the deed to the state, and all expenses accrued to the date of the sale * * * together with interest at seven per cent. per annum from the first day of July following the delinquency in each of said years to the date of the sale hereunder, computed upon the aggregate amount of such delinquent taxes, penalties and costs." Pol. Code, § 3897. It will be observed, then, that the purchaser not only is required to bid an amount sufficient to pay the particular tax for which the original sale was made five years before the deed, but also every subsequent tax. This requirement that the purchaser pay the taxes assessed for each of five years is particularly significant in view of the rule that where the assessment upon which the sale is based is void the owner will not be required to reimburse the purchaser at the tax sale, for that rule is based upon the principle that the owner should not be compelled to pay a void tax in order to secure his property. Where, however, the tax purchaser has paid off valid tax liens upon the property, the purchaser is equitably entitled to reimbursement for such portion of the taxes paid as were justly chargeable upon the property regardless of the fact that the particular tax for which the sale was made was void.

In considering the language of subdivision 5 of section 3898, Political Code, it should also be observed that in the same statute amending that section, section 3771 of the Political Code was also amended (St. 1913, p. 587), so that thereafter, at the end of the five-year period, the property sold to the state five years previously was included in the annual tax collector's sale for delinquent taxes, and this property, instead of being sold or deeded to the state, was sold to private purchasers. This property "which has not been redeemed from the sale made to the state five years previously, shall be sold by the tax collector at public auction to the highest bidder for cash in lawful money of the United States; but no bid shall be accepted at such sale for less than the amount of * * * taxes, penalties and costs due as shown in said advertised list. After such bid has been made and accepted the right of redemption shall cease, except as to the purchaser, who shall have thirty days within which to make redemption as provided in section 3785b of this Code, and if not so redeemed or if no sale is had under the provisions of this paragraph, then said property shall be deeded to the state." Section 3771. It appears, then, that there are two schemes for the sale of property sold to the state five years previously: One, the sale under section 3771 in the ordinary course, by which the purchaser was required to bid sufficient to pay the original tax with penalties, etc., plus whatever amount was necessary in order to make him the highest bidder, and thereby secured a right to redeem the property upon the payment of all taxes subsequently assessed; the other, the scheme under section 3897, by which the purchaser was required to pay, in the first instance, an amount at least sufficient to cover all taxes, etc. Under both of these schemes of sale to individual purchasers the purchaser was required to pay taxes covering the five-year period, with interest, penalties, and costs. In each instance, in order to become the highest bidder, it might be essential that he should pay some amount in excess of such taxes, penalties, and costs. Aside from the possibility, or, we may say, probability, of some defects in the proceedings, as to many of which the deed is made conclusive evidence of regularity, the purchaser secured the absolute fee to the land. The amount of the taxes, penalties, and costs would probably not exceed 7 to 10 per cent. of the value of the property, leaving a margin of 90 per cent. of the value to be bid, depending upon the belief of the purchaser in the validity of the title acquired by him. It is obvious that the amount thus bid would be increased if the purchaser could be assured that if this deed was void he would at least recover the money paid by him. No doubt the amendment in question was adopted to assure the purchaser such reimbursement. The amendment first provides for reimbursement from the property owner, and then provides for a refund from the county treasury of that part of the purchase price "in excess of the amount for which he may have been reimbursed for taxes, penalties and costs" as therein provided. In determining what the "excess" may be, it is important to consider the provisions of the statute with relation to the amount of reimbursement required to be paid by the property owner to the purchaser.

The introductory phrase of the statute "whenever in any action at law" is an apt reference to an action at law as distinguished from an equitable proceeding, but other provisions of the statute are inconsistent with that construction. For instance, the term "decree" is used in referring to decision of the court in the "action at law." "A decree is the judicial decision of a litigated case by a court of equity. * * * It is accurate to use the word 'judgment' as applied to courts of law and 'decree' to courts of equity, although the former term is now used in a larger sense to include both." Bouvier's Law Dic. "The word 'decree' is peculiarly appropriate to those proceedings in which a plaintiff or a defendant is required to do equity as a condition of securing relief." Id., Bishop Eq., § 7. Hence the use of the word "decree" would indicate that in using the phrase "actions at law" the Legislature intended to include equitable suits, as well as the common-law forms of action. The term "action" is alone sufficient to include both forms of civil remedies (section 22, Code Civ. Proc.; Smith v. Richmond, 19 Cal. 476, 481; Lux v. Haggin, 69 Cal. 255, 267, 4 Pac. 919, 10 Pac. 674), and the term "law," of course, in its broad sense includes equity. While the language of the amendment under consideration does not use legal terms with technical accuracy, we are satisfied that the statute was intended to cover every decision of a court in a civil action wherein it is adjudged that the purchaser's title is void, whether at law or in equity, and regardless of whether the purchaser is a plaintiff "in pursuit of the state's title to the property sold" or a defendant in an action brought by the owner. No doubt the phrase "in pursuit of the state's title to the property sold," as contradistinguished from "the amount paid at the tax sale," was used in view of the fact that under the provisions of section 3771 of the Political Code the purchaser at the tax sale was required to pay an added amount to the purchase price to redeem the property from all subsequent taxes before securing a deed. It will be observed, then, that in every instance the purchaser, in whatever form of proceeding the relative rights of the purchaser and the property owner may be litigated, is entitled to be reimbursed by the property owner "the full amount of taxes, penalties and costs paid out and expended by him, to be determined by the court, in pursuit of the state's title to the property so sold." If he thus receives the full amount so expended by him, the amount to be paid by the county would be the difference between the taxes, penalties, and costs paid by and to the purchaser and the amount bid by the purchaser at the time of sale. Under the new scheme for the protection of the purchaser at the tax sale it is evident that the primary purpose of this legislation, so far as the payment by the county is concerned, was to reimburse the purchaser the amount of such excess paid to the county, over and above the taxes justly due it. The Legislature could not have intended that the county should refund taxes justly due it. On the contrary, such taxes were to be paid by the owner to the purchaser.

[5] There remains to be considered the question whether in the event that the purchaser fails to recover judgment against the owner for the taxes, penalties, and costs expended by him, he can recover from the county such portion of the taxes, penalties, and costs as he thus fails to secure from the property owner. The question is of importance in this action as to the repayment of void tax levies, for it is alleged in the complaint that in the action between the purchaser and the property owner it was adjudged that the initial assessment and levy were void, and for that reason the purchaser was refused any relief. This decision was erroneous. Unless all subsequent tax levies paid by her were also void, the purchaser should have been reimbursed by the property owner for all valid tax levies paid by her. In the absence of evidence or allegation the presumption is that the other four assessments and tax levies included in the amount required to be paid by the purchaser at the time of purchase were valid. It cannot be ascertained from the complaint whether these four valid tax levies were less than or in excess of the $516 paid by the purchaser at the tax sale which is now sought to be recovered, for, by a proviso in section 3897, Political Code, not heretofore mentioned in this opinion, upon proper authorization by the board of supervisors, the tax collector could receive a bid for less than the full amount of all taxes, penalties, and costs levied upon the property. So far as appears from anything alleged in the complaint, the property in question may have been offered in accordance with these provisions at a price less than the total amount of taxes, penalties, and costs levied upon the property, and in that event the sum of $516, for all that appears in the complaint, may have been less than the taxes justly due and legally levied upon said property for the four years subsequent to the levy found by the court to be void. In view of that fact, it is unnecessary to determine in this case whether the amount of a void tax paid by a purchaser and not collected from the owner must be repaid to him by the county under the provisions of section 3898, Political Code.

[6] In the foregoing discussion we have assumed, and now hold, that the amount to be paid by the county is fixed by the law, not by the decree in the litigation between the owner and the purchaser at the tax sale. The county is not a party to that litigation. It was no doubt intended that the county should act upon the adjudication of the court so far as the invalidity of the tax sale was concerned, for this is a matter of indifference to the county. But the question as to whether or not the court has therein correctly determined the amount payable from the property owner to the purchaser is one, we think, that is not conclusive upon the county. In other words, we hold that the language of the statute requiring a refund from the county of the portion of the purchase price "in excess of the amount for which he may have been reimbursed for taxes, penalties and costs herein provided" should be read in effect as though the language were "for which it is herein provided that he shall be reimbursed by the property owner," or "for which he

should be reimbursed for taxes, penalties and costs as herein provided." That is to say, we think that the statute itself, rather than the decree of court, fixes the amount to be paid by the county and by the property owner.

[7] Respondent also contends that the demurrer to the complaint was properly sustained for the reason that the claim against the county upon which the suit is based was filed before the decree in the action between the purchaser and property owner was entered. It is clear that the right of the purchaser to be reimbursed by the county is predicated upon a formal and final adjudication that the title acquired by him at the tax sale was invalid and void. It follows that the purchaser must either waive his right to appeal, or the time for appeal must expire, or an appeal, if taken, must be determined before the purchaser can claim any refund from the county. It is obvious that under the statute the county should not refund any portion of the money paid by the purchaser until final determination of the right of the purchaser in and to the property in question. For this reason the claim was prematurely filed with the county.

[8] The judgment of the trial court was correct for the reason that the complaint failed to show any "excess" to be refunded by the county within the meaning of the law, and for the further reason that the claim against the county was prematurely filed, and such claim was a necessary prerequisite to the filing of a complaint. Sections 3898, 3804, Pol. Code.

The judgment is affirmed.

We concur: MELVIN, J.; LENNON, J.

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180 Cal. 675

GENERAL ELECTRIC CO. v. AMERICAN BONDING CO. OF BALTIMORE. (L. A. 5781.)

(Supreme Court of California. July 5, 1919. Rehearing Denied Aug. 4, 1919.)

1. Mechanics' Liens ⚷128—Materialmen's Action on Contractor's Bond—Necessity of Plaintiff's Filing Lien Claim.

A contractor's bond as required by Code Civ. Proc. § 1183, creates a direct obligation on the surety's part to pay for materials used in constructing a building, and such section, as well as section 1197, preserves to materialmen a right of action thereon without having first filed a lien claim, notwithstanding section 1187, requiring filing of lien claims for asserting liens.

2. Statutes ⚷225¾—Construction by Court—Subsequent Amendments Using Same Language.

The phrase, "claiming the benefits of this chapter," in Code Civ. Proc. § 1187, having been given a meaning by court construction confining its operation to the benefits of asserting a mechanics' lien and not to other remedies afforded by the chapter, its subsequent continuation in amendments should not be held to have changed its meaning.

In Bank.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by the General Electric Company against the American Bonding Company of Baltimore. Judgment for plaintiff, and defendant appeals. Affirmed.

J. Crider, Jr., A. L. Abrahams, and Chas. W. Fricke, all of Los Angeles, for appellant.

William Ellis Lady, of Los Angeles, for respondent.

PER CURIAM. Action on a bond given by a contractor to secure payment of claims for labor and material to be furnished in the construction of a building. Defendant appeals from a judgment in favor of plaintiff, a corporation that supplied certain materials for use in the building.

The bond in question had at its beginning the following words:

> "This bond is required by section 1183, C. C. P., as amended in 1911, and must be equal to 50 per cent. of the contract price. Bond to laborers, materialmen, etc."

By the terms set forth in the body of the instrument, it is "expressly made to inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in the work described" in the building contract. There is a further provision as follows:

> "Any and all such persons shall have and are given a right of action to recover upon this bond against the said principal and surety, or *either of them*, in any suit brought to foreclose mechanics' liens, which may be filed by such persons, or any of them, upon the property mentioned in said contract, *or in a separate suit brought upon this bond*, and may recover in such action or actions, the value of such labor done or materials furnished, or both." (The italics are ours.)

[1] Defendant sets forth in its answer a special defense based upon the failure of respondent to file any claim of lien under the provisions of section 1187, Code of Civil Procedure. It was alleged that during the time within which a claim of lien might have been filed a large sum of money was due from the owner to the contractor which could and would have been applied to respondent's claim if the lien had been thus

formally asserted. The court sustained a demurrer to this special defense and also on motion ordered it stricken out. These rulings are specified as erroneous. The question for this court to decide, therefore, is whether or not a materialman may sue on a bond, conditioned as is the one which is the basis of this action, without first duly filing a claim of lien.

Appellant insists that this is strictly a statutory bond, and that no liability arises upon it as a common-law obligation. The learned District Court of Appeal of the Second Appellate District agreed with appellant's view and reversed the judgment upon the authority of Miles v. Baley, 170 Cal. 151, 149 Pac. 45; Hubbard v. Jurian, 35 Cal. App. 757, 170 Pac. 1093; and Crane Co. v. Maryland Casualty Co. (App.) 173 Pac. 494.

The first of these cases arose, not under section 1183, Code of Civil Procedure, but under an act to secure the payment of the claims of materialmen, etc., employed upon public work. By the terms of the act it was made the duty of the contractor before entering upon the performance of the work to file the prescribed bond binding the sureties to pay for materials or labor, up to the amount specified therein, in case of the contractor's default "provided such claims shall be filed" as thereafter required.

It appears in Miles v. Baley that the verified statement prescribed by section 2 of the act (St. 1897, p. 201) as a condition precedent to the maintenance of a suit upon the bond had not been filed by the claimant. Therefore the sureties on the bond were held not to be liable. Said section 2, after requiring that the materialman or laborer must file a verified statement of claims within 30 days from the time when the work is completed, provides that "at any time within ninety days after the filing of such claim," the materialman or laborer "may commence an action against the sureties." This is the fundamental and essential difference between Miles v. Baley and the case at bar. In that case the materialman under the plain terms of the statute governing the performance of the public work and the remuneration therefor was required to file his claim before and as a precedent condition to the maintenance of a suit on the bond. The section governing the materialmen in the case at bar (section 1183, Code of Civil Procedure) contains no such restriction. Miles v. Baley therefore is not authority sustaining defendant's theory in the case at bar. Hubbard v. Jurian distinctly holds, however, that only those claimants who have duly perfected their liens within the statutory time are entitled to recover upon the bond given by section 1183, Code of Civil Procedure. Crane Co. v. Maryland Casualty Co. (App.) 173 Pac. 494, follows Hubbard v. Jurian without discussion of the principles involved. In Richardson & Fisher Co. v. Chicago Bonding & Surety Co., 35 Cal. App. 650, 170 Pac. 856, decided a few days before Hubbard v. Jurian, the court held that filing of a lien as prescribed by section 1187, Code of Civil Procedure, was a prerequisite to a suit on the bond given in accordance with section 1183, Code of Civil Procedure. In Hubbard v. Jurian there were petitions for transfer of the cause to this court and said petitions were denied. Unless, therefore, we are prepared to overrule the three decisions last cited, we must reach the same conclusion at which the learned District Court of Appeal arrived in this case. We are of the opinion that the cited cases were improperly decided so far as they held that a bond like the one before us is incapable of enforcement unless the claimants seeking to bind the sureties have filed their liens within the prescribed time. The rationale of these decisions appears clearly from the following language in the opinion in Hubbard v. Jurian, supra (at page 770 of 35 Cal. App., at page 1098 of 170 Pac.):

> "The bond in suit was executed in response to the requirements of the statute. It is therefore a statutory bond in the strictest sense, and under the familiar and well-settled rule parties claiming the benefit of the obligation of the bond must show a substantial compliance with the conditions of the statute under which the bond was given. Section 1183 of the Code of Civil Procedure, under which the bond was given, is part and parcel of title 4, c. 2, of that Code, which relates exclusively to 'liens of mechanics and others upon real property,' and section 1187 of the same Code and chapter requires that every person claiming the benefits of the provisions of the designated chapter must file a verified lien within the time specified by that section. Obviously, the several Code sections of the chapter in question must be considered and construed together, and when so considered * * * it must be held that the provision of section 1183 that the required bond shall 'in addition to any conditions for the performance of the contract, be also conditioned for the payment in full of the claims of all persons performing labor upon or furnishing materials, etc.,' has reference to the 'claims' of lien specified in section 1187 and required to be filed for record within a designated time, and to the 'claims' which the statute further says must be verified by the oath of the claimant or some other person."

We are of the opinion that this construction gives an importance to section 1187, Code of Civil Procedure, and limits the rights of materialmen in a manner not contemplated by the Legislature. Section 1197 of the same chapter clearly contemplates suits which may be maintained without the previous filing of liens, for it provides that—

> "Nothing contained in this chapter shall be construed to impair or affect the right of any person to whom any debt may be due for work done or materials furnished to maintain a personal action to recover said debt against the

person liable therefor. * * * But the judgment, if any, obtained by the plaintiff in such personal action shall not be construed to impair or merge any lien held by said plaintiff under this chapter; provided, only, that any money collected on said judgment shall be credited on the amount of such lien in any action brought to enforce the same, in accordance with the provisions of this chapter."

The bond by its terms creates a direct obligation on the part of the surety to pay for materials used in the construction of the building, and the right of action on such bond is preserved by said section 1197 as well as by section 1183.

It can no doubt be persuasively argued that the bond which must "be also conditioned for the payment in full of the claims of all persons performing labor upon or furnishing materials to be used in the work" relates to claims of lien filed within time. But it seems to us that this is a strained interpretation. The mere use of the word "claim," which is as apt a description of the demand of the individual who has filed no claim of lien as it is of one who has filed such claim, is not persuasive.

It is to be noted also that the portion of the section (and of the bond which follows its terms), by which the rights of materialmen are safeguarded, does not use the word "claims," but the bond is made to "inure to the benefit of any and all persons who * * * furnish materials to be used in the work described" in the contract.

But there is another and a very strong reason for rejecting the theory that section 1187, Code of Civil Procedure, restricts the terms of section 1183, Code of Civil Procedure, and makes them applicable only to those persons who have filed liens, and that reason is found in the history of the two sections and in the decisions of this court relating thereto.

Section 1187 was first enacted in 1872. At that time its introductory part was as follows:

> "Every original contractor, within sixty days after completion of his contract, and every person, save the original contractor, claiming the benefit of this chapter, must within thirty days after the completion of any building, improvement, or structure, etc.," file his claim with the county recorder.

Section 1183 provided that persons furnishing labor or materials for the construction of buildings, etc., should have liens upon the buildings for the same, "but the aggregate amount of such liens must not exceed the amount which the owner would be otherwise liable to pay." In 1874 this section was amended by striking out the passage just quoted, the result of which was that the owner was liable for the entire value of labor and materials furnished for his building, regardless of the contract price. Code Amendments 1873–74, p. 409. At the same session section 1187 was amended; but the opening sentence containing the clause "claiming the benefit of this chapter" was not changed, nor was any other material amendment inserted. Section 1183 was again amended in 1880 so as to provide that the lien should not be affected by the fact that no money is due or to become due, on any contract made by the owner with a contractor. Code Amendments 1880, p. 63. In 1885 this court decided that this section was unconstitutional so far as it made the owner liable for more than the contract price.

Thereupon in 1887 (Code Amendments 1887, p. 152), to obviate this difficulty as far as possible, the chapter was revised. Section 1183 was amended so as to provide for written contracts in all cases where the price exceeded $1,000, and such contracts were required to be filed before the beginning of the work. Section 1184 fixed the provisions of the contract so that one-fourth of the price should be payable 35 days after completion and three-fourths in installments at specified times after the beginning of the work. Up to this time the entire chapter had contained no remedy for a laborer or materialman, except by filing a claim of lien and foreclosing the same. It follows that the words "claiming the benefit of this chapter," in section 1187, had no other scope or effect than to require the person who claimed a lien, to file the same within a specified time as there provided. The benefits of the chapter consisted solely in the right to foreclose a lien. In the amendment of 1887, for the first time, an additional remedy was given. Section 1184 provided that a laborer or materialman could at any time give the "stop notice" which has now become familiar and thereby intercept a payment and make the same applicable to his claim.

Notwithstanding this additional remedy, section 1187 was again re-enacted with some amendments; but the opening part thereof remained as before, that every person "claiming the benefit of this chapter" must within the specified time file his claim of lien. Had this provision been given its literal meaning, it would follow that no person could avail himself of the stop notice provided in section 1184 unless he also filed his claim of lien within the time specified in section 1187.

[2] Thereafter, in 1891, the decision in Bates v. Santa Barbara, 90 Cal. 543, 27 Pac. 438, was rendered. It held, first, that no claim of lien could be filed or enforced against a public corporation such as a county or city. The claimants in that case had, however, given the stop notice as provided in section 1184, but, so far as appears in the opinion, had not filed any claims of lien against the county. If section 1187 had been given the effect now claimed for it, such

claimants would have been entirely cut off from any rights under the notice by reason of the fact that they had not filed any claims of lien for record. The court, however, declared that their stop notices were good, and that "the right of plaintiffs to recover does not depend upon their right to a lien." This decision was followed in a number of cases soon afterwards—First National Bank v. Perris, etc., Dist., 107 Cal. 55, 40 Pac. 45, Bianchi v. Hughes, 124 Cal. 24, 56 Pac. 610, and Newport v. Drew, 125 Cal. 589, 58 Pac. 187, in none of which was a claim of lien filed, all sustained the doctrine that the remedy under a stop notice does not depend upon the filing of a claim of lien and that the benefits of the chapter, so far as a stop notice is concerned, could be obtained without such filing. To the same effect, see Long Beach School Dist. v. Lutge, 129 Cal. 413, 62 Pac. 36; Diamond Match Co. v. Silberstein, 165 Cal. 289, 131 Pac. 874; Miles v. Ryan, 172 Cal. 208, 157 Pac. 5; and Stettin v. Wilson, 175 Cal. 426, 166 Pac. 6. The phrase "claiming the benefits of this chapter" was thus given a meaning which confined its operation to the benefits of asserting a lien upon the property and did not extend it to include the benefits of any other remedy afforded by the chapter against the owner. According to familiar principles of statutory construction, this became the settled meaning of the phrase, and its subsequent continuation in future amendments of the same section should not be held to have changed its meaning in any particular.

It follows that the superior court properly sustained the demurrer to the special defense averred in the answer.

The judgment is affirmed.

MELVIN, SHAW, OLNEY, WILBUR, and LAWLOR, JJ., concur.

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180 Cal. 637

TEMESCAL ROCK CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

(L. A. 6036.)

(Supreme Court of California. June 24, 1919. Rehearing Denied July 24, 1919.)

MASTER AND SERVANT 🔑388—WORKMEN'S COMPENSATION ACT—"DEPENDENT"—COMMON-LAW WIFE.

A woman who in good faith lived with an employé as his lawful wife, believing that their marriage license in itself constituted marriage, *held* entitled to recover for his death, as a "dependent" member of his household within Workmen's Compensation Act 1917, § 14, notwithstanding the 1895 amendment to Civ. Code, § 55, requiring solemnization of marriage.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dependent.]

In Bank.

Proceeding under the Workmen's Compensation Act by Dolores Rodriguez, otherwise known as Dolores Lopez, against the Temescal Rock Company, employer, and Ocean Accident & Guaranty Corporation, insurance carrier, to recover compensation for death of Silviano Lopez, employé. Award in favor of claimant, and the employer and insurance carrier apply for writ of review against the Industrial Accident Commission and claimant. Award affirmed.

George H. Moore, of Los Angeles, for petitioners.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondent Commission.

Walter S. Claysor, of Corona, for respondent Dolores Rodriguez.

SHAW, J. This is a proceeding to review a judgment of the Industrial Accident Commission awarding compensation to Dolores Rodriguez otherwise known as Dolores Lopez, on account of the death of one Silviano Lopez. The death was caused by accidental injuries to Silviano Lopez occurring on July 23, 1918, while he was in the employment of the Temescal Rock Company, which injuries arose out of said employment. The award was made against Ocean Accident & Guaranty Corporation, the insurance carrier of the rock company. It was made to Dolores Rodriguez on the ground that at the time of the accident she was wholly dependent for support upon said Lopez. The sole objection thereto is the claim that upon the evidence and the findings of the commission she was not dependent upon Lopez for support, within the meaning of section 14 of the Workmen's Compensation Act of 1917 (Stats. 1917, p. 844).

It is conceded that she was, as a matter of fact, dependent upon him for support and was being supported by him at the time of the injury. The commission found these facts to be true. The claim is that she cannot be classed as a dependent and is not entitled to compensation for the death of Lopez, because she sustained no legal relation to him, either of blood or marriage, at the time, but that she and the decedent were then living and cohabiting together as husband and wife, notwithstanding the fact that they were never married. Upon this question the commission found, upon sufficient evidence, that she and Lopez were ignorant persons, unacquainted with our laws or with the legal requirements of marriage; that on June 5, 1918, they had agreed to intermarry, and in pursuance of such agreement procured from the county clerk of Riverside county a marriage license authorizing their marriage; that they in good faith then believed that said license was sufficient to constitute in itself a lawful marriage; that thereupon they assumed the relation of husband and wife and cohabited together in the same dwelling, holding themselves out as husband and wife, the husband providing for their support until the time of said accident; and that during all that time Dolores Rodriguez believed herself to be the lawful wife of Lopez and continued to be in good faith a member of his household and wholly dependent upon him for her support.

The provisions of section 14, aforesaid, relating to this subject are as follows:

> "(a) The following shall be conclusively presumed to be wholly dependent for support upon a deceased employé:
>
> "(1) A wife upon a husband with whom she was living at the time of his death, or for whose support such husband was legally liable at the time of his death.
>
> "(2) [This clause specifies the children who are deemed to be dependent and is not important to the present case.]
>
> "(b) In all other cases, questions of entire or partial dependency and questions as to who constitute dependents and the extent of their dependency shall be determined in accordance with the fact, as the fact may be at the time of the injury of the employé.
>
> "(c) No person shall be considered a dependent of any deceased employé unless in good faith a member of the family or household of such employé, or unless such person bears to such employé the relation of husband or wife, child, posthumous child, adopted child or stepchild, father or mother, father-in-law or mother-in-law, grandfather or grandmother, brother or sister, uncle or aunt, brother-in-law or sister-in-law, nephew or niece."

Dolores Rodriguez does not come within the provisions of subdivision 1 of subsection (a). That part of the subsection includes only those who stand in the relation of husband and wife. Its language necessarily implies that the relation must be lawful, and therefore it excludes persons who, though not lawfully married, live together believing themselves to be husband and wife.

Subsection (b), however, clearly empowers the commission to inquire into the actual conditions of dependency and to ascertain whether or not the applicant was in fact dependent upon the decedent for support at the time of the injury, and finding such dependency complete or partial, thereupon to award compensation accordingly. Standing alone, this clause would authorize compensation to any person, regardless of relationship or place of abode. But it is expressly qualified and limited in these particulars by the provisions of subsection (c). The latter attaches two conditions to the powers given by subsection (b). The first one is that the person claiming to be a dependent must be "in good faith a member of the family or household of such employé." The facts found bring Dolores Rodriguez within these conditions. Lopez had a dwelling house and a household, consisting of himself and said Dolores. She was a member of that household. Both the findings and evidence show that she was living there and was such member in the utmost good faith, believing that she was the lawful wife of Lopez. The conditions are fully met by the facts.

The second limitation of subsection (c) applies to dependents of the employé who may not be members of his family, or household, but who are related to him by blood or marriage or by adoption in some one of the degrees there specified. The two classes of limitations are stated in the alternative, being connected by the disjunctive particle "or." The result is that the law does not require that the person found to be actually dependent under subsection (b) shall come within both classes of the limitations specified in subsection (c), but that such person may be awarded compensation if he or she comes within either class. If the applicant is a member of the family or household of such employé in good faith, compensation may be awarded although he or she may not bear any relation by adoption, blood, or marriage to the employé. But if it appears that the applicant bears either of the relations specified in the second part of subsection (c) although not a member of the family or of the household, compensation may be awarded according to the degree of dependency. It is not infrequently the case that a person bearing some one of such relations to another is living apart as a member of a different family or household. The second qualification in subsection (c) was intended to cover persons of this class.

The petitioners argue that to allow compensation to one whose only claim to dependency arises from an illegal cohabitation with the employé, ostensibly as his wife, would be a gross violation of morals and of the express policy of our law, and, furthermore, that one living in such forbidden and criminal relations with another cannot in law be deemed to be acting in good faith as a member of his household. We think there are satisfactory answers to this argument. At common law Dolores Rodriguez, under the facts found, would have been the lawful wife of Lopez. There was a contract of marriage and assumption of the rights, duties, and obligations of the relation, and an actual consummation thereof. Graham v. Bennet, 2 Cal. 506; Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345. It was not until after the amendment of 1895 to section 55 of the Civil Code that a solemnization became essential to the validity of a marriage. Norman v. Norman, 121 Cal. 620, 54 Pac. 143, 42 L. R. A. 343, 66 Am. St. Rep. 74. There was nothing essentially or inherently immoral or vicious in the conduct of the parties, if we judge them according to their own understanding and belief. The criminal character of their cohabitation does not come from the fact that they were cohabiting together believing themselves to be husband and wife, although not so, but from the fact that the Legislature, by the statute of 1895, had required an additional ceremony to constitute a legal marriage. Of this statute they were ignorant, and the immorality of their conduct cannot be judged with reference to it except in a case where the validity of the marriage is the essential thing to be determined. It was competent for the Legislature, by a subsequent statute, to make that particular requirement to a valid marriage inapplicable in other cases, such, for instance, as the determination of the question of dependency necessary to authorize compensation to a person injured by the death of an employé. This it has done by the provisions of section 14, with respect to one who at the time of the injury was in good faith a member of the household of the employé. This statute completely takes away, for that purpose, the immorality of parties who in good faith were living together as Lopez and Dolores Rodriguez were living. It also declares a different public policy with reference to such cases and completely removes the objection that it is not sound policy to allow compensation in such a case.

It is true that if the provision is loosely administered it may give rise to great abuses. Persons consciously living in illicit relations may endeavor to take advantage of the situation for their own gain. But for the proper administration of the law in this respect the state depends upon the Industrial Accident Commission. It will, of course, exercise the greatest care to require strict proof of entire good faith in such cases. There is nothing in the evidence in the present case to indicate that there was any ground for a charge of bad faith in the conduct of the parties at and prior to the time of the accident.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; OLNEY, J.; MELVIN, J.; LAWLOR, J.

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180 Cal. 664

SANDERS v. AUSTIN et al. (L. A. 4904.)

(Supreme Court of California. July 3, 1919.)

1. Explosives 🔑9—Filling Station—Operating Gasoline Pump — Care Required.

In view of the danger of gasoline catching fire if poured out over an automobile, there was negligence of the employé in charge of a filling station to begin pumping gasoline until he was certain that plaintiff was ready to receive it.

2. Damages 🔑188(2) — Evidence of Amount—Sufficiency.

Where no question was raised at the trial as to the value of the automobile in question and plaintiff testified that he had purchased it some months before for $345 and it was stipulated at the trial that it was worth $75 after it was burned, contention that amount of $225 allowed is without support in the evidence cannot be sustained.

3. Evidence 🔑143—Collateral Issues — Importance.

Testimony involving collateral issues will not be permitted, where such inquiry in its probative bearing on the main issue will not be worth the time and necessary complication of issues involved.

Department 1.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by John W. Sanders against A. E. Austin and others, doing business under firm name of Austin, Bryant & Carter, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Salisbury & North, of Los Angeles, for appellants.

Oscar E. Winburn, of Los Angeles, for respondent.

OLNEY, J. This is an action against the owners of an automobile supply station and their employé in charge of such station, one Lawrence, to recover damages for injuries to person and property claimed to have been suffered by the plaintiff through the negligence of Lawrence. The plaintiff had judgment, and the defendants appeal. The facts of the matter are:

[1] The plaintiff was the owner of a Ford automobile which he was operating as a jitney bus and ran the car alongside the gasoline pump of the supply station to obtain some gasoline. The gasoline tank on a Ford machine is beneath the front seat, and the plaintiff, standing in the car, was handed the free end of the hose from the pump in order to insert it into the tank. Before the hose was so inserted, and while the plaintiff was holding it with one hand and unscrewing the cap of the tank with the other, the defendant Lawrence started the pump, with the result that the gasoline poured out over the machine, caught fire either from the engine or the lights of the machine, and burned the plaintiff and the machine. There is no dispute as to the foregoing facts. There is a direct conflict in the testimony as to whether or not the plaintiff gave any signal to Lawrence to go ahead with the pumping, plaintiff testifying positively that he did not. It is evident, that, if this testimony is true (and in view of the conflict and the decision of the trial court it must be taken on appeal as true), there was undoubted negligence on the part of Lawrence. The danger of gasoline catching fire is so great that it was very clearly a lack of reasonable care on the part

of Lawrence to begin pumping until he was certain that the plaintiff was ready to receive the gasoline.

[2, 3] The only other point in the case is the amount of damages. The court awarded plaintiff $450, $225 of which was allowed on account of injury to the machine. It was stipulated at the trial that the value of the machine, after it was burned, was $75; but defendants object that there is no evidence of its value before it was burned, and that therefore the amount of $225 allowed is without any support in the evidence. There was no direct testimony, as there should have been, as to the condition of the machine or what it was worth at the time it was burned. All that appears is that the plaintiff had some months before paid $345 for it secondhand, and that he was actually using it in his business, from which it must be inferred that it was at least in running condition. It may be that testimony as to what the plaintiff paid for the machine was not competent and that if it had been objected to the objection would have been good. Such objection would have been good, however, not because such testimony was of no probative value, but because, standing alone, it was of slight probative value only, and to make it more than this would involve an inquiry into a collateral question, namely, whether or not the plaintiff had paid too much for the car. The rule is that testimony involving a collateral issue will not be permitted where such inquiry, in its probative bearing on the main issues will not be worth the time and necessary complication of issues involved.

But the testimony being in, it has sufficient probative value in the absence of any counter testimony whatever to sustain the finding of the court (Joost v. Sullivan, 111 Cal. 296, 43 Pac. 896; Booth v. Pendola, 88 Cal. 41, 23 Pac. 200, 25 Pac. 1101), particularly in view of the further circumstances that no question was raised at the trial as to the value of the automobile and it was apparently assumed that the price paid by the plaintiff was not out of the way. In this connection it should be noted that, in effect, the court found the machine, at the time it was burned, to be worth $300, or $45 less than the plaintiff had paid for it.

It is also worthy of note that, in view of the fact that the machine could actually run at the time it was burned, an appraisement of $300 cannot possibly exceed its real value by an amount at all equal to the reasonable expense to the defendants of a new trial. For this reason alone we would be disinclined to grant a new trial merely because of error in fixing the amount of damages.

Judgment affirmed.

We concur: SHAW, J.; LAWLOR, J.

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41 Cal. App. 175

RUNDELL v. McDONALD et al. (Civ. 2905.)

(District Court of Appeal, Second District, Division 2, California. May 12, 1919. Rehearing Denied by Supreme Court July 10, 1919.)

1. WILLS 🔑58(1)—CONTRACT TO DEVISE—VALIDITY OF ENFORCEMENT.

A contract to devise, when properly evidenced, is valid, and enforceable in equity, unless superior equities have intervened.

2. FRAUDS, STATUTE OF 🔑148(2)—PLEADING CONTRACT—PRESUMPTION.

The law presumes, under the allegation of due execution of contract, that it was made in compliance with the statute of frauds.

3. WILLS 🔑67—CONTRACT TO DEVISE — ACTION TO DECREE TRUST—COMPLAINT.

Complaint showing conveyance by plaintiff to deceased, his aunt and stepmother, of land, without other consideration than her agreement to return it to him by devise at her death, the making of will so devising it, her only property of value, and disposing of her other property, her subsequent marriage, revoking the will by operation of law, and praying that defendants, her husband and heirs, be declared to hold in trust for plaintiff, and that a conveyance thereof to him be decreed, *held* to state a cause of action.

4. EVIDENCE 🔑432, 444(4)—PAROL EVIDENCE—CONSIDERATION AND CONDITIONS OF DEED.

Complainant could show that there was no valuable consideration for his deed to testator, and parol evidence was admissible to establish the conditions governing the title under a collateral agreement between the parties.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Albert M. Rundell against Albert W. McDonald, personally and as administrator of Mary Ann McDonald, deceased. From adverse judgment, plaintiff appeals. Reversed.

Benjamin F. Thomas, of Santa Barbara, for appellant.

Fred H. Schauer and Francis Price, both of Santa Barbara, for respondent.

SLOANE, J. This is an appeal from a judgment entered against plaintiff after general demurrer was sustained to his complaint, without leave to amend.

The only question to consider is the sufficiency of the complaint to state a cause of action. The parties to the appeal are the plaintiff and the defendant McDonald as administrator and in person.

The complaint alleges the following: On the 20th of February, 1912, plaintiff was the owner of a house and lot in Santa Barbara, Cal., of the value of $3,000; on or about that date he entered into an agreement with Mary Ann Rundell, his aunt—who was also his stepmother, the widow of his father—whereby he agreed to convey this house and lot to her in consideration of an agreement on her part that she "would devise by her last will and testament said parcel of land to plaintiff free of any and all conditions and incumbrances on her death." Pursuant to said agreement, and without other consideration, the plaintiff did thereupon grant and transfer the premises to the said Mary Ann Rundell by a deed, a copy of which is attached to the complaint. On the 7th day of May, 1914, said Mary Ann Rundell, in pursuance of said agreement on her part, executed her holographic will whereby she did devise said parcel of land to the plaintiff, a copy of the will being attached as an exhibit to the complaint. On the 6th day of June, 1914, Mary Ann Rundell intermarried with Albert W. McDonald. She died some time prior to October 13, 1915, without having made any further will, or other disposition of her estate, which consisted of nothing of value outside of her interest in this real property, leaving as her heirs her surviving husband, Albert W. McDonald, and the plaintiff Albert M. Rundell, Fred Rundell, and Alice Cotton, children of her deceased sister, and a half-brother, James A. McGee. Letters of administration were issued on her estate to the surviving husband, Albert W. McDonald; it being alleged in the petition therefor that she died intestate. The action was brought against Albert W. McDonald, as administrator, and against Albert W. McDonald, Alice Cotton, Fred Rundell, and James A. McGee in person; plaintiff subsequently dismissing as to the latter three.

Under this state of facts, as more fully pleaded, the plaintiff asks judgment that the defendants hold this real property in trust for plaintiff; that a conveyance thereof to plaintiff be decreed; and that he have such other relief as he may be entitled to under the pleadings.

[1] That a contract of this character, when properly evidenced, is valid and binding and may be enforced by a court of equity unless superior equities have intervened, is not disputed by respondent, and, if it were disputed, is sustained by too great a weight of authorities to be open to discussion. Owens v. McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369; Steinberger v. Young, 175 Cal. 81, 165 Pac. 432; Keefe v. Keefe, 19 Cal. App. 310, 125 Pac. 929; McCabe v. Healy, 138 Cal. 81, 70 Pac. 1008; Rogers v. Schlotterback, 167 Cal. 35, 138 Pac. 728; Monsen v. Monsen, 174 Cal. 97, 162 Pac. 90. The rule as settled in this state is set forth by Mr. Justice Angellotti in Rogers v. Schlotterback, supra, as follows:

> "Suffice it to say if such a contract may fairly be said to be clearly and satisfactorily shown, if it is clear, certain, and definite in its terms, and if specific performance would not be harsh and oppressive and unjust to innocent third parties, * * * the contract even when resting in parol, will be enforced, 'not by ordering a will made, but by regarding the property in the hands of the heirs, devisees, assignees, or representatives of the deceased promisor, as impressed with a trust in favor of the plaintiff, and by compelling the defendant, who must of course belong to some one of these classes of persons, to make such disposition of the property as will carry out the intent of the agreement.'"

[2] On this appeal the question of the statute of frauds is not involved, as it does not appear from the complaint that the contract was not wholly in writing, and no question on this point, or as to the application of subdivision 7 of section 1973, Code of Civil Procedure, was or could be raised by demurrer. The law presumes, under the allegation of due execution, that the contract was made in compliance with the statute of frauds. McMenomy v. Talbot, 84 Cal. 279, 23 Pac. 1099; Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567, 112 Pac. 454.

[3] We have therefore in the pleadings here a statement of facts setting forth a valid and binding agreement to devise this property to the plaintiff, and under conditions which appeal most strongly to every natural sentiment of equity and fair dealing for its enforcement, and which the promisor proceeded to carry out by the execution of a sufficient will for that purpose. It is contended, however, that the will which was executed by Mary Ann Rundell in compliance with her agreement was revoked by operation of law, under the provisions of section 1300 of the Civil Code, upon her marriage to the defendant McDonald, and that at her death the situation of the parties was the same as though she had made no attempt to devise this property. Assuming this to be the fact, does any condition arise from this subsequent marriage, and the presumptive right of her husband to succeed to one-half of her estate, to defeat the equities of the plaintiff in his attempt to enforce this agreement against the heirs? The respondent McDonald contends that these subsequent conditions are a bar to plaintiff's right to enforce his contract, and relies upon the doctrine laid down in Owens v. McNally, supra, and later cases affirming the position of the Supreme Court in that decision, to support this contention.

We believe there are material points of distinction between the respective equities as shown in Owens v. McNally and all the other cases cited to the same point, and those apparent in the case at bar. First, it may be questioned if the existence of a defense of conflicting equities arises on a general demurrer to this complaint. Does the mere fact of the marriage of the promisor since the making of this contract, and that her husband is living and presumptively an heir, establish inequity and unfairness in plaintiff's claim, or should the point be met on issues raised by an answer? Does any presumption exist that McDonald had not, previous to his marriage, notice of the status of this real property, or, in the absence of special demurrer, is the burden upon the plaintiff to allege such notice in his complaint? But passing this question, which is not raised by either of the parties, it may confidently be said that many points of distinction, going to the respective equities, exist between the circumstances involved in Owens v. McNally, supra—which is the strongest case cited in behalf of respondent here—and the facts as pleaded in this complaint.

In the case cited it seems clear that the court refused specific performance of the agreement to make a will in plaintiff's favor because the enforcement of the agreement "would be harsh, oppressive and unjust to innocent third parties." In that case the promisor had, at the time of his death, accumulated an estate of some $20,000 in value, no part of which had been contributed by the plaintiff. As the court, in its opinion, says, there was much "vagueness and uncertainty" as to the services to be rendered by the plaintiff in consideration of the promise to make a will in her favor. Neither the length of time which plaintiff was to spend in living with and caring for the intestate is made certain, nor the kind or character of the services which she was to render. Moreover, "the defendant widow married McNally in ignorance of the contract, and, it appears, continued in ignorance of the contract until after his death. She acquired distinct rights of heirship and succession," and an enforcement of the contract would have deprived her of any share of the estate, entirely irrespective of the value of the services that had been rendered by plaintiff in pursuance of the agreement for a will in her favor. And, finally, the plaintiff had her recourse for just compensation by resort to an action in quantum meruit.

In the case at bar, the plaintiff had, without consideration—or, at best, for a nominal consideration—bestowed upon the promisor the entire property he was to receive back under the will. There is no question as to the precise consideration for the promise, and the entire fulfillment of consideration by plaintiff. He gave to the promisor this specific real estate on the condition that she should return it to him at her death by devise. She promised that he would receive his property back in kind, "free from conditions or incumbrances," thus negativing the presumption that the agreement was made in contemplation of its defeat by her subsequent marriage, if such marriage should occur. It does not appear that the defendant McDonald did not have knowledge of the agreement regarding this property at the time of his marriage with Mary Ann Rundell, and, whatever legal rights to succeed to a part of her estate may have been conferred upon him by marriage, it would never occur to a normal mind that there was anything "harsh, oppressive and unjust" in returning this property to the one who was, by virtue of contract and good conscience, entitled to it, rather than to pass it on, by succession, to a man who is only related to it by marriage. And, finally, it appears that this parcel of land is the only property of value in the estate, and if the plaintiff cannot recover it in this action he is without recourse, even if any other right of action exists.

The distinctions referred to, we believe, are, in themselves, sufficient to remove this case from the limitations upon relief by specific performance recognized in the authorities cited and relied upon by respondent.

But there is another aspect of this appeal which is deserving of attention. A valid agreement to devise this property to plaintiff, as shown by the complaint, was not only entered into but it was executed, so far as it could be, in the lifetime of the promisor by the making of her will devising this property to plaintiff. It is argued by appellant that this will, having been made under a contract for a good and sufficient consideration, was irrevocable by any act of the testator, or even under the provisions of section 1300 of the Civil Code, by operation of law. There is ample authority for the proposition that a devise of real estate, made in pursuance of such a contract as shown here, may be held irrevocable by any direct act of the testator. Page on Contracts, vol. 1, § 19; 40 Cyc. 2117; 1 Jarman on Wills, 18; Hudnall v. Ham, 183 Ill. 486, 56 N. E. 172, 48 L. R. A. 557, 75 Am. St. Rep. 124; Bird v. Pope, 73 Mich. 483, 41 N. W. 514; Baker v. Syfritt, 147 Iowa, 49, 125 N. W. 998; Bolman v. Overall, 80 Ala. 451, 2 South. 624, 60 Am. Rep. 107; Chase v. Stevens, 34 Cal. App. 98, 166 Pac. 1035. In the California case, last cited, it was held that the contract will could not be revoked by testator, and was entitled to probate as against a subsequent will purporting to revoke the former. It seems generally to have been held, however, that a revocation by subsequent marriage operates even against a will made in pursuance of a valid contract supported by valuable consideration paid. None of the decisions in this state relating to revocation by marriage involve the question of contractual obligations (Corker v. Corker, 87 Cal. 643, 25 Pac. 922; Sanders v. Simcich, 65 Cal. 50, 2 Pac. 741; In re Comassi, 107 Cal. 1, 40 Pac. 15, 28 L. R. A. 414); but the reason for the operation of the statute seems to be based upon public policy, which disapproves the determination before marriage of the rights of future husband, wife, or children to participate in the benfits of the testator's estate. It is presumed that a will so made is in contemplation of its annulment in the event of subsequent marriage. We have no doubt of the operation of the statute in the revocation of the will in the case before us, for the reason that it purports to dispose of all of the estate of the testator, and, after devising the land in question here, contains other bequests and a residuary clause which are not affected by the contract with plaintiff, and against which the rights of the surviving husband would doubtless prevail. It is true that there does not appear to be any known property of value affected by the will other than this land, but in its terms the will disposes of other estate. However, it does not follow that the annulment of the writing as a will entirely destroys its operation as a contract. It may be effective as to the statute of frauds, if that question should arise. It may operate as establishing a resulting trust in the property; it may have the effect of an equitable assignment of the title to the real property devised to plaintiff. It was held in Hudnall v. Ham, supra, by the Supreme Court of Illinois, that a will thus executed under contract was revoked by subsequent marriage of the testator, but that it could still be considered, in connection with certain releases by the wife of claim on her husband's estate, as conveying to the beneficiaries an equitable title to the property.

In Lant's Appeal, 95 Pa. 279, 40 Am. Rep. 646, where there had been a parol antenuptial agreement between the affianced couple that the woman could dispose of her estate as she saw fit, it was held that the will so made by the woman was revoked by the subsequent marriage, but that its provisions could be enforced in equity as an antenuptial contract. It is true that the doctrine stated in these cases is coupled with a relinquishment of the equities of the other spouse in the testator's estate; but they go to the extent of holding that, in the absence of such equities, the will, though inoperative as such by reason of marriage subsequent to its execution, has not become ineffective to sustain rights of those claiming under it.

None of the cases that have come to our attention deals with a devise of property the title to which, at the time of the contract, was wholly in the party claiming under the will, and which was transferred to the testator solely on condition that the specific property should be given back under the will.

We can see no reason why such an agreement as this, and the execution of the will in pursuance thereof, does not create a resulting trust under sections 2221 and 2222 of the Civil Code, or why the defendant is not bound in this matter under Civil Code sections 1573 and 2224. The circumstances as pleaded strongly suggest the existence of a confidential relation between the plaintiff and his aunt and stepmother creative of obligations under sections 2216 and 2219 of the Civil Code, but they probably rest more on inference than upon any sufficient allegations of the complaint.

We doubt if the policy of the law which declares the revocation of the will of an unmarried woman by her subsequent marriage was ever intended to apply to a devise of property which was conveyed to her without consideration and upon the express condition that she should return it in kind to the donor at her death. There is no authority before us which holds that the revocation of such a will by operation of law revokes the contract or obligation under which it was made. If this will was extinguished by the marriage of the testator, the law permitted her immediately thereafter to make another just like it, and the obligations of contract and conscience demanded it of her. It is an entirely different condition from that arising on a promise to leave one's own and indefinite estate at death in compensation for an unliquidated obligation for services rendered or to be rendered to the testator. It is a contract fixing a present obligation upon specific property.

[4] There can be no question here of the showing by the complainant that the consideration for this deed was merely nominal, and we are of the opinion that he is entitled to show, under his averment to that effect, that his conveyance to the testator was purely voluntary and without any valuable consideration. The authorities cited by respondent go to the rule that the consideration recited in a deed cannot be disputed so as to destroy the operation of the deed. There is no attempt here to defeat the deed, but merely to establish the conditions governing the title under a collateral contract between the parties, and parol evidence is admissible for such purposes. Coles v. Saulsby, 21 Cal. 47; Brison v. Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; Wiard v. Brown, 59 Cal. 194; Carty v. Connolly, 91 Cal. 18, 27 Pac. 599; Arnold v. Arnold, 137 Cal. 297, 70 Pac. 23; Higgins v. Higgins, 46 Cal. 259.

From either one of the several theories of this case discussed, we are of the opinion that the complaint states a cause of action.

Judgment reversed.

We concur: FINLAYSON, P. J.; THOMAS, J.

41 Cal. App. 227

CITY OF FT. BRAGG v. BRANDON.
(Civ. 2765.)

(District Court of Appeal, First District, Division 2, California. May 16, 1919.)

1. Municipal Corporations ⟹225(4)—Property—Sale by Board of Trustees.

In view of Civ. Code, §§ 2229, 2234, 2306, and the Municipal Corporation Act, §§ 750, 764, subd. 2, transaction whereby board of trustees of a city, on pretense of selling part of the city's land for valuable consideration, conveyed title in fee to the buyer, and, in lieu of payment of the consideration took back as part of the same transaction a limited conditional title, leaving the buyer the fee in reversion, *held* void; no title passing to the buyer by the trustees' deed to him, and his deed back conveying none to the city.

2. Quieting Title ⟹44(1) — Burden to Plead and Prove Title—Admission.

In a city's action to quiet title, the city's void deed to defendant, a purported purchaser from the board of trustees, having conveyed nothing to him, his admission of the city's possession, though qualified, put on him the burden to plead and prove title in himself.

3. Quieting Title ⟹44(4)—Proof of Title in Predecessor.

Where both parties to an action to quiet title claimed under the common source of a single deed from a lumber company, plaintiff city directly, and defendant by a void deed to him from plaintiff city, the city was not bound to prove title in its predecessor lumber company, regardless of whether it proved possession or not.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by the City of Ft. Bragg against David Brandon. Judgment for defendant, and plaintiff appeals. Reversed.

Leonard Stone, City Atty., of Fort Bragg (Henry G. Tardy, of Oakland, of counsel), for appellant.

Mannon & Mannon, of Ukiah, for respondent.

BRITTAIN, J. The plaintiff, city of Ft. Bragg, appeals from a judgment against it in a suit to quiet title.

The respondent contends the city's title was equitable only, and therefore not sufficient to support a suit to quiet title. The appellant contends the deed from the city under which respondent claims was void, and therefore the legal title is still in the municipality.

[1] The board of trustees of the city of Ft. Bragg, incorporated under the Municipal Corporation Act of 1883 (St. 1883, p. 93), and amendments thereto, on April 14, 1908, adopted a resolution to sell the land in controversy for $10,000 gold coin, and to apply the proceeds of the sale to the purchase of a city park. On April 27, 1908, the trustees adopted another resolution reciting the former one and the making of a conveyance under it to the respondent. The second resolution also recited that the president of the board of trustees had received from Brandon the sum of $10,000, and it purported to authorize the president to purchase for use solely as a city park, at a cost not to exceed $10,000, the same land. A deed referring to the incorporation of the city under the Municipal Corporation Act and to the first of the two resolutions, bearing date April 20, 1908, was made to David Brandon, the respondent. The deed also recited the receipt of $10,000 in gold coin paid by Brandon. It was acknowledged on the same day, but not recorded until May 4, 1908. Under date of April 25, 1908, Brandon, by a deed, reciting the payment of $10,000 gold coin to him by the city, purported to convey the property to the municipality upon three conditions: First, that it was to be held without partition or division, to be used permanently as a city park and for no other purpose; second, that the municipality should never give away, sell, or otherwise dispose of the property or any part thereof; and, third, upon breach of either of the other conditions that Brandon, his heirs or assigns, might re-enter and possess his former estate. This deed was acknowledged on April 27, 1908. It was also recorded on May 4, 1908, two minutes after the first deed. Both were recorded at the request of W. G. Jones, who was then the city clerk. It was his duty to keep a record of the treasurer's account. The account failed to show the payment of any money by or to Brandon. Brandon testified he paid no money to the city of Ft. Bragg, but made his promissory note, which was returned to him when the second deed was made. The city clerk testified he never received the note, and the treasurer's account made no mention of it. Brandon further testified the note was given and "they could have got the money on it the next day if they wanted it, but, of course, I want to say here, too, that we had an understanding about this thing that they sold me that." In other words, the trustees had an understanding with Brandon that upon a pretense of selling a part of the trust estate for a valuable consideration, $10,000, they would convey title in fee to him, and in lieu of payment of the consideration, they would immediately take back as a part of the same transaction a limited conditional title, leaving him to the fee in reversion. Counsel for the appellant disclaims any intention of charging bad faith to any of the parties to the transaction. Regardless of their actual intentions, it is elementary that trustees may not give away the subject-mat-

ter of their trust, nor can a person who acquires trust property without consideration successfully maintain he has a legal right to the property so acquired. Under the circumstances the making of the note was a mere disguise of the real understanding between Brandon and the board of trustees. Under the Municipal Corporation Act, the board of trustees had no power to dispose of the municipal property except for the benefit of the city. It had power to construct and maintain parks and might have done so without the interposition of Mr. Brandon and without giving him a vested reversionary interest in the city's real property. The exchange of conveyances was entirely to the detriment of the municipality and for the benefit of Mr. Brandon. The members of the board of trustees were trustees in fact and in law as well as in name. They had no power to deal with the property intrusted to them for any purpose unconnected with the trust. Civ. Code, § 2229. Their sole power to convey was limited to the making of a conveyance which should be for the benefit of the city. Municipal Corporation Act, No. 2348, Deering's General Laws 1915, §§ 750 and 764, subd. 2. A violation of section 2229 of the Civil Code, regardless of any ulterior purpose, constituted a legal fraud upon the municipality. Civ. Code, § 2234. As the agent of the municipality the board of trustees had no authority to dispose of its property without consideration. Civ. Code, § 2306. The pretended consideration for the deed to Brandon was never paid to the city, and no warrant or authorization was ever made for the municipality to pay him. The Municipal Corporation Act provides that the treasurer shall pay out money only on properly signed warrants, and that the president shall sign such warrants. The transaction was void. No title passed to Brandon by the first deed, and he conveyed none to the municipality by the second. McCoy v. Briant, 53 Cal. 250; Foxen v. Santa Barbara, 166 Cal. 77, 134 Pac. 1142; Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, 59, 11 Sup. Ct. 478, 35 L. Ed. 55.

On behalf of the respondent it is argued the plaintiff failed to show title in itself, and therefore it cannot complain of findings under which the defendant's title was quieted. On the trial there was introduced in evidence the record of a deed from the Union Lumber Company to the city of Ft. Bragg, dated in 1894. Counsel for the defendant objected to the admission of this deed in evidence upon the single ground that its acceptance by the city had not been shown. On a statement being made of evidence to be produced to show acceptance, all objection to the deed was withdrawn and counsel for the defendant expressed his satisfaction with the deed. A reading of the entire record leaves no doubt concerning the theory upon which the case was tried and determined. In no way was it suggested in the lower court that Brandon had any rights in the property except those he claimed to have acquired under the deed from the city, and a part of which he undertook to reserve to himself in his reconveyance to the city.

[2, 3] The plaintiff alleged it was, and for 20 years had been, in adverse possession of the land. The suit was commenced in 1917. The defendant denied that the plaintiff's possession had been adverse for 20 years, and alleged "that the plaintiff now is, and ever since the 25th day of April, 1908, has been, the owner and in possession of said real property upon the condition (and not otherwise)" that it should be used for a park, and setting out in terms the conditions contained in the deed from Brandon, dated April 25, 1908. The findings follow substantially the allegations of the answer. The deed from the city to Brandon and the conditional deed from him to the city were introduced on behalf of the municipality. No evidence of any other title in Brandon was introduced on his behalf. As a witness for the city he testified concerning his transaction with the city, and did not suggest that his claims were based upon any other conveyance than that from the city. The admission in the answer of the plaintiff's ownership and possession left open only the legal question of the character of the possession, whether adverse or upon condition, and the determination of this legal question depended upon other facts. The only other facts proved were the deed to Brandon and the deed from Brandon. So far as the record shows, Brandon was a stranger to the title, unless the city's deed to him conveyed title. The deed, being void, conveyed nothing. In such a case the admission of the plaintiff's possession, even though qualified, put the burden on the defendant to plead and prove title in himself. Davis v. Crump, 162 Cal. 518, 123 Pac. 294. In that case the learned Chief Justice reviewed at length the cases holding that proof of possession is sufficient as against the motion for nonsuit of a defendant who never had any title, but who claimed to have title, to the premises. In this case if a motion for nonsuit had been made at the close of the plaintiff's case upon the sole ground that the city had failed to prove titile in itself, the motion would have been denied, assuming, of course, the invalidity of the transaction between the board of trustees and Brandon. Zilmer v. Gerichten, 111 Cal. 73, 43 Pac. 408; McGovern v. Mowry, 91 Cal. 383, 27 Pac. 746; Scorpion S. M. Co. v. Marsano, 10 Nev. 378. As summarized in the opinion in Davis v. Crump, supra:

> "In Sepulveda v. Sepulveda, 39 Cal. 13, an action to quiet title, it was said that if the plaintiff showed possession she should not have been nonsuited, even if she had attempted to show paper title in herself and had failed, for the deeds read in evidence did not show any title

in the respondent, 'and until their title was in some way made to appear, the appellant might rest safely upon the mere fact of her possession * * * and the presumptions arising therefrom in her favor.'"

If a motion for nonsuit in the trial court would have been denied under this rule, the same evidence supports the appeal here, which presents only the question of the illegality of the only deed under which the respondent claimed on the trial of the case. If it be suggested that the attempted legal qualification of the character of the admitted ownership and possession of the plaintiff removes the case from the operation of the rule of Davis v. Crump, still the respondent must fail in his contention regarding plaintiff's proof of title. The only evidence before the court concerning the defendant's title was that contained in the purported deed from the city. From the record, therefore, in legal effect, both parties claimed under the common source of the single deed from the Union Lumber Company, the city directly, and Brandon by the void deed from the city. In such a case the plaintiff was not bound to prove title in the Union Lumber Company, regardless of whether it proved possession or not. Phillips v. Menotti, 167 Cal. 328, 139 Pac. 796. The right of the appellant to be heard in this court may be supported, therefore, upon both and upon either of the grounds, that the attempted qualification of the respondent's admission of ownership and possession presented a question of law, and left the case subject to the rule of Davis v. Crump, supra, and that upon this record the parties claimed under a common grantor, within the rule of Phillips v. Menotti, supra.

The judgment is reversed.

We concur: LANGDON, P. J.; HAVEN, J.

(41 Cal. App. 184)

MONTGOMERY et al. v. NEILON, County Clerk, etc. (Civ. 2016.)

(District Court of Appeal, Third District, California. May 12, 1919. Rehearing Denied by Supreme Court July 10, 1919.)

1. MANDAMUS 🔑3(2)—ADEQUACY OF OTHER REMEDY—BY APPEAL.

Mandamus will not lie where plaintiff has a plain, speedy, and adequate remedy at law.

2. MANDAMUS 🔑43—COMPELLING ENTRY OF DISMISSAL OF ACTION—POWER OF CLERK.

Under Code Civ. Proc. § 581, providing that an action may be dismissed by plaintiff by written request to the clerk before trial, if no counterclaim or affirmative relief is set up by defendant's cross-complaint or answer, the clerk cannot be compelled by mandamus to enter a dismissal of an action on request of plaintiffs, where defendants by their answer and cross-complaints seek affirmative relief and the court has determined that good causes of action were stated in such cross-complaints; the clerk having no authority to pass upon such questions.

3. MANDAMUS 🔑172—COMPELLING DISMISSAL OF ACTION—QUESTIONS DETERMINABLE—SUFFICIENCY OF CROSS-COMPLAINTS.

In mandamus to compel the clerk of the superior court, at the request of plaintiff, to enter a dismissal of an action in which defendants have filed answers and cross-complaints, it is not for the appellate court to pass upon the question of the sufficiency of the cross-complaints to state causes of action; that being a matter for the trial court.

4. PUBLIC LANDS 🔑61(6)—SUPERIOR COURTS—JURISDICTION — CONFLICTING STATE LAND CLAIMS.

Actions begun in superior court involving contests of conflicting claims to the right to buy state lands by the state surveyor general are different than ordinary actions at law; jurisdiction of the superior court therein being special and conferred by Pol. Code, §§ 3414, 3415, and its duty being to proceed and to determine the whole controversy referred to it for decision.

5. DISMISSAL AND NONSUIT 🔑19(3)—VOLUNTARY DISMISSAL—GROUND OF OBJECTION—CROSS-COMPLAINT.

In action involving conflicting claims of plaintiffs and defendants to patents for state lands, plaintiffs are not entitled to dismissal of such actions after filing of cross-complaints, where they take the position that neither they nor defendants are entitled to patents to the lands involved, but nevertheless question the right of defendants in such actions thereto, and stand ready to oppose them in their attempt to establish their right.

Petition for writ of mandamus by Don Montgomery and others, against William J. Neilon, County Clerk and ex officio Clerk of the Superior Court for the County of Siskiyou. Order to show cause discharged, and a peremptory writ denied.

Jacob P. Wetzel, of San Francisco, for petitioners.

Tapscott & Tapscott, of Yreka, and Arthur W. Bolton and A. E. Bolton, both of San Francisco, for respondent.

HART, J. The petitioners pray for a writ of mandate to compel the respondent, as ex officio clerk of the superior court in and for the county of Siskiyou, to "file and enter in the clerk's register" the dismissal of each of 12 separate and distinct actions which had been commenced in said court by the petitioners, each in his own right, against Churchill Company, a corporation, and others.

Section 581 of the Code of Civil Procedure provides that an action may be dismissed—

"(1) By the plaintiff himself, by written request to the clerk, filed with the papers in the case, at any time before the trial, upon payment of his costs; provided, a counterclaim has not been set up, or affirmative relief sought by the cross-complaint or answer of the defendant."

It appears from the petition that Jacob P. Wetzel was and is the attorney for each of the petitioners in the actions referred to, and acting as such for them, and upon the provisions of the above-named Code section, presented to the clerk the several written requests for dismissal of said actions, but that that official refused and still refuses to file and enter the same in his register.

The petition alleges that the actions referred to were commenced by the petitioners, in the said superior court, on the 12th day of June, 1917, and were based on contests arising in the office of the surveyor general of the state of California involving conflicting claims of the plaintiffs and defendants in said actions to patents for lands embraced and described in the application of one P. A. Dorris to purchase the same, and described in certificate of purchase No. 4185, issued to said Dorris, and which contests were by the surveyor general referred to the superior court of Siskiyou county for adjudication; that the said certificate of purchase issued to said Dorris was by him assigned to Churchill Company. It is alleged that—

> All the complaints filed in said actions "are alike and similar to each other in subject-matter and asking for the same relief"; that the Churchill Company appeared in each and all of said actions and on the 10th day of September, 1918, filed in each action "a document designated as the answer and cross-complaint of defendant Churchill Company," which document is set out and attached to the petition "and hereby referred to and made a part of this petition the same as if set forth in full herein."

It is further stated in the petition that—

> "Over and against the objection of your petitioners herein, through their attorney, Jacob P. Wetzel, made thereto, said action, No. 4581, of Daniel C. Cheney, plaintiff, v. Churchill Company, a corporation, et al., defendants (said Cheney being a plaintiff in one of said actions and one of the petitioners herein), and the other actions which are now pending in said superior court were on the 21st day of February, 1919, set down for trial, to be tried in said superior court on the 12th day of May, 1919."

The petition here shows that the defendants filed in each of said actions an answer and a document termed a cross-complaint. It is not necessary to the decision herein that we should repeat herein in detail the facts alleged in those pleadings of the defendants. It is enough to state that the defendants therein alleged that said P. A. Dorris made and filed in the office of the county surveyor of Siskiyou county an affidavit and application to purchase the lands involved in this controversy; that said Dorris took all the steps required by law for the purchase of said lands; that the county surveyor of Siskiyou county, upon the filing of said affidavit and application, in his office, made and completed a survey, plat, and field notes of said lands described in said application, and thereafter forwarded duplicate copies of the same, together with a certified copy of said application, to the surveyor general; that the surveyor general subsequently approved the said application; that thereafter said Dorris paid the fees required by law by him to be paid for a certificate of purchase therefor, also paid to the treasurer of Siskiyou county 20 per cent. of the principal and the legal interest thereon in advance from the date of approval, as provided by law, and that the surveyor general, as ex officio register of the state land office, on the 4th day of June, 1874, issued to said Dorris a certificate of purchase for the land described "in said plaintiff's complaint and the following described lands," describing same; that said defendant Churchill Company, under and by mesne conveyances and assignments from said Dorris, "is now the owner and holder, and ever since the 14th day of March, 1902, has been the owner and holder of said certificate of purchase," etc.

The prayer of the cross-complaint in each of said actions is for a judgment that plaintiff take nothing by the action; that it be adjudged and decreed by the court that the defendant Churchill Company is the owner and holder of the certificate of purchase issued to said Dorris, as alleged in the cross-complaint; that said certificate is in all respects and for all purposes valid; that said Churchill Company has paid the full purchase price of said lands and interest upon deferred payments, "and has in all respects complied with the law"; that said defendant is entitled to have a patent issued to it by the state of California for the said lands upon surrender by it of said certificate of purchase to the register, etc., and paying the fees required by law for a patent therefor, etc.

The petition here further states that the plaintiffs demurred on general grounds to the cross-complaint in each of the actions and that the court below overruled the demurrer in each instance.

It further appears from the petition here that on the 17th day of June, 1918, and while the actions above referred to were pending in the superior court of Siskiyou county, the Churchill Company petitioned the Supreme Court for a writ of mandate directed against Hon. W. S. Kingsbury, as surveyor general and ex officio register of the state land office of the state of California, to compel that officer to issue to said Churchill Company a patent for the land described in certificate No. 4185 and in the application of said Dorris (this certificate being the subject of the contest instituted by said Cheney against the Churchill Company, and one of the actions referred to above); that an alternative writ of mandate was issued by and out of the Supreme Court, commanding the surveyor general to issue a patent in the name of the original applicant, or to show cause, etc.; that the surveyor general answered said petition; that the Churchill Company in said petition to the Supreme Court stated fully all the facts stated in its pleadings in the actions involved herein and upon which they rely in said actions for the relief prayed for by it in said actions; that the Supreme Court, after a hearing of said petition, and on the 24th day of July, 1918, rendered its decision thereon, holding and deciding, upon reasons given in the opinion, that the said certificate of purchase issued to said Dorris by the register of the state land office was and is invalid, and that the Churchill Company did not in said proceeding, upon the facts as stated in the petition therein, establish its right to the relief therein and thereby sought, and therefore discharged the alternative writ or order to show cause.

We have now given enough of the contents of the petition here for the purposes of the decision herein.

The respondent herein answered the petition and in his answer merely sets forth, as we have seen the petition does, that the defendants in each of the actions referred to filed a general demurrer to the cross-complaint and that the court overruled the demurrer.

Although the Supreme Court, in the opinion in the above-mentioned mandate proceeding before it of Churchill Co. v. Kingsbury, 174 Pac. 329, 332, declared that "it should perhaps be said that the rights of the contestants [referring to the actions below] are not foreclosed by our decision herein, which is, of course, based upon the facts stipulated by the parties to this proceeding," the position taken by the petitioners herein is that neither they nor the defendants in the actions pending in the court below are entitled to patents to the lands in question, and that therefore the trial of the contests upon the facts pleaded, either in their complaints or in the answers and cross-complaints of the defendants, could not result legally in the awarding of relief either to the contestants or contestees. This proposition is based upon the decision of the Supreme Court in the case above mentioned (Churchill Co. v. Kingsbury, supra); the petitioners contending that the facts stated in the answers and cross-complaints of the defendants in the actions pending below are identically similar in all vital particulars to the stipulated or agreed statement of facts upon which said decision is founded.

[1] The writ of mandamus will issue only where there is not a plain, speedy, and adequate remedy in the ordinary course of law, and unless the facts disclosed by the petition are such as to show that the petitioners for the relief demanded herein have no plain, speedy or adequate remedy in the ordinary course of law, we must, of course, discharge the order to show cause.

[2, 3] That the defendants are, by their answers and cross-complaints in the actions referred to, seeking affirmative relief, we do not entertain the slightest doubt. Nor have we any doubt that we are without legal justification for inquiring into the question of the sufficiency of the cross-complaints of the defendants to state causes of action for the relief thereby demanded. The court below passed upon that question on its consideration of the general demurrers interposed by the petitioners to the cross-complaints, and held, by overruling said demurrers, that the defendants have stated good causes of action in their cross-complaints and that therein they ask for affirmative relief. To hold that, under such circumstances, it was the duty of the clerk of the superior court to enter a dismissal of the actions on the request of the plaintiffs therein would, of course, be to hold that the clerk himself is authorized to pass upon the question whether the cross-complaints state causes of action and whether the defendants therein ask for affirmative relief. Indeed, the request by the plaintiffs that the clerk enter dismissals in said actions was in effect asking that ministerial officer to review and overrule the order of the court overruling the demurrers in said actions. The clerk, of course, has no such power or discretion. nor, as above stated, is this court in a proceeding of this character, which involves an extraordinary and summary legal remedy, authorized to pass upon the question of the sufficiency of the cross-complaints to state causes of action. Said pleadings may be wholly deficient in the statement of such facts as would warrant the awarding of the relief therein prayed for, but the remedy in such cases is by appeal. The proposition here, in point of practice, is an important one. If a precedent for the review of such questions in mandamus proceedings, or through the agency of any of the jurisdictional writs, were established, the remedy by appeal would soon become practically obsolete in many cases and the appellate courts flooded with applications for such "short-cut" methods of reviewing questions which ordinarily are reviewable only on appeal. In the present case, the defendants may not be entitled to any relief on the facts they have pleaded. It may be that the court below committed obvious error in overruling the demurrers. It was not for the clerk to say whether such is or is not the case, nor is it for this court to determine that question in this proceeding.

Counsel for the petitioners, however, not only contend, as above stated, that the pleadings of the defendants, for reasons also above stated, utterly fail to state facts entitling them to the relief thereby sought, but further contend that, conceding that said pleadings do state sufficient facts and that thereby the defendants are asking for affirmative relief, such relief is not sought as against the petitioners as plaintiffs in said actions. From this it appears to be the argument that the petitioners are entitled to have their request for dismissal entered by the clerk.

[4] Actions instituted in the superior court on reference of contests of conflicting claims to the right to purchase state lands by the state surveyor general are essentially different in important particulars from ordinary actions at law. "The jurisdiction of the superior court in this class of cases is special, and is conferred by sections 3414 and 3415 of the Political Code, and when invoked it is the duty of the court to proceed and determine the entire controversy referred to it for decision." Perri v. Beaumont, 91 Cal. 30, 27 Pac. 534. And "though the plaintiff had no right to purchase the land, and even if he had not sought to purchase it, he could still contest the right of the defendants to purchase it." Garfield v. Wilson, 74 Cal. 175, 15 Pac. 620. "In such a contest each party is an actor, and must allege and prove all the facts essential to entitle him to purchase." Goldberg v. Thompson, 96 Cal. 117, 30 Pac. 1019. As the situation now stands, the defendants in said actions, in asserting their right to purchase the lands involved in the contests, are necessarily opposing or denying the right of the plaintiffs to purchase said lands. Besides, we do not understand it to be the law as to such actions that, because the plaintiff therein desires to abandon the contest, he may dismiss the entire action and thus deprive the defendant, who is, equally with the plaintiff, an actor therein, the right judicially to establish the validity of his claim to a patent. Of course, where there is no question upon the facts that either the contestant or contestee is entitled to a patent, we suppose an abandonment by the one or the other of the contest or the failure of the one or the other to establish his right to a patent would mean that the other party would be entitled to a judgment awarding him the right to purchase and so receive a patent to the land.

[5] In the present case, though, the position of the petitioners is, as seen, that neither they nor the defendants are entitled to patents to the lands in question upon the facts pleaded in the several pleadings of the parties. From this position and the fact that they have asked and insist upon a dismissal of the actions, it is obvious that, while they concede that they are not themselves entitled to patents to the lands involved, they nevertheless question the right of the defendants in said actions thereto, and stand ready to oppose the latter in their attempt to establish such right.

Our conclusion is that the writ herein prayed for should not issue, and, accordingly, the order to show cause heretofore made herein is discharged, and a peremptory writ denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

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41 Cal. App. 540

TOWN OF MILL VALLEY v. NATIONAL SURETY CO. (Civ. 2841.)

(District Court of Appeal, First District, Division 1, California. June 11, 1919. Rehearing Denied by Supreme Court Aug. 7, 1919.)

1. Street Railroads 🔑24(9)—Action on Bond—Construction of Street Railroad—Failure of Consideration.

Where a surety company gave a bond to a municipality to cover the construction of a street railroad by a corporation, but the franchise never became operative because the Railroad Commission refused its approval, which was a condition precedent to the granting of the franchise, the surety was not liable; the franchise never having vested in the railroad.

2. Principal and Surety 🔑7—Validity of Contract—Failure of Consideration.

Where a bond is given for the performance of a contract, and the latter is not binding upon the parties for any reason, there is no consideration for the bond, and no action, therefore, can be maintained on it.

3. Street Railroads 🔑61(5)—Forfeiture of Franchise — Self-Executing Provisions in Ordinance.

Where a municipal ordinance granting a street railroad franchise provided that the franchise "shall be forfeited" if a certificate of approval were not obtained from the Railroad Commission within four months, the provision was self-executing, and on failure to obtain the certificate of approval no judgment of the state was required to forfeit the franchise.

4. Street Railroads 🔑24(9) — Liability on Bonds—Conditions.

Where a municipality granted a street railroad franchise on condition that a certificate of approval be given by the Railroad Commission within four months, and the railroad commenced work before such permit had been obtained, a surety on a bond given to the municipality for the construction of the road was not thereby answerable as for a breach of the bond when the franchise was forfeited by failure to obtain the certificate of approval; the surety's obligation being conditional on the issuance thereof.

Appeal from Superior Court, Alameda County; W. M. Conley, Judge.

Action by the Town of Mill Valley against the National Surety Company. Judgment for defendant, and plaintiff appeals. Affirmed.

H. C. Symonds, of San Francisco, for appellant.

Goodfellow, Eells, Moore & Orrick, of San Francisco, for respondent.

KERRIGAN, J. This is an action to recover upon a bond given by respondent, as surety, to secure the performance by the Marin County Electric Railways of the terms and conditions of a certain franchise granted to it by the town of Mill Valley. In the lower court judgment went in favor of defendant, and this is an appeal from such judgment.

The main point relied on for a reversal is that the evidence is insufficient to support the findings.

The facts of the case are brief, and may be stated as follows: The Marin County Electric Railways, a corporation, was granted by ordinance a franchise to construct a street railroad in Mill Valley upon certain conditions, and the defendant became surety for such company for the faithful performance of this obligation. By the terms of the ordinance granting the franchise it was to be operative only in the event that the Railroad Commission within four months thereafter issued its certificate of approval. To meet this condition the railroad presented its application to the Railroad Commission, praying for a certificate of public convenience and necessity, but at no time either within the four months limited in the ordinance or thereafter was such a certificate granted by that board for all or any portion of the road provided for in the franchise; the board simply signifying, over a year thereafter, its willingness to grant its certificate on terms and conditions more onerous and different from those contained in the ordinance granting the franchise. The franchise therefore never became effective, and the road was never constructed. It was defendant's position below, and is here, that the obtaining of the certificate from the Railroad Commission was a condition precedent to the granting of the franchise, and that, as this was not performed, such franchise never vested in the railroad, and there could, therefore, be no breach or failure to perform that would render the defendant liable, for the reason that the consideration had failed.

[1-3] We see no escape from this contention. Where a bond is given for the performance of a contract, and the latter is not binding upon the parties for any reason, there is no consideration for the bond, and no action, therefore, can be maintained on it. 9 Corpus Juris, p. 20. Aside from this rule, by the express language of the ordinance it was provided that, if a certificate of approval from the Railroad Commission was not obtained within four months from the granting of the franchise, it should be forfeited, and that the bond provided for should be null and void. Counsel for appellant seeks to avoid the effect of this provision by claiming that the words "shall be forfeited," as used in the ordinance granting the franchise, did not ipso facto work a forfeiture, but that it required a judgment of the state to accomplish that purpose. There is no merit in the contention. The provision is self-executing. Kaiser Land Co. v. Curry, 155 Cal. 638, 103 Pac. 341.

[4] Nor is there any merit in the claim that the franchise was breached by reason of the fact that the railroad commenced work before the necessary permit had been obtained from the Railroad Commission, and for that reason defendant is answerable on its bond. It is true that the railroad, in anticipation of being granted its certificate, did some minor construction work, but we fail to see how that circumstance can in any manner affect the question here presented. Defendant's obligation was conditional upon the issuance of the necessary certificate to make the franchise effectual. The rights and privileges sought by the railroad which formed the consideration of the obligations undertaken by it were never granted, and there could, therefore, be no violation on its part of the claimed obligation to complete the road, and, this being so, no liability could accrue on a bond given by the railroad for the faithful performance of its contract. Under such circumstances, as the trial court found, the consideration for the bond had failed.

Considering the conclusion we have reached, it becomes unnecessary to discuss the question raised by respondent that it was released from its contract by reason of the fact that plaintiff and the railroad altered the terms of the franchise by granting to each other certain mutual concessions.

For the reasons given, the judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

41 Cal. App. 537

BENNETT v. BENNETT et al. (Civ. 2646.)

(District Court of Appeal, Second District, Division 1, California. June 10, 1919.)

JURY ⚷14(6, 9)—RIGHT TO TRIAL BY—ACTION TO CANCEL DEED OR TO QUIET TITLE.

An executor's action to declare testator's deeds null and void and require them delivered up and canceled, and to adjudge executor as such to be the owner of such land and bar defendants' interest, right, and title therein, the complaint not stating a cause of action in ejectment, must be regarded as one to set aside a deed or one to quiet title, and is entirely equitable, and plaintiff is not entitled to jury trial, and the court may disregard a verdict.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by B. S. K. Bennett, executor of the estate of Mary Kingsford Bennett, deceased, against Nelson D. Bennett and another. Judgment for defendants, and plaintiff appeals. Affirmed.

J. B. Holley, of Long Beach, and Levi D. Barr, of Los Angeles, for appellant.

J. D. Fredericks, Byron C. Hanna, Joseph Musgrove, and Charles W. Lyon, all of Los Angeles, for respondents.

CONREY, P. J. The plaintiff appeals from a judgment in favor of the defendants. The complaint refers to three deeds made by plaintiff's testator—one made on March 18, 1913, purporting to convey a described lot to defendant Nelson D. Bennett; one made on June 21, 1913, purporting to convey another described lot to defendant Edward D. Bennett; and one made on August 12, 1913, purporting to convey a third described lot to defendant Nelson D. Bennett. It is alleged that each of said deeds was executed while plaintiff's testator, Mary K. Bennett, was insane, feeble, and mentally incompetent to attend to her business affairs, and that at the stated times and while the said Mary K. Bennett was so insane, etc., the defendants unduly influenced her to make said deeds; that the deeds were executed without any consideration therefor. It is further alleged that the deeds were never delivered, but were handed to the defendant Edward D. Bennett by the said Mary K. Bennett, with instructions to take said papers and take care of them for her, for fear something might happen to her; that thereafter, without said deeds ever having been delivered, they were placed on record by the defendants for the purpose of cheating the said Mary K. Bennett and her estate out of said property. It is further alleged that said Mary K. Bennett never intended to part with the title or any part thereof during her lifetime, but intended said deeds to operate as wills or transfers of the property after her death; that "she was insane, feeble in mind, and mentally incompetent, and did not know the difference between a deed and a will, and supposed when she signed said deeds that she was making a disposition of her property in the same way that she would by a will properly executed."

Based upon these allegations, and the alleged facts that on the 18th day of March, 1913, the said Mary K. Bennett was the owner and in possession of said lots, and that she died on the 16th day of October, 1913, and that the plaintiff is the duly qualified executor of her last will and testament, the plaintiff—

> "therefore alleges that the said real estate hereinbefore belonged to the said Mary K. Bennett at the time of her death, and she was the owner and holder thereof in fee simple, and the same is now a part of the estate of the said Mary K. Bennett and now belongs to this plaintiff as executor of the estate."

The prayer is that said deeds each be declared to be null and void and be delivered up and canceled; that it be adjudged that plaintiff, as executor, is the owner of said land, and that the defendants have not any right, title, or interest therein; and that defendants be forever debarred from asserting any right, title, or interest therein.

We have thus carefully set forth the issues, and the only issues, proffered by the complaint, because the appeal rests solely upon the ground that appellant has been deprived of the right to a trial by jury, a right which he cannot maintain unless the action is, in respect to some issue therein, an action at law. The case was tried before a jury, which rendered a general verdict for the plaintiff. The court also submitted to the jury six special interrogatories, of which the jury answered only three. Thereafter the judge who presided at the trial set aside the verdict and made findings of fact and conclusions of law, pursuant to which he caused judgment to be entered in favor of the defendants.

Appellant concedes that in a case in equity a jury acts only in an advisory capacity and its verdict may be disregarded by the court. He contends, however, that the case is one "of mixed law and equity, the proposition of delivery of deeds being purely a law proposition, and one in which the jury has the power to render a verdict"; that therefore, if the court was not satisfied with the verdict, its utmost power was the power to grant a new trial, wherein the plaintiff might again claim the right of trial by jury.

If this had been an action in ejectment, an action wherein the right to possession of real property was the real issue involved, and the delivery or nondelivery of the deeds

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

had been in dispute, we would have an action at law and issues at law upon which the parties would be entitled as of right to a jury trial. But the cause of action stated in the complaint here is entirely of an equitable nature. This is so, whether the action be regarded as one brought to set aside deeds obtained by fraudulent means, or be considered as an ordinary action to quiet title. The allegations concerning delivery of the deeds are no part of any cause of action pleaded by the plaintiff, except as those allegations are incidental to the application made for equitable relief. The complaint does not show that the decedent at the time of her death was in possession, or that plaintiff ever was in possession, or that defendants are in possession of the property or any part thereof, and does not demand possession. It does not state a cause of action in ejectment. The answer raises issues upon the allegations of the complaint concerning the deeds made to defendants, and denies the plaintiff's claim of ownership. It is silent on the subject of possession. The defendants were content to rest on their denials and to demand that the plaintiff take nothing. If the judge had approved the verdict of the jury, the court's judgment would have been and could have been nothing other than a decree in equity. The cause of action relied upon being solely of equitable cognizance, the plaintiff was not entitled to a trial by jury. Davis v. Judson, 159 Cal. 121, 113 Pac. 147. In such a case the verdict of the jury, when allowed, was subject to the rule that in equity cases such verdict is not binding unless approved by the court. Sweetser v. Dobbins, 65 Cal. 529, 4 Pac. 540; Rockhill v. Parker, 22 Cal. App. 371, 134 Pac. 720.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

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41 Cal. App. 390

PEOPLE v. LOZA. (Cr. 651.)

(District Court of Appeal, Second District, Division 1, California. June 5, 1919.)

RAPE ⚿51(7)—ASSAULT—SUFFICIENCY OF EVIDENCE—IDENTITY OF DEFENDANT.

In prosecution for assault with intent to commit rape, involving the issue of the identity of defendant as the person who committed the offense, evidence *held* to sustain conviction.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Porfirio Loza was convicted of assault with intent to commit rape, and from judgment of imprisonment and from order denying new trial, he appeals. Affirmed.

Albert D. Trujillo, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of the crime of assault with intent to commit rape. The appeal is from a judgment of imprisonment and from an order made by the trial court denying to defendant a new trial.

In support of the claim for reversal of the judgment it is contended that the evidence was insufficient to warrant the verdict of the jury, particularly in that the identity of the defendant as being the person who committed the alleged assault was not established. We have carefully examined the transcript of the evidence, and think that sufficient evidence is shown to fully support the verdict. A young girl, about the age of 13 years, was on her way home from school in a country district in the county of Riverside on a day in November, 1918. It was approaching dark, and her way led along an uninhabited road, by the side of which was brush or shrubbery. While passing along this road she was accosted and seized by a Mexican, thrown to the ground, and the rape was attempted. In order to still her cries the assailant beat her in the face so that blood ran, and the child became partially unconscious. However, before the act designed had been accomplished, the assailant, evidently becoming frightened at some noise, left his victim and ran away. Before doing so, however, he had not only beaten the girl, as we have narrated, but, as evidence of his ultimate purpose, had torn her underclothing almost from her body. On the morning following the assault several Mexicans were brought before the little girl, and she identified the appellant as being the man who had assaulted her. His description tallied with the picture of her assailant as it appeared to her mind. However, at the trial she would not swear positively that appellant was the assailant, and it is because of her qualified answers in this regard that counsel now contends that no sufficient identification was shown. Among the statements made in her testimony, the child, when asked if she was positive that the appellant was the man who assaulted her, said:

> "Yes; I am positive of it, but I won't swear to it; I am as positive as possible to be, but I won't swear because I may be mistaken."

When asked as to what had been her state of mind when the man was first brought before her the day after the assault had been committed, regarding his identity, she said:

> "Well, I was certain he was the man when I saw him. Q. Are you still of that opinion? A. I am."

There was the testimony of another school girl who had passed along that road earlier in the afternoon, to the effect that she had been pursued by a Mexican, and that in her opinion the appellant was the man whom she had seen at that time. But this was not all. After the appellant had been arrested and taken to the jail he made statements which, in effect, admitted that he had committed an assault upon the young girl at the time charged. It is argued that these statements were disconnected, indefinite, and not properly interpreted, but an examination of them will show that at least one of the witnesses who heard the statements testified positively that he did hear from the lips of the defendant the direct admission that he had had improper relations with a child. These statements were brought out by inquiry being made of the appellant as to the cause of his arrest. The evidence as to the identity of the defendant was fully as strong as that shown in the case of People v. Delgado, 175 Pac. 24, where the judgment was sustained.

We find no error here sufficient to warrant an order of reversal.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

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41 Cal. App. 294

TITLE LAND CO. v. SCHAEFER et al.
(Civ. 2657.)

(District Court of Appeal, Second District, Division 1, California. May 27, 1919.)

1. Appeal and Error 🔑933(1)—Review—Presumptions—New Trial.

On appeal from order denying new trial, where no affidavits had been filed in support of motion, and where record on appeal fails to show on what ground motion for new trial was made, court will presume that order denying motion was properly made; there being no affirmative showing of error in view of Code Civ. Proc. § 657, subds. 1–4.

2. Appeal and Error 🔑553(1) — Record — Typewritten Form — Compliance with Statute.

On appeal from order denying new trial, where appellants did not avail themselves of Code Civ. Proc. § 953a, providing that appellant, in lieu of preparing and settling a bill of exceptions pursuant to section 650, may file notice with clerk requesting transcript to be considered when certified by court in lieu of bill of exceptions, statement in support of motion for new trial, as settled and allowed by court, brought up in typewritten form, was unauthorized in such form and could not be considered.

3. Appeal and Error 🔑553(1)—Record—Typewritten Form—Bill of Exceptions.

Code Civ. Proc. §§ 953a, 953c, authorizing typewritten form of record on appellant's application for transcript to be certified by court and considered in lieu of bill of exceptions, has no application to bill of exceptions or statements settled and allowed by trial judge as provided in section 653.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Action by the Title Land Company against B. G. Schaefer and another. From judgment for plaintiff and from order denying motion for new trial, defendants appeal. Affirmed.

Charles Lantz and W. J. Davis, both of Los Angeles (Howard F. Shepherd, of Los Angeles, of counsel), for appellants.

John F. Poole, of Los Angeles, for respondent.

SHAW, J. Defendants appeal from a judgment rendered by the court in favor of plaintiff, quieting its title to a certain lot of land described in the complaint, and also from an order of court made denying their motion for a new trial.

[1] No argument is made by appellants urging a reversal of the judgment for any error disclosed by the judgment roll. In their brief, however, they insist not only that the evidence is insufficient to support certain findings, but complain of rulings of the court both in admitting and rejecting evidence offered, by reason of which they insist that the court erred in denying their motion for a new trial. No record is presented upon which the court may review the rulings complained of. The motion for new trial was made upon a statement the correctness of which is certified by the judge who tried the case; and while the record shows that defendants' motion for a new trial was by order of the court denied, it fails to show upon what ground the motion for a new trial was made. For aught that appears to the contrary, it may have been made for any one or all of the causes specified in subdivisions 1, 2, 3, and 4 of section 657, Code of Civil Procedure, in which event such grounds must be made to appear by affidavits, none of which were filed. We must, in the absence of an affirmative showing of error, presume the order denying the motion was properly made.

[2] The statement in support of defendants' motion for a new trial, as settled and allowed by the court, is brought up in typewritten form. No authority or warrant for such procedure exists. Section 953a, Code of Civil Procedure, provides that one desiring to appeal may, "in lieu of preparing and settling a bill of exceptions pursuant to the provisions of section 650 of this Code,"

adopt the procedure therein prescribed for obtaining and presenting to the court a phonographic report of the proceedings had and taken at the trial, to the truth of which the judge should certify, and when so settled it shall be deemed a part of the judgment roll and on appeal considered a part of the judgment roll. Section 953c, Code of Civil Procedure, provides that where an appellant, in adopting a procedure for presenting a record for review, avails himself of the provisions of section 953a, such transcript need not be printed, but "in filing briefs on said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court."

[3] The provisions of these sections have no application to bills of exception or statements settled and allowed by the trial judge as provided in section 653, Code of Civil Procedure. When such method of bringing up the record is adopted, it must be presented by a printed transcript thereof. It is only in those cases where the appellant avails himself of the provisions of section 953a, Code of Civil Procedure, that he may adopt a typewritten form in bringing up the record. Appellants did not avail themselves of the provisions of this section, but, for the purpose of illustrating the alleged errors committed by the court, procured the settlement of a statement used on their motion for a new trial. The record so presented in typewritten form is unauthorized by the sections of the Code to which we have referred, and hence cannot be considered in support of their appeal from the order denying their motion for a new trial.

There appears to be no error disclosed by the judgment roll, and for the reasons given no authenticated record is presented upon which we can say the trial court erred in denying defendants' motion for a new trial.

The judgment and order are therefore affirmed.

We concur: CONREY, P. J.; JAMES, J.

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41 Cal. App. 232

TAYLOR v. BALLARD et al. (Civ. 2761.)

(District Court of Appeal, First District, Division 2, California. May 20, 1919. Rehearing Denied by Supreme Court July 17, 1919.)

1. Appeal and Error ⟹1170(12)—Reversal—Statute Decree—Way of Necessity.

In suit to quiet title, decree quieting plaintiff's title subject to a right of way "of necessity" across it in favor of defendants *held* not erroneous, in view of Const. art. 6, § 4½, Code Civ. Proc. § 475, Civ. Code, §§ 3533, 3534, 3537, as to disregard of technical error, as giving a right of way of necessity in the absence of claim therefor in the pleadings, where contract right to way was established, and only effect of remand would be to strike out superfluous words "of necessity."

2. Easements ⟹12(3) — Right of Way — Temporary and Uncertain Character.

Temporary easement in the nature of a right of way granted defendants in suit to quiet title over plaintiff's land *held* not open to attack on account of its temporary character and the claimed uncertain character of the right of way, where contract on which right was based provided that temporary way was to be superseded by a permanent way.

3. Easements ⟹22—Innocent Purchaser—Freedom from Easement.

If a purchaser bought without knowledge of an unrecorded contract granting to prior purchasers of other land a temporary right of way, and also without knowledge, actual or imputed, of facts sufficient to put a prudent buyer on inquiry, she took title free from the use of the right of way in the prior purchasers, and could convey good title to a purchaser from her, though he was fully informed of the prior purchasers' claims.

4. Easements ⟹22—Notice of Right of Way.

The purchaser of land was charged with notice of an easement in the nature of a right of way across it in favor of prior purchasers from her vendor, though she was elsewhere when her purchase was consummated; the way across the land purchased being obvious and noticeable.

5. Easements ⟹22—Subjection to Right of Way.

Where the purchaser of land was charged, on account of the open and visible character of the road, with notice of an easement in the nature of a right of way across the land purchased, on account of the purchaser's failure to obtain information regarding the right of way, the title of the purchaser from her was subject to such right of way.

6. Easements ⟹36(3) — Existence — Sufficiency of Evidence.

In suit to quiet title against defendants setting up an easement in the nature of a right of way, if the burden was on defendants to prove notice to or knowledge of the right of way in plaintiff's grantor when she purchased the land, they met such burden by proof of the patent existence and constant use of the road.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Henry W. Taylor against M. V. Ballard and others. From the judgment, plaintiff appeals. Affirmed.

Chas. F. Hanlon, of San Francisco, for appellant.

J. Early Craig, of San Francisco, for respondents.

BRITTAIN, J. The plaintiff, Henry W. Taylor, appeals from a judgment quieting

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

his title to 24½ acres of land in the Claremont district of Berkeley, subject to a right of way across it, adjudged to belong to the respondents E. D. Walden and Virginia E. Walden.

The parties claim from a common source of title. E. E. Hewlett and Ione Fore Hewlett, his wife, the common grantors, acquired title to 27 acres of land, bounded on the north and east sides by a deep canyon with precipitous sides. Between the land and the nearest public roads on those sides intervened the lands of other owners. The land abutted on the south upon the Alvarado road. In 1912 the Hewletts sold to the Waldens 2½ acres in the northeast corner of the 27-acre tract, where the respondents established their home. The only means of access to it was from the Alvarado road over the remaining 24½ acres. Coincident with the conveyance to the Waldens, the grantors and the grantees named in the deed executed an instrument in which they were respectively designated as "first party" and "second party." Its effective words were that—

> "The first party hereby agrees to allow second party, his heirs and assigns, to use a temporary right of way over and across the lands of the first party," that is, the lands in suit, "said temporary right of way being described as follows: [here follows a description by courses and distances from a point on the southern boundary of the tract, to the intersection of the right of way line] with the western side line of that parcel of land conveyed by party of the first ——— to party of the second part by deed of even date herewith. The second party hereby agrees to surrender and relinquish all claim to said temporary right of way immediately upon receipt of written note from first party that said first party has selected and established a permanent right of way over and across his said lands."

It was the right of way so established that was decreed to belong to the respondents.

The broad ground of appellant's attack on the decree rests on the fact that before this right of way agreement was recorded the Hewletts conveyed the 24½ acres to Mrs. Mary A. Huntington without her having actual notice of the contract or knowledge of the existence of the road, and, it is argued, she, therefore, took title free from the easement, and conveyed equally good title to her grantee, Taylor, the appellant, even though he knew of the existence of the agreement at the time he received conveyance from Mrs. Huntington.

At the close of an able and exhaustive brief counsel for the appellant has well summarized his grounds of attack in five propositions, upon which reversal is asked. From a careful examination of the record, and a consideration of the printed and oral arguments of counsel and the authorities relied upon by them, the conclusion has been reached that the judgment must be affirmed. For convenience in stating the grounds of the decision, the appellant's five propositions are discussed in an order differing from that of their presentation.

[1] The appellant's fifth proposition is that the court erred in giving judgment for a right of way of necessity when no such claim was set up in the pleadings. The attack is made upon the fourth paragraph of the decree, in which it is stated the respondents are the owners and in possession of a right of way of necessity, which is described as it was described in the agreement, and that until the selection and establishment by the plaintiff or his successors, as the grantee by mesne conveyances from the Hewletts, of a permanent right of way, the respondents and their successors are entitled to the use of the right of way described. The decree established the respondent's right to use the easement. The facts on which this right depended are to be found either expressly stated or necessarily implied in the findings. If the right to the use exists, the words "of necessity" are superfluous. They neither add to nor detract from the force of the judgment, and are not to be construed in any narrow or technical sense to defeat it. The findings show that the only means of access to the Walden land is a road over the appellant's land, and that as a part of the consideration of the purchase by the respondents the Hewletts, after causing the particular road to be surveyed, executed the agreement by which the right of way was established. Broadly speaking, it is necessary to the use of the Walden land, and in that sense, no doubt, the phrase was used. It was descriptive merely, and the only possible result of a reversal of the judgment on this ground would be to permit a pen to be drawn through the superfluous words. A judgment will not be reversed for a matter of form nor upon a rigid interpretation of an immaterial statement of fact, even though technical error appears. Const. Cal. art. 6, § 4½; Code Civ. Proc. 475; Civ. Code, §§ 3533, 3534, and 3537; Webster v. King, 33 Cal. 348; Stoddart v. Burge, 53 Cal. 395; San Francisco, etc., Ry. Co. v. Leviston, 134 Cal. 415, 66 Pac. 473.

[2] In the appellant's fourth proposition he attacks what is claimed to be the temporary and uncertain character of the right of way, but the argument is based upon the assumption that the right of way was one resting upon implication upon the severance of the Walden land from the main body. If such were the case, the facts on which appellant relies might have controlling force, but as against the definite agreement for a particular right of way, it is immaterial that the respondents in good weather at times made use of an equally well-defined road, described as a little cut-off, a straight up and down road, which branched from the contractual right of way near one end, rejoin-

ing it near the other end, and was wholly on the 24½ acres. Neither is it material that there were cattle trails upon the appellant's land. The respondents' right rested on the express contract and not upon either an implication of a technical way of necessity or adverse user. It is argued that an easement must be permanent and not a mere temporary license. The cases cited to support this argument had to do with different conditions. They do not, nor could they, change the ordinary rules of law relating to contract. There is no magic in the use of the word "easement," and a right of way expressly granted for a limited period or upon a contingency or condition is just as firmly vested for the time being as would be a leasehold. It is suggested that, as the Hewletts have parted with title to the 24½ acres, the contingency provided in the contract can never arise. If this were so, under the very terms of the contract the right of way would be permanent and the appellant's contention in that regard would fail. The judgment, however, expressly determines that the appellant and his successors are vested with the same power reserved by the Hewletts to designate another and permanent right of way.

[3, 4] Counsel for the appellant designates his second proposition as a corollary of the first, and because of their close relationship they are considered together. The rule of law asserted on behalf of the appellant is well established. If Mrs. Huntington bought from Hewlett without knowledge of the unrecorded contract, and also without knowledge, actual or imputed to her, of facts sufficient to put a prudent buyer upon inquiry, she took title free from the use, and had the right to convey equally good title to her purchaser, even though he was fully informed of the respondents' claims. Pomeroy's Eq. Jur. (3d Ed.) 754. Under the facts of this case it does not appear that Mrs. Huntington was in a position to rely upon the nonrecordation of the contract because the condition of the land was such as to require her as a prudent purchaser to inform herself regarding the possessory use of the well-defined road. The rule applicable to the facts disclosed by the evidence and incorporated in the findings was that announced and clearly illustrated in a recent opinion written by Mr. Justice Olney, and which met the unanimous concurrence of the members of the Supreme Court:

> "Actual occupancy of the land, possessio pedis, has always been held, in the absence of qualifying circumstances, to be possession of a character sufficient to constitute or establish notice." Randall v. Allen, 180 Pac. 941, May 2, 1919.

Upon this branch of the case the facts are that about a year after the contract for the right of way was executed, Hewlett, then being indebted to Mrs. Huntington to the amount of $250,000 or thereabouts, joined by his wife, conveyed to his creditor the 24½ acres, on an agreed valuation of $21,500 to be set off against his debt. This transaction took place in Los Angeles. Neither Mrs. Huntington nor her son who was representing her caused any examination to be made, either of the title or of the land. At that time the road along the contractual right of way had been graded with plow and scraper to a width of 10 feet, after the brush had been cut out. As found by the court, it follows the meanders of the hills and cuts deeply into the hillsides and into the surface of the land, and at places runs over substantial fills. It was in daily use by the Waldens and persons visiting their premises, as a road for vehicles, pedestrians, and livestock. This road, with the similarly constructed and visible cut-off entirely on the 24½ acres, by reason of the configuration of the land, furnished the only means of access to the Walden house. The road and the house are clearly apparent from a photograph introduced in evidence on behalf of the plaintiff. The appearance of the road showed its purpose was to permit access to Waldens' home; its condition and constant use were facts which no buyer could safely refuse or neglect to observe. A purchaser may not, by failing to acquaint herself with the open and clearly discernible possession and use of the land by another than her prospective vendor, avoid making inquiry on the subject, and thereby evade the rule in regard to notice as well as its consequences. Scheerer v. Cuddy, 85 Cal. 273, 24 Pac. 713. The buyer, in this instance, Mrs. Huntington, was bound to know who was in possession of the property, and is chargeable with notice of the occupants' title. Beattie v. Crewdson, 124 Cal. 579, 57 Pac. 463.

It is argued that this rule does not apply to the present case, because both Mrs. Huntington and her son, Mr. H. E. Huntington, were in Los Angeles, and therefore it was impracticable for them to visit and examine the land. The buyer might readily have had another make the examination for her.

After submission the case was reopened to enable counsel for the appellant to make a tender of additional evidence to the effect that neither Mrs. Huntington nor her son had ever seen the property, that it was impracticable for them to have seen it by reason of their residence in Southern California, and that they had no actual notice of the existence of the road or the physical conformation of the land. Under the rule applicable to such cases, this amounted to an excuse for not observing the rule requiring a prudent buyer to inform herself concerning the rights of third persons openly using the land. Such evidence was immaterial. There was no error in rejecting it.

It was stipulated Mrs. Huntington received the deed from the Hewletts "and the title of the property in good faith and for value." There was no imputation of bad faith on the part of Mrs. Huntington. The whole record shows the only substantial question was whether or not the physical conditions were such as to bring her within the rule of Randall v. Allen and Beattie v. Crewdson. The findings leave no doubt upon that subject, and they are supported by the evidence.

[5] Upon conflicting evidence the court found that before the appellant contracted to purchase from Mrs. Huntington, he had actual knowledge of the existence of the road, the Waldens' use of it, and the fact that the only means of ingress to and egress from the Walden lands was over the lands the appellant subsequently purchased. His contract to purchase was recorded prior to the recordation of the Walden contract, and the deed to the appellant was executed 2½ months after the recordation of the Walden contract. The rights acquired by him under his contract of purchase were in no respect superior to those acquired by Mrs. Huntington. He was charged, as she was, with notice by the physical conditions and the Waldens' use of the right of way. His title is subject to the right of way, not by reason of his own actual knowledge, but by reason of Mrs. Huntington's failure to obtain information regarding facts of which he knew, and of which she ought to have known.

[6] The appellant's third proposition is in regard to the burden of proving notice to or knowledge of Mrs. Huntington. Even if it be assumed the burden was upon Walden, he undertook and carried the burden by proof of the physical conditions, the existence and constant use of the road. It is unnecessary to enter upon a lengthy discussion upon minor points presented by counsel in the argument in support of his five essential propositions. None of them warrants interference with the action of the trial court.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

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41 Cal. App. 222

KOHLBERG v. HAVENS. (Civ. 2742.)

(District Court of Appeal, First District, Division 2, California. May 15, 1919. Rehearing Denied June 13, 1919. Denied by Supreme Court July 14, 1919.)

1. LANDLORD AND TENANT 🔑22(1)—AGREEMENT FOR LEASE—COMPLETENESS—ABSENCE OF PROVISION AGAINST SUBLETTING.

An agreement procured by plaintiff as agent for defendant *held* a complete and valid agreement for a lease, although not containing a provision against subletting.

2. APPEAL AND ERROR 🔑931(5)—EVIDENCE—FINDINGS—CONFLICTS IN PLAINTIFF'S TESTIMONY AT DIFFERENT TRIALS — PRESUMPTION.

Where dealings occupied more than one week, plaintiff's failure to recall certain details, four years later to which he had testified shortly after such dealings, should not nullify his entire testimony, and it will be presumed that the trial court weighed such inconsistencies and conflicts against plaintiff, and its finding will be sustained.

3. PRINCIPAL AND AGENT 🔑149(2)—BREACH OF WARRANTY OF AUTHORITY—ACTS CONSTITUTING WARRANTY.

Defendant's assuming to act as agent of a company in securing plaintiff's services constituted a warranty of agency under Civ. Code, § 2342, and the action, being for breach thereof and not one to hold the defendant as a principal under the contract, is not within section 2343.

4. PRINCIPAL AND AGENT 🔑149(2)—BREACH OF WARRANTY OF AGENT'S AUTHORITY—MEASURE OF DAMAGES.

Plaintiff should recover from defendant for breach of warranty of authority as agent the compensation he would have received from the principal under the contract had defendant been its authorized agent, in view of Civ. Code, § 3318.

5. INTEREST 🔑44—BREACH OF WARRANTY OF AGENCY—DAMAGES.

In view of Civ. Code, § 3287, providing that every person entitled to recover damages certain or capable of being made certain is entitled to interest thereon from the time of vesting of right of recovery, plaintiff is entitled to interest upon damages for breach of warranty of agency from the date of completion of his contracted services in procuring a lease.

Appeal from Superior Court, Alameda County; William H. Donahue, Judge.

Action by M. S. Kohlberg against H. Roscoe Havens. Judgment for plaintiff, and defendant appeals. Judgment affirmed.

Wm. M. Abbott and Wm. M. Cannon, both of San Francisco, for appellant.

Wise & O'Connor, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal from a judgment for the plaintiff in a suit to recover damages from the defendant on account of breach of warranty of authority to act as agent. The facts pertinent to a discussion of appellant's contentions are that the plaintiff and H. Roscoe Havens, president of the M. H. Blake Estate Company, entered into a contract some time in April, 1910, whereby the plaintiff was to perform certain services, for which the estate company was to pay $2,500. Later, when plaintiff sued the estate company for payment of this amount, the estate company denied the authority of the defendant to act as its agent in making said contract, and the plaintiff was nonsuited. He then brought the present action against the defendant for breach of warranty of authority. The exact nature of the services to be rendered by the plaintiff is the subject of dispute. The plaintiff claims that he was to secure the signature of Hale Bros. to a certain agreement in writing, which is set out in the findings, and which is an offer to lease to Hale Bros. certain real property belonging to the estate company, and particularly described therein, at a specified monthly rental, with an agreement on the part of the estate company to place improvements of the value of $20,000 upon the property, and also embodying other details relating to the respective obligations and rights of the parties.

[1] The defendant contends that the contract was that the plaintiff should not only secure the signature of Hale Bros. to this agreement, but should also secure their acceptance of another condition, which was not embodied in the written agreement to the effect that Hale Bros. should occupy the leased premises, or a substantial part thereof, with their own business, and that this latter portion of his contract plaintiff failed to perform. The finding on this point is in favor of the plaintiff, and supports the judgment, and it is this finding which is a special subject of attack by the appellant. Appellant contends that the agreement which Hale Bros. signed was an incomplete agreement, and that their acceptance was never secured to a complete agreement for a lease. We think the agreement to which the plaintiff procured the assent of Hale Bros. is in all respects a complete agreement for a lease. It embodies all necessary terms of a lease, and was apparently satisfactory to the estate company, except that it contained no provision against subletting. It is not sufficient to say it might have contained a covenant against subletting or other conditions; the other conditions it might have contained are limitless, but this does not affect its validity or sufficiency to create the relation of landlord and tenant as between the estate company and Hale Bros.

[2] Appellant points out certain contradictions in the testimony of the plaintiff, and wishes this court to decide that, because of these contradictions, his testimony in support of the facts found is without weight and insufficient to justify the finding. This court is not concerned with what it may believe is a preponderance of the evidence. We may go no further in our examination of the evidence than is necessary to determine that a substantial conflict exists. In the present case there appears to be some contradiction between the testimony of the plaintiff given in his action against the estate company (which was considered in evidence in the present action by stipulation of the parties) and his testimony given in the present action. It appears that the testimony in the second action was given about four years after the transactions in question occurred; that the dealings between plaintiff and defendant upon which the action is based included negotiations covering a period of about a week or more; that there were several conversations between the parties at which numerous details were discussed, and it would seem quite natural if some of the details of these conversations had escaped the memory of the plaintiff after a period of several years. Under the circumstances, if some contradictions and inconsistencies appear in his testimony, we think these should not have the effect of nullifying his entire testimony. The trial court had before it all the inconsistencies and conflicts in the testimony, and we will presume that they were weighed against the plaintiff in considering the evidence as a whole and arriving at the finding concerning the terms of the contract between plaintiff and the defendant as president of the estate company. We cannot disturb this finding.

[3] The action in the present case is founded upon section 2342, Civil Code, and the objections made by the appellant as to the existence of the liability on the part of defendant under the findings made seem to us to be without merit. This section defines a warranty of authority by saying that one who assumes to act as an agent thereby warrants to all who deal with him in that capacity that he has the authority which he assumes. In the present case the defendant assumed to act for the estate company in securing the services of the plaintiff, and that in itself constitutes a warranty of his authority to act as such agent. The action is not to hold the defendant as a principal under the contract, and the case does not come within the provisions of section 2343, Civil Code, and therefore much of appellant's argument is misdirected.

[4] The only other point which remains to be considered is the question of damages. These are defined by section 3318, Civil Code, to be the amount which could have been recovered and collected from his principal if the warranty had been complied with and the reasonable expenses of legal proceedings taken in good faith to enforce the act of the agent against his principal. The court having found that the plaintiff fully performed his part of the contract which was entered into between him and the defendant as president of the estate company, the plaintiff would have been entitled to recover his compensation under the contract from the estate company had the president of that company been authorized to act for the company in making the contract. This, then, would seem to be the amount which he is entitled to recover from the defendant.

[5] Appellant contends that the action of

the trial court in allowing interest upon the amount recovered from the time that the agreement was signed by Hale Bros., was improper because, as he contends, the damages were unliquidated. The trial court having found that the service to be performed by plaintiff was to secure the signature of Hale Bros. to the contract set out in the findings, and having found that the plaintiff performed this service, the plaintiff would have been entitled to a definite and fixed compensation at that time from the estate company had its president been authorized by it to act in this matter. The agent not having been authorized, he became responsible at the same time for said fixed and certain amount by reason of the breach of warranty of authority. Under section 3287, Civil Code, which provides that every person entitled to recover damages certain or capable of being made certain by calculation is entitled to interest thereon from the time the right of recovery is vested in him, we think the judgment of the trial court allowing interest upon the amount due from the time it became due and payable is a proper judgment.

Judgment affirmed.

We concur: BRITTAIN, J.; HAVEN, J.

41 Cal. App. 265

WRIGHT et al. v. ROHR et al. (Civ. 2650.)

(District Court of Appeal, First District, Division 1, California. May 24, 1919. Rehearing Denied by Supreme Court July 21, 1919.)

1. Husband and Wife ⚷274(1)—Community Property.

Civ. Code, § 1386, subsec. 8, relating to the disposition of community property, merely provides a rule of succession, when the owner shall die intestate leaving no issue, and recognizes the full right of the owner to dispose of such property; hence children of husband by a former marriage cannot reach community property which the wife, after the death of the husband, conveyed by way of gift to another on the theory that they were entitled under the statute.

2. Deeds ⚷211(3, 4)—Evidence—Capacity.

In a suit to set aside a voluntary conveyance, made by plaintiff's stepmother to one who had lived with the stepmother from the time she was a child, evidence *held* insufficient to show that the deed was procured by fraud and undue influence at a time when the stepmother was incapable.

3. Deeds ⚷196(1) — Conveyance — Confidential Relation.

Where a conveyance is by way of gift and a confidential and fiduciary relation existed between the parties, the burden of proving the good faith of the transaction is on the grantee.

4. Deeds ⚷72(3)—Validity—Undue Influence.

The mere fact that there was a confidential relation existing between a woman and a girl, who made her home with the woman from the time she was a child, and that such grantee might have exercised undue influence, will not of itself warrant a finding that undue influence was actually exerted.

Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by Sampson B. Wright and others against Rosalie Catherine Rohr and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

J. A. Barham, of Santa Rosa, R. A. Long, of Willows, H. W. A. Weske, of Santa Rosa, and Herbert Choynski and James Raleigh Kelly, both of San Francisco, for appellants.

Geary & Geary, J. R. Leppo, and Phil Ware, all of Santa Rosa, for respondents.

WASTE, P. J. This is nominally an action brought by plaintiffs, the appellants, to quiet title to a tract of land situated in Sonoma county. In addition to the relief usually sought in such actions, plaintiffs pray that a certain deed, set out in the complaint, be canceled. Judgment was entered in favor of the defendants, and plaintiffs appeal.

Winfield S. M. Wright, prior to his marriage to Jarena D. Wright, now deceased, was a widower with two children, the plaintiffs and appellants here, the issue of his former marriage. On December 13, 1860, said Winfield S. M. Wright and Jarena D. Wright were married, and continuously lived together as husband and wife until June 17, 1892, on which date said Winfield S. M. Wright died, testate.

During their married life, Winfield S. M. Wright and Jarena D. Wright accumulated the lands involved in this action, and other property, both real and personal not involved here, and the land in controversy was community property at the time of Winfield S. M. Wright's death.

After the death of said Winfield S. M. Wright, upon due and regular proceedings had in the superior court of Sonoma county, his will was duly admitted to probate. Sampson B. Wright, one of the plaintiffs here, and J. E. Hall, became the duly appointed and qualified executors thereof. The will contained the following provision, relating to Jarena D. Wright, the surviving widow, and the property in controversy herein:

"Third Paragraph. I give and bequeath to my wife, J. D. Wright, in fee an undivided one-half of all those lands situate in Sonoma county, state of California, as follows, to wit: An undivided one-half of those lands conveyed to me by James M. Hudspeth by deed dated September, 1863, and recorded in the office of the county recorder of said Sonoma county in book of deeds numbered 14 at pages 205 and 206 thereof, the entire tract containing about 294 acres."

By the same paragraph of the will an undivided one-half of other lands described was also devised to the widow. In due course the executors filed their petition for distribution, and in the answer of Jarena D. Wright, the widow, to the petition, she alleged the property in controversy here to be community property. Thereafter a decree of distribution was duly given and made. The decree, in so far as it affects the property in controversy here, contained the following provision:

> "An undivided one-half interest in and to that tract of land known as the Hudspeth Tract" (amply describing the same) "is hereby distributed to Mrs. J. D. Wright in fee (the said tract being common property), and the other undivided one-half is hereby distributed in equal proportions, share and share alike, to Sampson B. Wright and Mahala Olive Hall, for and during their natural lives respectively, with remainder over in fee to all the children of the said Sampson B. Wright and Mahala Olive Hall, all the children of each taking in fee, share and share alike, whether born now or hereafter, the quantity that their respective parent had for life."

The Sampson B. Wright and Mahala Olive Hall mentioned in the decree are the children of Winfield S. M. Wright, and are the plaintiffs in this action.

Shortly after the entry of this decree of distribution, Jarena D. Wright instituted a suit in partition against the plaintiffs, her stepchildren, in which she sought to have partitioned the larger tract containing the property involved in this action. In her complaint, she averred herself to be "the owner in fee of an undivided one-half interest in both of said described tracts of land in common with the said defendants." As the result of this action, the property was partitioned, and the tract in controversy here was duly set apart to Jarena D. Wright in severalty and in fee.

On the 26th day of July, 1898, Mrs. Jarena D. Wright made, signed, executed, and acknowledged a deed of the property which had been partitioned to her in fee, in which deed Rosalie Catherine Suggs (now Mrs. Rohr), defendant here, was named as the grantee. The deed recited consideration of love and affection and that said deed was made for the better maintenance, support, protection, and livelihood of the grantee. This deed remained in the possession, or under the control, of Mrs. Wright until the 17th day of October, 1902, when, in the presence of reputable witnesses, she delivered the deed to Miss Suggs. The deed was duly recorded on the next day, and the property described herein, which is the land in controversy in this action, has ever since been assessed to respondent and she has paid all taxes levied thereon. It is this deed which plaintiffs seek to have canceled and under which defendant claims the right, title and interest which plaintiffs seek to have quieted.

Mrs. Jarena D. Wright died intestate as to the land involved here, on November 14, 1916, and left no issue.

The first contention of appellants is that, assuming a gift deed to have been made by Jarena D. Wright to Mrs. Rohr (née Suggs), respondent, no interest whatever was conveyed by such deed, owing to the fact that the property was community property of Winfield S. M. Wright and said Jarena D. Wright; that, upon the death of the husband, the surviving spouse took, and held, all the community property distributed to her, in trust for plaintiffs, the children of her deceased husband, during her life; that, under section 1386 of the Civil Code, Mrs. Wright, not having sold or exchanged the property, or disposed of it by will, it revested to them upon her death. Stated in another way, as we understand it, the contention of the appellants is that said section 1386 is a limitation upon the estate which Mrs. Wright, the surviving spouse, took in the community property upon her husband's death, and upon her power to dispose of or convey, other than by will; that she had, in effect, only a life estate therein; that, even had she seen fit to sell, or exchange, the property after distribution to her, the proceeds would, in turn, have become impressed with the same trust as the original estate; that, upon her death without issue, Mrs. Wright not having disposed of it by will, appellants are entitled to succeed to the property now claimed by Mrs. Rohr under the deed attacked in the court below. Reduced to a few words, the contention of appellants appears to be that Mrs. Wright, while living, could in no manner dispose of the property, but might by will, effective after her death.

[1] Appellants contend, secondly, that the deed from Mrs. Wright to respondent was obtained by means of undue influence and fraud, and at a time when Mrs. Wright was of unsound mind.

Section 1386 of the Civil Code, in so far as it affects this case, is as follows:

> "When any person having title to any estate not otherwise limited by marriage contract, dies without disposing thereof by will, it is succeeded to and must be distributed * * * in the following manner: * * *
>
> "(8) If the deceased is a widow, or widower, and leaves no issue, and the estate, or any portion thereof, was common property of such decedent and his or her deceased spouse, while such spouse was living, such property goes in equal shares to the children of such deceased spouse, and to the descendants of such children by right of representation, and if none, then one half of such common property goes to the father and mother of

such decedent in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such decedent and to the descendants of any deceased brother or sister by right of representation, and the other half goes to the father and mother of such deceased spouse in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such deceased spouse and to the descendants of any deceased brother or sister by right of representation."

Both appellants and respondents place much reliance on the opinion of the Supreme Court of this state in Estate of Brady, 171 Cal. 1, 151 Pac. 275. As we understand that decision, it appears rather to sustain the claim of the respondent that subdivision 8 of section 1386 of the Civil Code is a rule of succession to be applied in the specified contingencies, and not a limitation upon the power of the surviving holder of community property to convey.

From the facts of that case it appears that the wife predeceased the husband. At the time of her death there was certain community property of her husband and herself, consisting in part of real property and partly of notes and mortgages. The husband died intestate several years later. In the meantime he had sold the land and collected the amounts due on the notes, and had reinvested the proceeds in stocks and bonds. His entire estate consisted of the rents, issues, and profits of the community property owned by him and his said wife at the time of the death of the latter, and of property purchased with moneys derived from the sale of said community property, and the satisfaction of the mortgages. Neither of the spouses leaving issue, on distribution of the husband's estate the lower court treated all of the property of the husband as being controlled in its devolution by said subdivision 8 of section 1386 and distributed it accordingly.

On appeal the principal claim was that none of the property left by Brady was common property of himself and wife at the time of the death of Mrs. Brady, and that consequently said subdivision was not applicable thereto. After deciding that "the apparent object of subdivision 8, when both spouses die without lineal descendants, is to provide for the inheritance of the property equally by the respective families of the two spouses by whose efforts it was accumulated," the Supreme Court disposed of appellants' claim by holding the more reasonable conclusion to be that—

> "The subdivision applies, not only to the community property in kind, as it existed at the death of the wife, but also to that into which the husband may convert it during his subsequent life, and that it also applies to the rents, issues, and profits thereof."

But the court went further, and said:

> "It does not follow * * * that the heirs of the predeceased wife have anything more than an expectancy in the property, or its proceeds, during the subsequent life of the husband. It does not affect the husband's title. It may also be conceded that if such community property is by the husband so mingled with his other property that it cannot be traced to its origin as a part of the community property, subdivision 8 could not be applied. * * * Mr. Brady * * * was, without administration, from the moment of the death of his predeceased wife, the absolute owner of all the community property (Estate of Klumpke, 167 Cal. 414, 419, 139 Pac. 1062), as fully as though it had been his separate property during coverture, with power to deal with it as he saw fit, even to the extent of effectually devising or bequeathing it by will; subdivision 8 of section 1386 of the Civil Code applying only in the event of intestacy. This, however, is entirely immaterial in determining the proper construction of the rule of succession prescribed by subdivision 8 of section 1386 of the Civil Code. The situation is the same in this regard whether the property remain in its original form, or is exchanged by the surviving spouse for other property. In each case we are dealing with property which during the life of the surviving husband was his absolute property, to do with as he wills. The Legislature has simply enacted a rule of succession in regard thereto in the event of his dying intestate, as it unquestionably had the right to do." Estate of Brady, supra.

This exact question was also before this court but a short time ago, so recently, in fact, that the respective parties to this litigation were allowed to file supplemental briefs to discuss the decision in the case of Viers v. Roberts, 179 Pac. 689. The facts of that case are strikingly similar to those of the case at bar, and the contentions on appeal are identical. It was charged that the deed, in that case, from mother to daughter, was executed while the former was incompetent, was obtained by undue influence, and that the property in question, being proceeds of community property of Mrs. Roberts and her predeceased spouse, must be regarded as held by her in trust for their children, and that the attempted conveyance of it to one of them, to the exclusion of the others, was a violation of the rights of the latter. The last contention was based, as it is here, upon subdivision 8 of section 1386 of the Civil Code. Having reached and announced the opinion that there was evidence to sustain the findings of the trial court upholding the deed's due execution, this court said:

> "The most cursory reading of the above quotation from section 1386 makes it apparent that it has no reference to the situation presented in this case, for two reasons: First, the property concerned in this litigation formed no part of the estate of Mrs. Roberts at the time of her death; and, second, the subdivision quoted in part provides a rule of succession to a certain character of property when the owner thereof

shall die intestate and leaving no issue. It fully recognizes the right of the owner to dispose of such property either by gift inter vivos, or by last will and testament, which right was exercised in this case."

After a careful re-examination of the matter as it is presented on this appeal, we have no hesitation in announcing our adherence to the views there expressed.

[2] The second point advanced by appellants on this appeal is that the deed from Mrs. Wright to Mrs. Rohr, of July 28, 1898, was made by Mrs. Wright at a time when she was of unsound mind, and was procured by means of fraud and undue influence imposed on her by the respondent. The finding of the trial court was opposed to this contention, and we are asked to review the testimony of some 25 witnesses, and the proceedings taken in the court below, brought here by the alternative method and consisting of a record of more than 1200 pages. Our labors have been lessened by the painstaking manner in which counsel for each side have observed the requirements of the court rule governing the matter, and have printed in supplemental form, appended to their respective briefs, such portions of the record as they desired to call to the attention of the court.

After a careful review of the testimony thus presented, we are satisfied that the trial court was correct in its decision. There is some evidence which, standing alone and uncontradicted, might support a contrary view; but on the whole the testimony preponderates strongly in favor of the respondent's side of the case. This is particularly so in view of the law applicable to such facts as we understand it. The most favorable view we can take in support of appellants' position is that there is a conflict in the evidence, which the trial court passed upon, and reconciled. We have no power to disturb the conclusion reached.

From the findings, amply supported by the evidence, it appears that in 1893 the respondent, then a girl of about 16 years of age, at the request of Mrs. Wright, went to live with the latter, at the ranch in Sonoma county, and from that time occupied a place in the home as a member of the family. The relation between the two soon became that of mother and daughter, and so continued until the death of Mrs. Wright. The younger woman referred to and addressed the elder as "mother." The respondent was affectionate, obedient, industrious, and respectful towards Mrs. Wright, and performed and shared with the latter the usual household, family and social duties, obligations and pleasures incident to the relation so existing between the two. They lived together in the home of Mrs. Wright until respondent married in 1898. After that date, the respondent and her husband lived with Mrs. Wright until 1912. From that time until her death in 1916 Mrs. Wright lived at the home of respondent and her husband.

In 1898, Mrs. Wright sent for her attorney and told him she wished to give her property to respondent, and wished when she died everything to go to her. The matter of carrying her plan into execution by means of a deed in escrow was discussed by her and her attorney, and the latter fully explained the details of the transaction and its results. These matters he discussed alone with Mrs. Wright, who gave the attorney the description of the property to be conveyed by the deed. The deed under attack in this case was the result of these interviews. Mrs. Rohr knew nothing about the making of the deed at the time it was made, did not discuss the subject with Mrs. Wright, and did not learn of its execution until told of it by her foster mother herself, more than a year later. At the time of the execution of this deed, there was nothing in the attitude or conduct of Mrs. Wright to indicate to her attorney, who had known her for some time, that there was any impairment of her mental faculties. Other witnesses, including the pastor of her church, testified that at this period of her life, both mentally and physically, Mrs. Wright was unusually active and alert for a woman of her years; she being at that time of the age of 74 years or thereabouts.

Four years later, in 1902, Mrs. Wright took the deed from escrow, and in the presence of an attorney (not the one who had drawn the deed) and other witnesses in her own home made actual delivery thereof to Mrs. Rohr, at the same time receiving from the latter an agreement, which, among other provisions, conveyed to herself a life estate in the property. The day following, the deed and agreement were duly recorded. The testimony shows that Mrs. Rohr knew nothing of the purpose of her foster mother to deliver the deed, and take back the agreement for a life estate, until called into the room by the notary who took her acknowledgment to the latter document.

The mental condition of Mrs. Wright during a period as far back as 1885, particularly between the time of the making of the deed and its delivery and until her death, was testified to by a number of witnesses, called by the opposing sides, other than those already mentioned. Among them were Mrs. Wright's physician, another doctor, relatives, friends, and acquaintances of long standing. To summarize their testimony, with some contradictions, is but to conclude that Mrs. Wright was not only strong-minded, clear-headed, and sound mentally, but that, as her physician testified, "her mental condition was extremely good for a person of her age—in fact, extremely good, regardless of age."

A number of witnesses also testified from their own observations, in instances extending over a period of many years, relative to the relations existing between Mrs. Wright and Mrs. Rohr, before and after the execution and delivery of the deed. From our review of the testimony of all of these witnesses, which in some material matters presents a conflict, we are led to the conclusion that the trial court was justified in finding these relations to be as we have heretofore described, and that the execution and delivery of the deed from Mrs. Wright to Mrs. Rohr was not the product or result of any influence, or act, whatever of respondent, and was not induced by any fraud on her part. The findings likewise properly exonerate the husband of respondent, who, although not made a party to the action, was directly charged in the complaint with being a party to the fraud and undue influence to which, it was therein alleged, Mrs. Wright was subjected.

[3, 4] Appellants contend that, it being established that the relationship between Mrs. Wright and Mrs. Rohr was one of unqualified affection and confidence, and that the opportunity for the exercise of undue influence existed through the parties living together for so many years, the burden was upon respondent to prove that fraud and undue influence was not practiced, and that no undue advantage of Mrs. Wright was taken in the matter. A confidential, and therefore fiduciary, relation being established, the burden of showing the good faith of the transaction was undoubtedly on the respondent. Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289; Bacon v. Soule, 19 Cal. App. 429, 126 Pac. 384. This burden, we feel, was squarely met and sustained, as we have already indicated in expressing our approval of the findings of the trial court.

The confidential relation existing between Mrs. Wright and respondent, and the opportunity afforded therefrom for the latter to exercise undue influence, were proper matters to take into consideration with the other evidence in the case. But the relation itself and opportunity were not sufficient alone to warrant a finding that undue influence was actually exerted. Estate of Ricks, 160 Cal. 461, 117 Pac. 532. No activity on the part of Mrs. Rohr, or any one in her behalf, was shown in the matter of the preparation of the deed. Estate of Baird, 176 Cal. 384, 168 Pac. 561; Estate of Higgins, 156 Cal. 261, 104 Pac. 6. The record presents uncontradicted testimony that she knew nothing about its execution until long after it was made, and did not anticipate its delivery until it was actually delivered to her some years later by her foster mother, who, at the time, it is sufficiently shown, was acting upon independent advice of counsel and friends, and in pursuance of a well-defined plan, matured in her own sound and disposing mind.

The conclusion reached by the trial court in the matter was correct, and its judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

41 Cal. App. 201

COLEMAN et al. v. SPRING CONST. CO. et al. (Civ. 2819.)

(District Court of Appeal, First District, Division 1, California. May 13, 1919. On Rehearing in Supreme Court, in Bank, July 10, 1919.)

1. Municipal Corporations 🔑294(1) — Street Improvements—"Notice."

The Improvement Act of 1911 is applicable to a city in which no paper is published and circulated, the word "notice" in section 79 referring to posting as well as publication of notice, and section 1 expressly making the act applicable to all municipalities.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Notice.]

2. Municipal Corporations 🔑294(7) — Improvements—Notice—Posting.

Under Improvement Act 1911, § 79, permitting posting in lieu of publication, notice of a proposed improvement should be given by posting where no newspaper is published in the city, although newspapers are circulated therein.

3. Municipal Corporations 🔑294(2) — Improvements—Time for Filing Protest —Notice.

Under Improvement Act 1911, §§ 6, 7, no notice of the time or place within which protest against an intended improvement may be filed is required to be given by a city council.

4. Municipal Corporations 🔑294(6) — Improvements—Notice—Posting.

Since, under any circumstance, the greatest period of publication of notice of intention to make improvements, under Improvement Act 1911, would be eight days, the demands of such statute are satisfied, in a city where no newspaper is published, if the notices are posted and kept posted for a like period.

5. Constitutional Law 🔑290(3) — Due Process of Law—Street Improvements—Notice.

Since Improvement Act 1911 fixes the time and place for protesting against intended improvements, a lot owner is not denied due process of law in that a city council is not required to give notice of time and place for hearing protests.

6. Municipal Corporations 🔑485(3) — Street Improvements — Warrants — Issuance.

Where a warrant was recorded and thereafter handed back to the contractor, and, after demand for payment, was returned to the superintendent of streets within 30 days after its date, Improvement Act 1911 was complied with, in view of section 25.

7. MUNICIPAL CORPORATIONS ⚷485(1) — STREET IMPROVEMENT BONDS — VALIDITY — INNOCENT PURCHASER.

If a bond issued by a municipal corporation to a contractor under Improvement Act 1911 is void upon its face, it is void in the hands of an innocent purchaser for value, as well as in the hands of the contractor.

8. QUIETING TITLE ⚷7(3) — CLOUDS UPON TITLE—VOID IMPROVEMENT BOND.

If a bond issued by a municipal corporation under Improvement Act 1911 is void upon its face, it does not constitute an enforceable obligation against a lot owner, and casts no cloud upon his title, and is no ground upon which to base an action to quiet title.

9. QUIETING TITLE ⚷14 — CONDITIONS PRECEDENT—PAYMENT OF SUM DUE.

Since the amending act of 1915 to Improvement Act 1911 changed the provisions of section 60 by giving to a lot owner the privilege of paying off bonds and discharging the land from the lien at any time before commencement of proceedings for sale, a lot owner, before bringing an action to quiet title on the ground that the bonds did not contain a recital that they might be redeemed before maturity, should offer to pay the obligation.

On Rehearing in Supreme Court.

10. MUNICIPAL CORPORATIONS ⚷485(5) — STREET IMPROVEMENTS — NOTICE — BOND —CONCLUSIVENESS.

A notice of improvement under Improvement Act 1911, posted along the line of the contemplated work, which was headed "Notice of Improvement," the words "notice of" being in letters of one inch in length and the word "improvement" in letters of five-eighths of an inch in length, although a technical departure from the requirement of the statute, will be held, after the issuance of bonds, a substantial compliance with the statute, in view of the conclusive evidence provision of section 66.

Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Action by Robert L. Coleman and others against the Spring Construction Company and others. From a judgment for defendants, plaintiffs appealed to the District Court of Appeals, which affirmed, and plaintiff applies for rehearing in the Supreme Court. Rehearing denied.

Edgar M. Wilson, Powell & Dow, and Francis Dunn, all of San Francisco, for appellants.

Elston, Clark & Nichols, of Berkeley, Earl D. White, of Oakland, and O. F. Meldon, of Sausalito, for respondents.

NOURSE, Judge pro tem. This is an appeal from a judgment in favor of defendants in an action to quiet title to certain lots in the city of Larkspur. Plaintiffs attack the validity of certain street improvement proceedings which resulted in the levy of an assessment and the issuance of bonds thereunder, creating a first lien upon the property involved. They asked for judgment declaring the assessment void, canceling the bonds, and quieting their title. At the close of the trial the action was dismissed as to all defendants except the Spring Construction Company, which performed the street work, the city of Larkspur and its treasurer, all of whom are the respondents on this appeal.

The facts are that on April 7, 1915, the city council of Larkspur adopted its resolution of intention for the purpose of improving Baltimore avenue under the "Improvement Act of 1911." St. 1911, p. 730. There being no newspaper published and circulated in the city of Larkspur, copies of this resolution were posted in three public places, and kept so posted for a period of 14 days. Eighteen days after the expiration of the 14 days of posting, the city council adopted its resolution ordering the work to be done. On April 16th the superintendent of streets posted notices of the intended improvement along the line of the contemplated work. Thereafter, and on May 12th, sealed proposals were solicited in due time and order, a contract was executed with the Spring Construction Company, the work done, inspected, and accepted.

The assessment was levied January 16, 1916, to cover the amounts due, a warrant was attached to the assessment, demanding various sums and advising the owners that nine-year serial bonds would be issued for assessments remaining unpaid. This warrant was filed and recorded and thereafter delivered to the contractor. The assessment was read upon the property, demand was made, and the warrant was returned unsatisfied to the superintendent of streets within 30 days after its date, with the return indorsed thereon. On March 1, 1916, after the expiration of the full 30 days from the date of said warrant and the recordation of the return thereof, bonds were issued by the city treasurer covering the assessments unpaid.

No complaint, objection, protest, or appeal was ever made or filed by the owners in writing or otherwise at any stage of the proceedings.

Appellants advance five points of attack upon the validity of the proceedings and the bonds issued by the city council. These will be treated in the order presented.

[1] 1. Appellants insist that the Improvement Act is not applicable to Larkspur, because no paper is published and circulated in that city. The argument is that, as sec-

tion 6 of the act gives to the property owners 15 days after the second publication of the copy of the resolution of intention within which to file their protests, and that where this notice is given by posting instead of publication in a newspaper there is no time fixed for the beginning of this period, the city council cannot acquire jurisdiction of any of the proceedings leading to the improvement of streets under this act if the preliminary notice is not given by publication in a newspaper.

But the act is expressly made applicable to all municipalities in the state (section 1), and notice by posting in lieu of publication is provided for where no newspaper is printed or circulated in the city (section 79). The latter section also provides that "no publication, or notice, other than that provided for in this act, shall be necessary to give validity to any of the proceedings." The word "notice," above quoted, refers to posting, and the clear purpose of the section is to substitute posting for printing in a newspaper in cities where no newspaper is published or circulated.

[2] In this connection appellants urge that as section 79 permits posting in cities only where no newspaper is "printed *or* circulated," if any newspaper of any character is distributed in the city posting cannot be had. The entire proceedings following the adoption of the resolution of intention are based upon the publication of a copy of the resolution in a newspaper "published *and* circulated" in said city. The same language is used throughout the act where the character of publication is specified. Therefore, when by section 79 of the act posting is permitted in lieu of publication, this method of giving notice is only available as a substitute for the character of a publication required by the act. As the act does not in any single section permit the publication of any of the proceedings in a newspaper merely circulated or distributed in the city and not published therein, manifestly it is only in a city where no newspaper is published as well as circulated that notice by posting alone can be given.

[3] 2. The second proposition is based upon the theory that the city council did not acquire jurisdiction to proceed because the running of the period within which protests could be filed was not fixed. As to this, appellants rely upon the provisions of sections 6 and 7 of the act, which read in part as follows:

> Section 6: "At any time within fifteen days after the date of the second publication of the resolution of intention, * * * any owner of property liable to be assessed * * * may make written protest against the proposed work."
>
> Section 7: "When no protests have been delivered to the clerk * * * within fifteen days after the date of the second publication of the resolution of intention * * * the city council shall be deemed to have acquired jurisdiction to order the proposed improvements."

In a city where a newspaper is published and circulated a copy of this resolution must be published twice. This may be in a daily, semiweekly, or a weekly newspaper. The publications may thus appear 2, 4, or 8 days apart, according to the kind of newspaper designated by the city council for the purpose. Protests may be filed within 15 days after the second or last publication. This time may therefore, be 16, 19, or 23 days after the first publication. The time within which protest may be filed is thus fixed by the statute in an indefinite way, depending upon the periods of publication, and no notice of the time or place within which such protests may be filed was required to be given by the city council.

[4] All that the statute required the city council to do in so far as the giving of notice of the preliminary resolution is concerned was, at the time these proceedings were had, to publish twice, or to post and to keep posted for the same length of time as publication should be had, a copy of its resolution of intention. As under any circumstances the greatest period of publication would be 8 days, the demands of the statute are satisfied if the notices are posted and kept posted for a like period. There is, thus, no more uncertainty as to the time within which protests may be filed where the notice is given by posting than where it is given by publication in a newspaper. Here the posting was made on April 10th, and the notices were kept posted for 14 days thereafter, and the work was not ordered done until May 12th, a period of 32 days thereafter. Thus the lot owners were given more time within which to make protest than they would have had under the most favorable conditions if notice had been given by publication.

[5] All that the guaranty of due process of law requires in this respect is that the lot owners be given notice of the intended improvement, and that they be accorded an opportunity to protest and to have their protests heard. This notice they have had, and it goes without question that notice of the intended improvement is as effectual for this purpose when given by posting as when given by publication. Appellants quote from numerous authorities holding that defects in notices of the time and place for hearing protests defeat the jurisdiction of the council to proceed. These authorities are not applicable here because the council was not charged to give this notice, but the statute itself gave to the lot owners the only notice required as to the time and place for hearing such protests. It is within the power of the Legislature to determine what notice is sufficient for this purpose, and, having done

so, the city council acquires jurisdiction for all purposes on the expiration of the time fixed by the statute if notice of the resolution of intention has been given in the manner prescribed. This having been done, it is incumbent upon the lot owners to determine for themselves the limit of time within which their protest may be filed. And where, as in this case, more time was given for this purpose than is required by the statute, but, notwithstanding this, no protests were filed during the time given or at any time thereafter, the court cannot be asked to nullify the proceedings resulting therefrom.

3. The third objection is equally without merit. The complaint is that the word "improvement" in the notices of improvement which were posted along the line of the contemplated work was printed in type five-eighths of an inch in height instead of one inch, as required by the act. Aside from the fact that this objection is extremely technical, the lot owners were given an opportunity to appeal to the city council under section 26 of the act, the posting of these notices being an act required of the superintendent of streets. No appeal was taken, and in view of the provisions of that section the determination of the city council as to the sufficiency of these proceedings is conclusive and forecloses any objection on this score at this time. But the notice as posted was legible, and substantially complied with the requirements of the act. Clark v. Los Angeles, 160 Cal. 30, 43, 116 Pac. 722; McCaleb v. Dreyfus, 156 Cal. 204, 210, 103 Pac. 924.

[6] 4. The fourth objection is that the warrant was never returned as required by the act. The facts are that the warrant was recorded, and thereafter handed back to the contractor. After demand for payment was made the warrant was returned to the superintendent of streets, and this was done within 30 days after its date. This is all that the act requires (section 25).

[7, 8] 5. The fifth ground for relief urged by appellants is that each bond is void on its face because it does not contain the recital that it may be redeemed by the owner at any time before maturity, as required by the amendment to section 63 of the act as enacted June 11, 1915, effective August 10, 1915. St. 1915, p. 1464. It is conceded that none of these bonds contained this recital, and that all were issued subsequent to the effective date of the amendment.

Of course, if it be true that each bond is void upon its face, then it is void in the hands of an innocent purchaser for value as well as in the hands of the contractor. In such event they do not constitute enforceable obligations against the lot owner, and hence cast no cloud upon his title. If there be no cloud, then there is no ground for equitable relief. Bucknall v. Story, 36 Cal. 67, 71; Chase v. Treasurer, 122 Cal. 540, 542, 55 Pac. 414.

See, also, Crocker v. Scott, 149 Cal. 575, 87 Pac. 102.

[9] But in another respect appellants have mistaken their remedy. The amending act of 1915 above noted also changed the provisions of section 60 of the act by giving to the lot owner, or to any person interested therein, the privilege of paying off such bond and discharging the land from the lien "at any time before commencement of proceedings for sale." Thus if, as appellants insist, the form of the bonds as to payment before maturity is to be controlled by the amendment, the privilege of making payment before sale of the land is also available. He may thus remove an asserted cloud upon his title by paying the obligation, and this he should offer to do before he seeks equitable relief.

In answer to this attack of appellants, respondents urge that as the contract was executed under the original act, the contractor is entitled to a bond in the form prescribed by the act at the time of the execution of the contract. The argument is that as the form of the bond and the terms of payment were fixed in the original act, these provisions became a part of the contract, and the subsequent amendment impaired the obligation of the contract. There is much force in this argument, but the question is one which should be determined only in a proceeding where it is properly put in issue.

In conclusion, it should be said that the complaint in this action is wholly lacking in the essential averments of a bill in equity of this nature. There is no allegation that appellants did not have actual notice of every step in the proceedings leading to the improvement of their property. The proceedings were instituted on April 7, 1915. This action was commenced on December 12, 1916, some 20 months thereafter. If an owner sits quietly by while his property is being improved in this manner, and makes no objection or protest at any stage of the proceedings, having full knowledge of what is being done in the meantime, he cannot wait until he has received all the benefits of the improvement, and it is too late for the authorities to correct the alleged irregularities, before suing in a court of equity to remove the cloud placed upon his property through his own acquiescence.

For the reasons given the judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

On Rehearing in Supreme Court.

PER CURIAM. [10] In denying the application for a hearing in this court after decision by the District Court of Appeal for the First Appellate District, Division 1, we withhold our approval from that portion of the opinion dealing with the objection that the notice of improvement posted was fatally defective in that the heading, "Notice of Improvement," was not printed in letters of sufficient length, except that portion which holds that there was a substantial compliance with the requirements of the statute. The statute requires "said notice shall be headed 'Notice of Improvement,' in letters not less than one inch in length." The notice was headed, "Notice of Improvement," the words "Notice of" being in letters of one inch in length and the word "Improvement" in letters of only five-eighths of an inch in length. Of course, there was in this a technical departure from the requirement of the statute, but we think, taking the whole heading together, that it should now be held that there was a sufficiently substantial compliance with the requirement of the statute to warrant us in sustaining the proceeding after the issuance of the bond, in view of the conclusive evidence provision of section 66 of the act. Stats. 1911, p. 760.

We disapprove the concluding paragraph of the opinion, the paragraph commencing with the words, "In conclusion it should be said," etc.

Application for a hearing is denied.

All concur, except MELVIN, J., and OLNEY, J., absent.

180 Cal. 723

MINTER v. SAN DIEGO CONSOL. GAS & ELECTRIC CO. (L. A. 4919.)

(Supreme Court of California. July 23, 1919.)

1. Electricity 🔑19(2)—Personal Injury—Sufficiency of Complaint.

A complaint, alleging that it was defendant's duty to maintain its electric power wires so that they would not endanger persons in a certain tree, that it negligently failed to do so, and that such failure resulted in death of plaintiff's son, *held* to state a cause of action.

2. Electricity 🔑14(2)—Electric Power Wires—Negligence.

Defendant is liable for placing electric power wires some 30 feet from the ground near a tree if an ordinarily prudent person would reasonably anticipate that wires so placed would cause injury.

3. Appeal and Error 🔑999(3)—Jury Question—Negligence.

If reasonable men might fairly differ as to whether defendant was negligent in locating its electric power wires near a tree, a verdict for plaintiff will not be disturbed.

4. Electricity 🔑19(5)—Personal Injury—Sufficiency of Evidence.

Where electric power wires located 27 and 35 feet, respectively, from the ground and near a tree, killed plaintiff's son who had climbed into the tree for an unknown purpose, *held*, that evidence did not sustain a verdict that defendant was negligent in failing to anticipate such a result.

5. Electricity 🔑19(12)—Personal Injury—Contributory Negligence—Jury Question.

Evidence that plaintiff knew the danger of touching electric power wires, but did not caution his son when he saw him climbing into a tree near the wires, *held* not to establish plaintiff's contributory negligence as a matter of law, where plaintiff's evidence contradicted defendant's and defendant's expert stated it was not particularly dangerous to climb near wires.

Department 2.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by P. A. Minter against the San Diego Consolidated Gas & Electric Company. Judgment for plaintiff, and defendant appeals. Reversed.

Sweet, Stearns & Forward, of San Diego, for appellant.

Crouch & Chambers, of San Diego, for respondent.

LENNON, J. This is an appeal from a judgment upon a verdict for the plaintiff in an action to recover damages for the death of the plaintiff's son. The deceased, a boy 16 years of age, was killed by an electric shock from one of the defendant's power wires while he was climbing a eucalyptus tree growing on the highway immediately in front of his father's premises. The death was alleged to have been caused by the negligence of the defendant in maintaining imperfectly protected wires at an improper distance from the tree.

[1] The court did not err in overruling the defendant's demurrer to the complaint. The complaint alleged a duty on the part of the defendant to so maintain its wires that they would not endanger persons in the tree, a breach of this duty, and an injury to the plaintiff resulting from that failure of duty. The complaint therefore stated the three elements necessary to sustain an action to recover damages for negligence. Fallon v. United Railroads, 28 Cal. App. 60, 151 Pac. 290.

[2-4] Upon an analysis of the evidence adduced on behalf of the plaintiff, we are of the opinion that the appellant's motion for a nonsuit at the close of the plaintiff's case should have been granted, and we are satisfied that the evidence as a whole does not support the verdict.

The facts of the case are these: The deceased was killed on the 2d day of March, 1915. On that day, the plaintiff owned land in San Diego county situated in a country district and bounded by a public highway. Upon this land he maintained a small store patronized by the neighbors, passers-by, and by children from a school which was not far distant. There was a eucalyptus tree in front of the premises and in the highway. This tree was about 2½ feet in diameter near the ground and a little over 10 inches in diameter at the height of 35 feet from the ground. The first limb of the tree was approximately 6½ feet from the ground. The defendant maintained power wires strung upon wooden poles set along the highway on the side upon which the plaintiff's land was located. One wire was strung at a height of about 27 feet from the ground and at a distance from the tree of about 14 or 16 inches. It carried 2,300 volts and was insulated. The insulation did not make the wire safe to handle and was particularly inefficacious when it was wet. Another wire was strung 6 or 8 feet higher and at a distance from the tree of about 3 feet. This wire carried 11,000 volts and was not insulated. There was a crotch in the tree between the two sets of wires. There had been a shower on the morning in question, but the weather had cleared before the accident. The deceased was in the third year of high school and had worked with a pumping plant operated by electricity and had kept two automobiles in order. There was no evidence to show that he had ever before climbed over 15 or 18 feet into the tree. Some days before the accident, the defendant's workmen had trimmed the tree. There were some twigs left up in the tree described by the plaintiff as "small branches about the size of a wire * * * and leaves on the end of them, little green branches that come in pulling larger branches down." It seems that there had been some discussion between the plaintiff and the deceased about removing these twigs. But on the day in question, the deceased started up the tree without his father's knowledge and for a purpose not disclosed by the plaintiff's evidence. The plaintiff was at the time pulling weeds near by. He looked up and saw the boy in the tree and afterward looked down again to his work. About 90 seconds after that he heard a sliding noise in the tree. Looking up he saw the body of the deceased lodged in the crotch. The body was then in a position to indicate that it had slid down the trunk of the tree from a position facing north. In that position, the wires of the defendant would have been to the right of the deceased. The boy's right hand was badly blistered and burned with the exception of the thumb, index finger, and the portion of the hand below the middle of the palm. There were five punctuated burns on the left leg between the knee and the pelvis. The deceased had apparently been instantly killed.

It is not disputed that the defendant might lawfully maintain its power wires along the highway in front of the plaintiff's premises, being under the duty, however, to exercise such care in the operation thereof as would be exercised by a reasonably prudent and skillful person under the same or similar circumstances. The plaintiff does not contend, nor, indeed, in view of the generally known and accepted practices of electric companies, could he well contend, that there was a failure to use due care in maintaining an insulated 2,300-volt wire 27 feet from the ground or in maintaining an 11,000-volt uninsulated wire at about 35 feet from the ground carried through a country district on wooden poles set along a public highway. The breach of duty alleged was in maintaining these wires without further protection close to the eucalyptus tree in front of the plaintiff's premises.

If, guided by those considerations which ordinarily regulate the conduct of human affairs, an ordinarily prudent person would have had reasonable ground to suspect that the wires so placed would cause injury, the plaintiff can be said to have proved a breach of duty. And if reasonable men might fairly differ as to the answer to this question, the verdict for the plaintiff should not be disturbed. We are of the opinion, however, that it could not be fairly and reasonably found that an ordinarily prudent person would have considered additional precautions necessary under the circumstances here presented.

The plaintiff relies on the case of Giraudi v. Electric Imp. Co., 107 Cal. 120, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114, where it was said that there was sufficient proof of negligence where it was shown that the defendant had failed to raise its current-bearing wires so high above a hotel roof, on which they were placed, that those having occasion to go there would not come in contact with them. It is to be noted, however, that the facts in that case showed that the plaintiff was injured while in the discharge of his duty in doing some work on the roof of the hotel where any person called upon to look after the structure or the signs placed thereon might be expected to have to go.

On the other hand, in Fairbairn v. American River, etc., Co., 170 Cal. 115, 148 Pac. 788, it was held that a power company whose wires were 27 feet 8 inches above the ground was not bound to anticipate that persons might wish to transport along the road under these wires a hay derrick extending to a higher elevation. It was held to be the duty of the company to consider carefully all uses of the highway reasonably to be anticipated and to take precautions to prevent its wires from interfering therewith. The same rule was announced on the appeal from the judgment rendered after the second trial in that case, though new evidence which had been adduced was held to warrant a finding of negligence. Fairbairn v. American River, etc., Co., 175 Pac. 637. By analogy, the defendant in the case at bar was bound to prevent its wires from interfering with any use of the highway and, in particular, of the eucalyptus tree which was reasonably to be anticipated. It affirmatively appears from the plaintiff's testimony that the trees were trimmed by the defendant's workmen. No evidence was adduced to show that the tree was used or needed for anything but shade or ornament, or to show the existence of any custom with reference to the care of the tree of which the defendant would be reasonably expected to take notice and which would be likely at times to require the presence of the deceased or of any other person in the tree at a height of 27 feet from the ground. In the absence of such evidence, we do not think that the existence of any such business or duty was fairly inferable under the circumstances here presented.

The plaintiff also relies upon Temple v. McComb Co., 89 Miss. 1, 42 South. 874, 11 L. R. A. (N. S.) 449, 119 Am. St. Rep. 698, 10 Ann. Cas. 924, wherein it was said that:

> "The immemorial habit of small boys to climb * * * trees filled with abundant branches extending almost to the ground is a habit of which companies stretching their wires over such trees must take notice."

The case does not support the plaintiff's contention that the defendant was bound to anticipate that children might be attracted to climb into the tree where they might be endangered by the wires. An examination of the photographs, appended to the record as plaintiff's Exhibits "A," "B," and "C," as well as uncontradicted testimony, shows that the tree in question was not one likely to appeal to young and irresponsible children. It was nearly 3 feet in diameter at the ground. The first limb branched out over 6 feet from the ground. For a considerable distance between the lower branches and the defendant's wires the tree was practically bare of limbs. Although the plaintiff stated that school children were wont to frequent his store and to gather around the tree, there was no attempt to show that any of them had ever undertaken to climb the tree. The facts of the case, so far as they bear upon the duty of the defendant to anticipate that the wires might be a source of danger to irresponsible juvenile climbers, are more analogous to those in Mayfield, etc., Co. v. Webb, 129 Ky. 395, 111 S. W. 712, 18 L. R. A. (N. S.) 179, 130 Am. St. Rep. 469, where it was held that the company was not bound to anticipate that children would be attracted to climb two nearly parallel guy wires placed a short distance apart at an angle of 45 degrees from the ground and passing within 8 inches of an electric wire at a height of 18 feet. Again, in Graves v. Washington, etc., Co., 44 Wash. 675, 87 Pac. 956, 11 L. R. A. (N. S.) 452, it was held that the company was not bound to anticipate that boys would climb into danger from its wires, placed near the piers of a public bridge, 30 feet above the roadway. This decision was made in the face of evidence that the piers were so constructed that their braces formed a ladder which could be easily ascended and that boys sometimes climbed there for purposes of sport or to catch pigeons which nested about the bridge. A judgment for the plaintiff was reversed and the cause remanded with instructions to dismiss the action.

The plaintiff appears to maintain the proposition that, because a person might climb the tree without committing a trespass, it was incumbent upon the defendant to assume the burden of keeping its wires so protected that a climber would not be subjected to risk. That, however, is not the test. The question is, not what a person might lawfully do, but what the defendant was bound, in the exercise of reasonable prudence, to assume that a person would be likely to do. Wetherby v. Twin State Co., 83 Vt. 189, 75 Atl. 8, 25 L. R. A. (N. S.) 1220, 21 Ann. Cas. 1092; Brush Co. v. Lefevre, 93 Tex. 604, 57 S. W. 640, 49 L. R. A. 771, 77 Am. St. Rep. 898.

The case of Freeman v. Railroad Co., 54 App. Div. 596, 66 N. Y. Supp. 1052, is instructive in view of the theory advanced by the plaintiff that the defendant's workmen may have left green branches touching the wires and that through them the current may have been communicated to the body of the deceased. The plaintiff in that case was using a public bridge at the time of his injury. Instead of following the footpath, however, he had started to walk across on a girder which was 115 feet long and had a rise of 13 feet in the center. The defendant was lawfully maintaining a trolley wire on the bridge together with a guard wire. The guard wire should not have been charged with electricity, but current had in some manner leaked into it. While crossing the girder, the plaintiff was struck by this guard wire and suffered the injuries complained of. Although the plaintiff was using a public highway, it was held that, inasmuch as the defendant was not bound to anticipate that such a use would be made of the girder, it was under no active duty to keep its wires so protected as to make such use safe.

[5] There is no merit in the contention of the defendant that the court should have found as a matter of law that the plaintiff was precluded from recovering by reason of contributory negligence on his part or on the part of the deceased. The defendant introduced evidence to show that the plaintiff was fully aware of the danger of coming into proximity to the wires and of the fact that the deceased was about to do so and that he failed in his duty to exercise his parental authority to keep the boy out of danger. The evidence on behalf of the plaintiff, however, tended to contradict this, and one of the defendant's experts stated in effect that he did not consider it particularly dangerous to climb near the wires. The question of the plaintiff's negligence was therefore properly a question of fact for the jury. It was not shown beyond question that the deceased was guilty of some negligent act after entering the zone of danger. The question of his negligence was therefore also a question of fact for the jury.

While isolated sentences from the court's instructions to the jury, considered alone and unqualified by the context, do, in some instances noted by the defendant, appear to be erroneous or misleading, the instructions, viewed as a whole, are sufficiently clear and correct.

The judgment appealed from is reversed.

We concur: MELVIN, J.; WILBUR, J.

180 Cal. 651

In re ROSS' ESTATE. (L. A. 5758.)

(Supreme Court of California. July 1, 1919.)

1. JUDGMENT 🔑489—CONCLUSIVENESS—PERSONS CONCLUDED.

Where after the superior court sitting in probate had approved a compromise whereby the administrator was to pay claimant a sum of money, respondent filed a petition setting up that she was entitled to the entire estate, that she was not a party to the compromise, and that the claim was wholly unfounded, *held* that a decree, adjudging respondent to be the owner of the entire estate and enjoining the administrator from selling any portion of the estate for the purpose of paying claimant the sum agreed upon in the compromise, which brought claimant's right within Code Civ. Proc. § 1908, subd. 2, is binding and not open to collateral attack, and he cannot thereafter in probate proceedings assert his right to amount fixed in compromise agreement on theory the decree was without the court's jurisdiction.

2. JUDGMENT 🔑410, 441—VALIDITY—FRAUD.

The courts in an equitable proceeding may inquire whether a judgment valid on its face was obtained by fraud, and this principle applies to probate decrees.

3. JUDGMENT 🔑503—COLLATERAL ATTACK—GROUNDS.

The failure of a complaint to state a cause of action is not a defect going to the jurisdiction of the superior court, and a judgment upon such a complaint cannot be held void on collateral attack.

4. JUDGMENT 🔑505—COLLATERAL ATTACK—INSUFFICIENT FINDINGS.

That findings do not support a judgment given does not render the judgment void on collateral attack.

In Bank.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

In the matter of the estate of Elizabeth B. Ross, deceased. From orders of the superior court overruling the opposition of Robert E. R. Scanlan to the petition of Maggie G. Steinberger for final distribution to her of the whole estate, and denying Scanlan's petition for an order directing payment to him of a sum of money, he appeals. Affirmed.

See, also, 182 Pac. 303, 755.

Louis P. Boardman, of San Francisco, and Davis, Kemp & Post, of Los Angeles, for appellant.

J. H. Merriam, of Pasadena, and G. Harold Janeway, Hunsaker & Britt, and Leroy M. Edwards, all of Los Angeles, for respondent.

H. M. Barstow, of Los Angeles, for administrator.

Philip C. Boardman, of San Francisco, for Mary E. Ross.

ANGELLOTTI, C. J. This is an appeal from two certain orders of the superior court overruling the opposition of appellant, one Robert E. R. Scanlan, to the petition of Maggie G. Steinberger for final distribution to her of the whole of the estate, and denying appellant's petition for an order directing the payment to him of the sum of $8,000, the amount of his asserted claim against the estate.

There is no conflict as to the material facts, which are substantially as follows: The deceased died intestate on January 5, 1910, leaving a considerable estate, included in which, according to the records at least, was a parcel of real estate in the city of Pasadena known as the Ross Block. Appellant Scanlan claimed to be the owner of an undivided one-half of this property under a conveyance alleged to have been executed and delivered by deceased in the year 1907 to him and his mother, a sister of deceased, notwithstanding that prior to the death of deceased both appellant and his mother had apparently executed a reconveyance to deceased and this had been recorded. In this connection the claim of appellant was that this reconveyance had been executed solely for the purpose of insuring to deceased the possession and income of the property during her lifetime, and that it had been placed in the possession of a third person with the understanding that it was not to be delivered to deceased, but that contrary to such understanding it was so delivered and then recorded. Milton K. Young having been appointed administrator of the estate of deceased, appellant commenced an action against him to obtain a decree declaring the reconveyance invalid, and that he was the owner of a one-half interest in said property. In this action the issues made by the pleadings were tried by a jury and a verdict given for appellant, on which judgment was entered in his favor. The trial court granted the defendant administrator's motion for a new trial, and appellant appealed from the order granting such motion. While this appeal was pending an agreement of compromise was made between the administrator and appellant, the substance of which was that in consideration of $1,000 to be paid at once, and of $8,000 as soon as money therefor was available in said estate, appellant would abandon his action, and he and his mother would execute a conveyance of the property to the administrator. The latter presented a petition to the department of the superior court in which the probate proceeding was pending, setting forth the facts relating to the litigation and compromise, and asking the court to approve the compromise. This petition was heard by the court without any notice being first given, and on February 26, 1912, an order was made approving the compromise and directing that it be carried into effect. No appeal was taken from this order. The $1,000 was paid to appellant, a conveyance of the property to the administrator was made by appellant and his mother, and a stipulation filed in the action providing for a final determination thereof against appellant and in favor of the administrator. A little later, on the application of the administrator, an order was made for the sale of certain property of the estate to obtain the money necessary to pay appellant the balance due under the terms of the compromise. No sale was ever made. It is not questioned that throughout the administrator acted in good faith and according to what he conceived to be for the best interest of the estate. Up to this time it was supposed that the lawful heirs of deceased were the only persons interested in the succession to her estate.

Subsequently, on August 14, 1912, one Maggie G. Steinberger commenced an action in the superior court of Los Angeles county, alleging an agreement between herself and her stepfather on the one part and deceased on the other, by the terms of which deceased had agreed that she would adopt said Maggie G. Steinberger, take her into her house and treat her as her daughter, and that in consideration of her obedience, affection, and services she would be the heir of deceased, and on the death of the latter would be entitled to all her property. She alleged full execution of the agreement on her part, and that she had thereby become the equitable owner of all the property of deceased, to the exclusion of her heirs at law. In that action the parties defendant were the administrator, the appellant here, and a number of other persons, including appellant's mother, alleged to be the only heirs at law of deceased. As to appellant, the plaintiff alleged the matters leading up to the compromise, the compromise agreement between the administrator and appellant, and the order of court for the sale of property to pay the $8,000 agreed to be paid him. She further alleged that she was not a party to the compromise or to any of the proceedings in court relative to the same, that the claim of appellant to any portion of the property of the estate was wholly unfounded, because founded on a purported deed made by deceased while she was wholly incompetent to make a conveyance, and further because appellant and his mother had reconveyed the property to deceased in her lifetime, and that the compromise was illegal and void. She asked for a decree adjudging her to be the owner of the entire property and to be entitled to have the same distributed to her, and also that the administrator be enjoined from selling any portion of the estate for the purpose of paying appellant the sum claimed by him, and from paying any portion of such claim out of the funds or property of the estate. The administrator and appellant and certain others of the defendants answered, denying the plaintiff's claim in toto, and appellant further specifically reasserted his original claim of ownership in the Ross Block, the proceedings to enforce the claim, the compromise, the court's orders approving the same, and that such orders had never been appealed from or vacated and were in full force and effect, and constituted a final adjudication of his rights. The findings of the court in that action were entirely in accord with the allegations of the plaintiff's complaint, and it was concluded that the purported compromise was neither fair, nor proper, nor binding as against the plaintiff Steinberger. Judgment was accordingly given that said Steinberger was the equitable owner of all the property of deceased; that the defendant heirs at law held the legal title in trust for the benefit of plaintiff, that none of said defendants had any right or beneficial interest therein. It was further adjudged that the administrator be enjoined and restrained from making any sale of any of the property of the estate for the purpose of raising funds with which to pay appellant said $8,000 or any part thereof, and that he be enjoined and restrained from paying to appellant said sum or any part thereof out of any of the funds or property belonging to the estate.

From this judgment an appeal was taken to this court by all the defendants, and on May 9, 1917, the judgment was affirmed. Steinberger v. Young et al., 175 Cal. 81, 165 Pac. 432. No point appears to have been made upon that appeal as to any want of jurisdiction on the part of the trial court to embody in its judgment the provisions relative to the claim of appellant, and the matter was not discussed in the opinion of this court, but this fact is altogether immaterial in determining the effect of the judgment. See Neale v. Morrow, 163 Cal. 445, 125 Pac. 1052.

After the aforesaid judgment had become final following its affirmance upon appeal, the administrator of said estate presented to the court in which the proceedings in the matter of said estate were pending his final account and petition for the distribution of said estate to said Maggie G. Steinberger in accordance with the aforesaid judgment. Thereafter, and on February 20, 1918, the appellant herein presented and filed his opposition to said distribution, together with his petition for an order directing the administrator of said estate to pay to him the sum of $8,000 out of the funds and property of said estate in accordance with the terms of said compromise and of the order of said probate court approving the same. In his said petition the appellant herein set forth the facts relating to the institution and trial of the action of Steinberger v. Young et al., and of the judgment rendered therein, but averred that the prior determination of the probate court, as embodied in its order approving said compromise, and directing said administrator to pay said sum of money to the appellant, was a final determination of said matter and of all matters involved therein, and that the trial court in the case of Steinberger v. Young et al., was without jurisdiction to review the validity of said compromise or of the order of the probate court approving the same, or to enjoin the administrator from paying to the appellant the sum agreed to be paid therein; wherefore the appellant prayed for an order directing the administrator to pay him said sum. To this petition the respondent herein, Maggie G. Steinberger, appeared and filed her opposition in the form of a demurrer to the sufficiency thereof, and also and at the same time filed her answer thereto, wherein she again set forth in detail the matters which she had averred in her complaint in the case of Steinberger v. Young et al., and which matters the court upon the trial of said cause had adjudicated in her favor, together with the further fact that the judgment therein had been affirmed and became final upon appeal. The court overruled said demurrer, but proceeded to trial upon the issues raised by the answer to said petition, and after a hearing thereon made its findings of fact and conclusions of law, reciting the history of the whole complicated series of proceedings and determining that the findings and judgment of the trial court in the case of Steinberger v. Young et al., as to all of such matters, was a final adjudication thereon, and hence that appellant was thereby barred and estopped from prosecuting or maintaining his opposition to the distribution of said estate, and that said administrator was precluded and debarred from paying petitioner any sum out of the funds of said estate. From the orders thereupon made overruling the appellant's opposition to the distribution of said estate and dismissing his said petition this appeal has been taken.

This somewhat extended statement has been deemed essential to a proper understanding of our brief discussion of the questions that we consider determinative of this appeal.

[1, 2] Manifestly, if the judgment in the action of Steinberger v. Young et al. was in no respect in excess of the jurisdiction of the superior court rendering it, appellant's claim of right to participate in the property of the estate is foreclosed thereby. He was made a party to that action for the purpose of having his rights in regard thereto determined, issues were made thereon, and a judgment was given which in substance and effect debars him from such participation. While the judgment in this respect is perhaps not as happily expressed as it might have been, being simply a permanent injunction restraining further proceedings on the part of the administrator looking to the sale of property for the satisfaction of appellant's claim, or the payment of the claim or any part thereof out of funds or property belonging to the estate, such is its necessary effect. By the judgment his alleged right was, in effect, directly adjudged within the meaning of subdivision 2 of section 1908, Code of Civil Procedure, the diversion of any part of the property of the estate to the payment of his alleged claim being thereby forbidden. The effect of this judgment, if accepted as a valid judgment in toto, is not disputed by appellant, whose real claim is that the portion of the judgment relative to the claim of appellant was absolutely void because in excess of the jurisdiction of the court giving it, the theory, in short, being that it constituted an attempt on the part of the court to enjoin the execution of valid decrees of the superior court sitting in probate and practically nullify the same, notwithstanding that they had become final. The answer to this claim is very simple. It was not sought in Steinberger v. Young, supra, to vacate or annul the orders of the probate department of the superior court on which appellant relies for the award to him of $8,000 from the funds and property of the estate of Elizabeth Ross, and no such relief could properly have been awarded the plaintiff in that action. See Larue v. Friedman, 49 Cal. 278, 284; Sohler v. Sohler, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98. In so far as the action related to appellant, it was an action in equity against him on the part of the plaintiff, alleging herself to be entitled to all the property of the deceased, for the purpose of foreclosing his claim to any part thereof based on orders of the probate court illegally and fraudulently obtained. If it had been that by force of such orders he had already been paid the $8,000 from the funds of the estate, the relief sought would have been a decree adjudging that he held the same in trust for plaintiff because the orders under which he had obtained the same had been illegally and fraudulently obtained to the detriment of the plaintiff, who was the real beneficial owner of the property. As was said in Title Ins. Co. v. California Development Co., 171 Cal. 208, 152 Pac. 557:

> "It is elementary that the courts of this state may in an equitable proceeding inquire whether a judgment valid on its face was obtained by fraud. Sometimes such judgment may be set aside, but even in cases where this relief cannot be had a court of equity may 'prevent an inequitable advantage being taken of it [the judgment] by adjudging the guilty beneficiary or his successor with notice a trustee for the defrauded party.'"

This principle has frequently been applied with relation to probate decrees. See Campbell-Kawananakoa v. Campbell, 152 Cal. 201, 92 Pac. 184; Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317; Estate of Walker, 160 Cal. 547, 117 Pac. 510, 36 L. R. A. (N. S.) 89; Sohler v. Sohler, 135 Cal. 323, 67 Pac. 282, 87 Am. St.

Rep. 98. Here the property sought to be improperly diverted had not yet come into the possession of the appellant, and consequently all the equitable relief essential in regard thereto was the decree forbidding the actual appropriation of any of the funds or property of the estate, to all of which the plaintiff was adjudged to be entitled, to the payment of any part of his, Scanlan's, claim. Such a decree rests upon the same basis as those involved in the cases just cited, and is within the well-recognized jurisdiction of a court of equity. See Larue v. Friedman, 49 Cal. 278. We are of the opinion that there is no force in the claim that any portion of the judgment in Steinberger v. Young was in excess of the jurisdiction of the court rendering it.

It is urged that neither the complaint nor findings in Steinberger v. Young, supra, in allegations and statement of facts, showed anything in the way of extrinsic fraud or other matter justifying the portion of the judgment complained of. The theory appears to be that this is a matter going to the jurisdiction of the court to give such judgment. Manifestly there is no force in this claim. Assuming appellant to be correct in his view as to pleadings and findings, the objections amount to nothing more than that the complaint in this respect failed to state a cause of action, and that the findings fail to support the judgment.

[3, 4] It is thoroughly settled in this state that the failure of a complaint to state a cause of action is not a defect going to the jurisdiction of the superior court, and that a judgment given upon such a complaint cannot be held void upon collateral attack. In this connection it is only necessary to refer to our recent decision in Gillespie v. Fender, 180 Pac. 332. Of course the same thing is true as to an objection that the findings do not support the judgment given. We are not here concerned with any question as to the correctness of the judgment given by the superior court in Steinberger v. Young, supra, except in so far as the court may have exceeded its jurisdiction, and there is no basis for holding that the judgment was in any respect in excess of the jurisdiction of the superior court. Appellant's remedy for any errors committed by the trial court in the exercise of its jurisdiction was, of course, by way of appeal.

It follows from what we have said that the lower court was not in error in its conclusion that appellant was barred and estopped from asserting his claim by the judgment in Steinberger v. Young, supra.

The orders appealed from are affirmed.

We concur: LENNON, J.; SHAW, J.; OLNEY, J.; WILBUR, J.; MELVIN, J.; LAWLOR, J.

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180 Cal. 643

In re ROSS' ESTATE. (L. A. 5864.)

(Supreme Court of California. July 1, 1919.)

1. EXECUTORS AND ADMINISTRATORS 🔑314(2)—FINAL DISTRIBUTION—PROCEEDINGS—JURISDICTION.

Under Code Civ. Proc. §§ 1634, 1665, an administrator is authorized to file with his final account his petition for final distribution of the estate, and the filing of this petition and the giving of notice prescribed by law confers on the court jurisdiction in the proceeding thus initiated to proceed with the matter of distribution immediately upon settlement of the final account, and it is immaterial that the administrator has no legal interest in any dispute that may arise between claimants on distribution as to how the estate shall be distributed.

2. EXECUTORS AND ADMINISTRATORS 🔑314(3)—FINAL DISTRIBUTION—DENIAL—PENDENCY OF APPEALS.

The pendency of appeals, one from parts of an order settling the administrator's account, and the other by a claimant whose claim was denied, does not warrant the denial of the petition for final distribution, even though the court might properly, in the exercise of its discretion, have continued hearings in the proceedings for distribution pending determination of the appeals.

3. EXECUTORS AND ADMINISTRATORS 🔑314(3)—FINAL DISTRIBUTION—DENIAL—GROUND.

The denial of a petition for final distribution filed by the administrator on the ground of the pendency of a petition filed under Code Civ. Proc. § 1664, by one claiming the estate of the decedent *held* erroneous; it appearing that the claim might as readily have been disposed of in the proceedings for distribution as in the special proceeding inaugurated under section 1664.

4. DESCENT AND DISTRIBUTION 🔑52(2)—SURVIVING WIDOW.

Under no circumstances does the surviving widow of a deceased brother of a deceased husband of a deceased take directly from such deceased under Civ. Code, § 1386, subd. 8; and, where no relative of the deceased spouse specified in that section survives the surviving spouse, there can be no succession to the surviving widow of a deceased brother thereunder.

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Elizabeth B. Ross, deceased. From an order made in proceedings for final distribution of the estate, denying her motion for dismissal of the petition filed by one Mary E. Ross, praying that the court proceed in accordance with Code Civ. Proc. § 1664, to determine who were entitled to the estate, and denying the application for final distribution presented by the administrator, Maggie G. Steinberger appeals. Order reversed, and matter remanded.

See, also, 182 Pac. 303, 752.

J. H. Merriam, of Pasadena, and G. Harold Janeway, Hunsaker & Britt, and Le Roy M. Edwards, all of Los Angeles, for appellant.

Davis, Kemp & Post, of Los Angeles, Philip C. Boardman, Louis P. Boardman, of San Francisco, and H. M. Barstow and Kemp & Clewett, all of Los Angeles, for respondent.

ANGELLOTTI, C. J. This is an appeal by one Maggie G. Steinberger from an order made in proceedings for the final distribution of the estate of deceased, denying appellant's motion for a dismissal of the petition filed therein by one Mary E. Ross, praying that the court proceed in accord with the provisions of section 1664, Code of Civil Procedure, to determine who were entitled to succeed to the estate, and denying the application for final distribution presented by the administrator.

On May 9, 1917, this court affirmed the judgment in favor of plaintiff in the action of said Maggie G. Steinberger against said administrator, one Scanlan, and various persons found to be the only heirs of deceased, decreeing that subject to the debts, charges, and expenses of administration of said estate said Maggie G. Steinberger was entitled to all the property of the estate by virtue of a contract between herself and her stepfather and deceased, under which she was to be the sole heir of deceased. See Steinberger v. Young, 175 Cal. 81, 165 Pac. 432. After the affirmance of this judgment, viz. on June 23, 1917, the administrator presented his final account, together with his petition for final distribution of the estate, as is authorized by the law. Sections 1634 and 1665, Code of Civil Procedure; Estate of Sheid, 122 Cal. 528, 531, 55 Pac. 328. The estate proceeding had then been pending for over 7 years, and the estate was in condition for final settlement and distribution. By the petition distribution was sought in favor of said Maggie G. Steinberger, according to the judgment in Steinberger v. Young, supra, all of the next of kin of deceased, alleged to constitute her only heirs, having been parties defendant in that action, and their rights as heirs at law being barred by the judgment therein. Notice of the time fixed for settlement of the account and hearing of the petition for distribution was duly given. When the matter came on for hearing, the only appearance in opposition was that of Maggie G. Steinberger, who, claiming to be entitled to all of the distributable assets, as alleged by the administrator, objected to various items of his account. The matter was heard by the court, evidence being received both as to the account and as to the petition for distribution, the evidence on distribution being to the effect that the only heirs at law were the next of kin of deceased who were parties defendant in Steinberger v. Young, supra. On February 18, 1918, the court made an order settling the final account, allowing certain credits which had been objected to by Maggie Steinberger.

Two days later, February 20, 1918, one Scanlan appeared, opposing distribution pending payment to him of a claim of $8,000, alleged to be due under a compromise with the administrator, approved by the probate court, and seeking payment of this claim. A hearing was had on this, and on March 15, 1918, an order was made overruling Scanlan's opposition and denying his petition. On the same day Maggie Steinberger appealed from the portions of the order of settlement of the account disallowing her objections to certain specified items thereof. The hearing on the petition for distribution having been regularly continued from time to time and finally to March 16, 1918, and there being apparently no further bar to final distribution to Maggie Steinberger, except possibly her own appeal from portions of the order settling the administrator's final account, a new claimant made her first appearance on the field of action, viz. Mary E. Ross, the surviving widow of one Albert E. Ross, deceased, who was alleged to have been a brother of R. E. Ross, the deceased husband of deceased, and to have survived such deceased husband of deceased. On March 16, 1918, more than 8 years after the institution of the proceeding for the settlement of the estate of deceased, and nearly nine months after the filing of the final account and petition for distribution, and after the hearing on such settlement and petition for distribution was practically completed, she appeared at the hearing on distribution, and, opposing distribution to Maggie G. Steinberger, instituted the proceeding provided for by section 1664, Code of Civil Procedure, by filing a petition praying the court to ascertain and declare in the manner provided by that section the rights of all persons to the estate and all interests therein, and to whom distribution should be made. The theory of her claim to heirship was substantially that all of the property of deceased was the same property, "or the proceeds or avails thereof" which she, the deceased, had received under a decree of final distribution made in the year 1885 in the matter of the estate of her deceased husband, R. E. Ross; that all property received by her under such decree was separate property of said R. E. Ross at the time of his death; that deceased having died intestate, leaving no issue, the property of deceased should go to next of kin of her deceased husband, R. E. Ross, who also left no issue, as provided in subdivision 8 of section 1386, Civil Code; that claimant Mary E. Ross, the surviving wife of Albert E. Ross, who was a surviving brother of R. E. Ross, and various other unnamed persons who were heirs at law of R. E. Ross, none of whom has appeared herein, were entitled to share in this estate as heirs, by virtue of the provisions of subdivision 8 of section 1386. Neither said Mary E. Ross nor any of the next of kin of the deceased husband of deceased, R. E. Ross, if any there were surviving, were parties to the action of Steinberger v. Young, and it is conceded that their rights, if any they had, were not concluded by the judgment in such action.

Upon the filing of this petition, the hearing on final distribution was continued to April 2, 1918, at which time Maggie G. Steinberger made a motion for an order dismissing the petition of Mary E. Ross, or such other order as might be proper, on the ground substantially that the estate was then in condition for distribution and would be unreasonably and unnecessarily delayed if deferred pending the proceeding provided by section 1664, Code of Civil Procedure, and that the question of the heirship of Mary E. Ross and all other persons should be heard and determined on the hearing on the pending petition for distribution. The court having heard the motion, made an order on May 24, 1918, denying the motion to dismiss the petition of Mary E. Ross, and also denying the petition for final distribution, without prejudice, however, to the rights of Maggie G. Steinberger. This is the order appealed from by the latter. At the same time the court made an order on the petition of Mary E. Ross, directing the notice required by section 1664, Code of Civil Procedure. In the meantime, viz. on May 3, 1918, Robert E. R. Scanlan had taken an appeal from the order denying his claim. This is the appeal entitled "In the Matter of the Estate of Elizabeth B. Ross, Deceased, L. A. No. 5758," 182 Pac. 752, this day decided, the order appealed from being affirmed. It may also be noted that the appeal of Maggie G. Steinberger from parts of the order settling the account was decided December 5, 1918 (Estate of Ross, L. A. No. 5705, 182 Pac. 303), and that all questions in regard to such account are now finally settled.

[1, 2] In view of our statutes and the decisions of this court thereunder, it is clear that the administrator was authorized to file with his final account his petition for the final distribution of the estate among the persons entitled to succeed thereto, and that the filing of this petition and the giving of the notice prescribed by law conferred upon the court jurisdiction in the proceeding thus initiated to proceed with the matter of such distribution immediately upon settlement by it of the final account. Code Civ. Proc. §§ 1634, 1665; Estate of Sheid, 122 Cal. 528, 531, 55 Pac. 328; William Hill Co. v. Lawler, 116 Cal. 359, 361, 48 Pac. 323; Smith v. Westerfield, 88 Cal. 374, 379, 26 Pac. 206. It is entirely immaterial in this connection that the administrator has no legal interest in any dispute that may arise between claimants on distribution as to how the estate shall be distributed. The statute expressly authorizes the administrator to so initiate the proceeding, the purpose perhaps being, as was suggested in Estate of Sheid, supra, "to enable the administrator to hasten the closing of the estate, and to make one notice and one hearing serve both purposes." By the notice required by the law upon such a filing being given, as was said in the William Hill Co. v. Lawler, supra "the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate; and every person who may assert any right or claim therein is required to present his claim to the court for its determination." The law contemplates that this proceeding thus properly instituted shall be carried on to decree of distribution as speedily as is reasonably practicable with due regard to the interests of all concerned, and any interested party appearing is entitled to have it so carried on. Certainly such a party may justly complain of the absolute termination of such a proceeding by an order denying the petition, whether with or without prejudice to a future application, if no proper ground for such denial is made to appear. We need not discuss here the question whether, in view of the pending appeals, the one taken by Maggie G. Steinberger from parts of the order settling the administrator's final account, which parts allowed certain credits to the administrator objected to by her, and the other taken by Scanlan, to which we have heretofore referred, the trial court might properly, in the exercise of its discretion, have continued the hearing in the proceeding for distribution pending the determination of said appeals. The trial court did not do this, but absolutely terminated the distribution proceeding by denying it, and the question suggested is no longer of practical importance in the matter of this estate. It is clear that the mere fact of the pendency of these appeals afforded no warrant for the order denying the petition for distribution.

[3] Doubtless but for the petition filed by Mary E. Ross, the trial court would have proceeded with the matter of distribution. The record seems to indicate that the learned trial judge was of the view that the institution and pendency of the special proceeding given by section 1664, Code of Civil Procedure, a proceeding in the nature of an action to determine heirship, either required or authorized a denial of the pending proceeding for distribution. We think it clear that it could not have such effect. The nature and effect of the proceeding authorized by this section, a special proceeding which may be instituted by "any person claiming to be heir to the deceased, or entitled to distribution in whole or in any part of such es-

tate," for the purpose, as said in Whalen v. Smith, 163 Cal. 364, 125 Pac. 905, Ann. Cas. 1913E, 1319, "of ascertaining and determining, in advance of distribution, the persons who have succeeded to the estate," are sufficiently shown by the section itself, and the decisions of this court thereunder make extended discussion unnecessary. The section itself provides:

> "Nothing in this section contained shall be construed to exclude the right upon final distribution of any estate to contest the question of heirship, title, or interest in the estate so distributed, where the same shall not have been determined under the provisions of this section, but where such question shall have been litigated under the provisions of this section, the determination thereof, as herein provided, shall be conclusive in the distribution of said estate."

In Estate of Sheid, 129 Cal. 172, 61 Pac. 920, the pendency of such a proceeding instituted prior to the filing of the petition for distribution was set up by way of a plea in abatement in the distribution proceeding, and it was held, quoting the portion of section 1664, Code of Civil Procedure, above set forth, that the plea was not good. In Estate of Sheid, 122 Cal. 532, 55 Pac. 328, it was substantially held, referring to In re Oxarart, 78 Cal. 109, 20 Pac. 367, that notwithstanding the pendency of a proceeding under section 1664, Code of Civil Procedure, all questions of heirship and title to the estate can be properly determined in a distribution proceeding regularly initiated. In the Oxarart Case just cited, a proceeding under section 1664, Code of Civil Procedure, was instituted by a claimant, and thereafter the executor of the will filed his final account, together with a petition for final distribution. The petition for distribution having come on for hearing, the claimant sought a continuance thereof pending the determination of her proceeding under section 1664, Code of Civil Procedure, insisting that the court could not properly proceed with such hearing in the face of the pendency of her proceeding. The trial court's action in denying a continuance was approved by this court. It was substantially said that it was clear that the court had the power to proceed with the distribution proceeding, notwithstanding the pending proceeding under section 1664, and that it was plain that the question of heirship involved "might as well have been heard and determined on the hearing of the petition for distribution." The court plainly said that where the circumstances are such that the questions involved may as readily be determined on a pending proceeding for distribution, there is no good reason for even postponing the hearing and determination of the distribution proceeding merely because a proceeding under section 1664 has been initiated. Assuming that by reason of special circumstances a trial court might be justified in the exercise of a wise discretion in postponing the hearing on distribution, this court said:

> "In our judgment, the court very properly exercised its discretion in refusing to postpone the cause. If resort is to be had to the provisions of section 1664 to delay the settlement and distribution of estates, it had better never been passed. We have no doubt that the object of its enactment was to expedite such distribution by enabling persons claiming interests in estates to have their claims determined in advance of the application for distribution. * * * The determination of the proceedings initiated by the appellant * * * under section 1664 would have involved much delay, and would have deprived the devisee of the estate of his right on the showing made of having the question determined then and there on the application for distribution made by him."

In view of the expressions of this court referred to it seems clear, not only that the lower court erred in absolutely terminating the pending proceeding for distribution by its denial of the petition for distribution duly presented by the administrator, but also that there was nothing shown in connection with the attempted proceeding under section 1664 that would have warranted a continuance of the hearing of the distribution proceeding pending the determination of the proceeding under that section. Clearly the claim thereby made was one that could as well be determined in the latter proceeding as in a proceeding under section 1664. No showing whatever was made of inability to at once produce the testimony desired in support thereof. It is worthy of note that the petition filed by Mary E. Ross did not in its allegations of specific facts show any right in her to share in the estate of deceased, even upon the theory upon which she claimed such right.

[4] Under no circumstances does the "surviving widow" of a deceased brother of a deceased husband of a deceased take directly from such deceased under subdivision 8 of section 1386. The subdivision specified to whom the property shall go in the event therein stated, and such a surviving widow is not among those enumerated. She could only take through her dead husband, the brother of the deceased husband, or one or more of his descendants, and then only in the event that such husband or descendant survived deceased, Elizabeth B. Ross, for of course descent is cast under subdivision 8 of section 1386 as of the date of death of the surviving spouse whose estate is being administered and whose heirs are being determined. If no relative of the deceased spouse specified in said subdivision 8 of section 1386, Civil Code, survives the surviving spouse, there can be no succession under such subdivision. The petition of Mary E. Ross does not suggest that her husband or any descendant of her husband survived deceased, Elizabeth B. Ross, who died more than 25 years after

her own husband's death. Nor does it specify the relationship to R. E. Ross, the deceased husband of deceased, of any of the unnamed "heirs at law" of said R. E. Ross, alleged "to claim an interest in the estate" of deceased, none of whom has ever appeared in this proceeding. We mention these facts solely to show the character of the petition interposed on the very eve of distribution, more than 8 years after the institution of the proceeding for the settlement of the estate of deceased, nearly nine months after the filing of the petition for distribution and notice given thereon, and after the hearing on distribution was practically concluded. We are satisfied that there was nothing shown in connection with the attempted proceeding under section 1664 that warranted either the denial of the petition for distribution or postponement of the hearing and determination thereof pending the determination of such attempted proceeding, and that in so far as the distribution proceeding was concerned the utmost effect to be given to the petition filed by Mary E. Ross was to treat it as a claim to be determined in that proceeding.

The order appealed from is reversed, and the matter remanded for proceedings not inconsistent with the views herein expressed.

We concur: LENNON, J.; SHAW, J.; OLNEY, J.; WILBUR, J.; MELVIN, J.; LAWLOR, J.

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41 Cal. App. 304

ATKINSON v. CHARLES NELSON CO. et al.
(Civ. 2568.)

(District Court of Appeal, First District, Division 1, California. May 28, 1919. Rehearing Denied June 27, 1919. Denied by Supreme Court July 24, 1919.)

1. **Trover and Conversion** 🔑25—**Acts of Independent Contractor.**

The fact of a boat company being an independent contractor under its contract with defendant to receive from another 20 spars belonging to defendant, and to transport and deliver them to S., defendant's agent, does not prevent defendant being guilty of conversion, where the company received, as part of such spars, 6 spars belonging to plaintiff, and transported and delivered them to S., and S sold them, and defendant refused to reimburse plaintiff therefor.

2. **Principal and Agent** 🔑23(3)—**Agency—Evidence.**

That defendant, engaging a boat company to transport spars belonging to defendant, directed it to deliver them to S., in the absence of a showing to the contrary, justifies inference, in action for conversion of spars belonging to plaintiff which the boat company took and delivered to S., that S., in receiving the spars, was the agent of defendant.

3. **Appeal and Error** 🔑1050(3)—**Harmless Error—Admission.**

Error in admission of evidence as to facts concerning which there is no substantial dispute is harmless.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Action by T. G. Atkinson against the Charles Nelson Company and others. From an adverse judgment, the named defendant appeals. Affirmed.

Cooley & Lachmund and A. E. Cooley, all of San Francisco, for appellant.

Henry A. Jacobs and G. B. Blanckenburg, both of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in plaintiff's favor in an action for damages for the alleged conversion of certain spars.

The plaintiff's assignor had delivered to the United States government at the Mare Island Navy Yard a number of spars 85 feet in length. Six of these had been rejected by the government, but were lying at the boom of the Mare Island Navy Yard pending their removal by the plaintiff's assignor. The defendant had also and about the same time delivered a number of spars of the maximum length of 65 feet to the United States government at said navy yard, of which 20 had been rejected, and these were also lying at the boom of the navy yard awaiting removal. This was the condition of things on May 17, 1914, when the defendant wrote the following letter to the general storekeeper in charge of whatever spars were at the boom of the navy yard, viz.:

"S. F., May 17, 1914.

"General Storekeeper, Mare Island:

"Please deliver to Oakland Launch & Towboat Company 20 rejected spars.

"The Charles Nelson Co.,
"Per James K. Nelson."

This letter, or order, was delivered to the captain in charge of a tug of the Oakland Launch & Towboat Company named therein, who was at the same time instructed by the defendant to deliver the spars named in said order when received by him to one R. B. Swayne in Oakland. In executing this order and instruction the captain of the tugboat of the Oakland Launch & Tugboat Company proceeded to Mare Island, and there received from the said storekeeper 20 spars, of which however, 6 were the rejected spars of the plaintiff's assignor, and these he transported to Oakland and delivered to said Swayne, who sold the entire lot to other parties. Later the plaintiff, to whom the 6 rejected spars had been assigned, sent a tugboat to Mare Island for the purpose of having his spars towed to San Francisco, and then for the first time learned that his spars had been delivered to the Oakland Launch & Tugboat Company on the defendant's order. Upon learning these facts the plaintiff, at first orally and then in writing, demanded of the defendant reimbursement for the value of the spars so taken. To these demands the defendant replied, disclaiming any liability for the plaintiff's spars, or any interest in the matter. Whereupon this suit was begun, and resulted in a judgment in the plaintiff's favor for the sum of $900, the value of said spars, and $188.14, interest thereon from the date of the alleged conversion.

[1, 2] The first and in fact the main contention of the appellant is that it was not guilty of the conversion of the spars in question, for the reason that the Oakland Launch & Tugboat Company, which actually received said spars from the government official at Mare Island, was an independent contractor, for whose tortious acts the appellant cannot be held responsible. It would seem to be conceded by the respondent that the authorities cited by the appellant sustain its contention that the said tugboat company, which received the respondent's 6 spars from the storekeeper at Mare Island upon the appellant's order to said storekeeper to deliver to the captain of the tug "20 rejected spars," was, in the receipt of the respondent's spars, an independent contracter, for whose mistake or tortious act the appellant would not be liable; but it seems to us that this is not the determining factor in the case, for the reason that the tugboat company, after receiving whatever spars it did receive under said order, was under its further instruction to deliver said spars to R. B. Swayne in Oakland. Had the appellant's said instruction to the towboat company been to deliver said spars to the appellant directly, and had it done so, and had the appellant sold said spars, its liability for their conversion could not be disputed. The evidence shows that the tugboat company was instructed by the appellant to deliver whatever spars it received from the storekeeper at Mare Island to R. B. Swayne, and that it obeyed said instruction. This in the absence of any showing to the contrary, would have been sufficient to have justified the inference that said R. B. Swayne was to be the agent of said appellant in receiving said spars.

This view is amply supported by the unquestioned fact that the appellant, in its dealing with the United States government in the matter of the sale to it of spars, was acting as the owner of whatever spars it had delivered at the Mare Island Navy Yard, and of whatever portion of said spars the government had rejected, and that it was seeking to have transported by the tugboat company and delivered in Oakland according to its instruction. Having shown such delivery of the 6 spars in question to Swayne, the consignee of the appellant's own selection, and having further proven that, upon being informed by the respondent that its chosen carrier had taken possession of his said spars and delivered them to Swayne and that the appellant made no other response or explanation than to disclaim either liability or interest in the premises, the plaintiff was entitled to rest upon the inference of Swayne's agency which thus arose, and the burden was, in our opinion, cast upon the defendant to rebut such inference by proof of the real relationship between itself and Swayne. This, however, the appellant made no effort to effectually do. In its briefs it is suggested that Swayne was not its agent, but was the agent of one Vallens, from whom it originally procured the spars which it had delivered at Mare Island upon the government requisition; but the proofs which it proffered do not justify this claim, but, on the contrary, seem to show that Swayne, in the receipt of these spars and in their resale, was acting for the appellant and made his accounting to it. For whatever of deficiency there may be in the proofs on this subject, the appellant must be held responsible, since all of the facts from which the relationship between itself and Swayne was to be inferred were within its own knowledge. Upon this branch of the case we are of the opinion that the plaintiff had made out a case of conversion when he had traced his missing spars into the custody of Swayne, who had resold them, and when he had failed to receive any satisfaction from the defendant upon demand for reimbursement for his spars.

[3] The appellant further contends that the court committed several errors in the admission of evidence. We have examined these, and are of the opinion that the appellant was not prejudicially affected by any of said errors (conceding them to be such), since the matters to which they refer cover evidence in regard to facts concerning which there is no substantial dispute.

The judgment is affirmed.

We concur: WASTE, P. J; KERRIGAN, J.

41 Cal. App. 280

MEAD v. MEAD. (Civ. 1974.)

(District Court of Appeal, Third District, California. May 26, 1919.)

1. Trusts ⟹44(2)—Evidence—Sufficiency.

In a suit by a father against his son to compel the reconveyance of land conveyed to the son, on the ground that it was granted subject to a trust, etc., evidence *held* sufficient to sustain a judgment for plaintiff.

2. Witnesses ⟹240(2) — Examination — Leading Questions.

The allowance of leading questions is a matter largely within the discretion of the trial court, and where plaintiff was a very old and feeble man it cannot be held that to allow leading questions to be propounded to him was an abuse of that discretion.

3. Trusts ⟹35(1) — Agreements to Hold in Trust.

In a suit by a father to compel reconveyance of land which he deeded to his son, on the ground that the conveyance was obtained by the son's claim that he would hold the property as trustee for his father, etc., the fact that the statements antedated a conveyance is no ground for denying reconveyance, where the father executed the deed in reliance thereon.

4. Trusts ⟹44(3)—Parol Trust—Rules of Evidence.

The rule that the evidence of a verbal agreement must be clear, satisfactory, and conclusive, where the effort is made to set aside a deed or have it adjudged affected by parol trust, is for the trial and not the appellate court.

5. Trusts ⟹107—Constructive Trusts — Rules of Evidence.

Where it is asserted that a conveyance was subject to a parol trust, and it appeared that the grantor, who was the father of the grantee, was an elderly man, and that a relation of business confidence existed between them, the transaction, being beneficial to the son, will be viewed with most scrutinizing care, and the presumption of fraud arises.

Appeal from Superior Court, Sacramento County; J. E. Prewett, Judge.

Action by W. H. Mead against Frank Mead. From a judgment for plaintiff, defendant appeals. Affirmed.

White, Miller, Needham & Harber, of Sacramento, for appellant.

Driver & Driver and G. W. Bedeau, all of Sacramento, for respondent.

BURNETT, J. The matter in controversy is set out substantially in appellant's brief, as follows:

"Respondent and appellant are father and son respectively. By his bill of complaint respondent seeks a reconveyance of certain real property deeded by him to his son in the year 1911, when respondent was of the age of 76 years. The complaint, which was filed during the fall of 1916, * * * sets forth in substance that for several years prior to the date of the execution of the deed in question respondent was the owner of real property therein described; that he is of advanced age, is ignorant of business and legal transactions concerning the selling and conveying of real estate and title thereto, and that appellant had been his trusted agent and counselor in matters relating to the management of his real estate; that in the year 1909 respondent had executed a contract for the sale of said property on the installment plan, appellant acting as agent and adviser and having entire charge and management of the sale; that subsequently default was made in the payment of installments on the purchase price, whereupon appellant stated to respondent that the title to said real property would be clouded and trouble and litigation would result by the recordation of said contract by the purchasers; that defendant then advised plaintiff to convey said property to him and promised and agreed that if plaintiff did convey said property to him that he would hold the same in trust for plaintiff and would reconvey said property to plaintiff upon demand; that on April 4, 1911, respondent, without receiving any consideration, executed and delivered a deed of said real property to appellant, which was at once placed of record; and that appellant refuses to reconvey the same, although demand has been made. Appellant's answer contains certain denials of the alleged ignorance of the respondent, of the confidential relationship, of his alleged management of the sale, of the making of the alleged parol trust to reconvey on demand, of the execution and delivery of the deed because of the alleged confidential relation, or respondent's ignorance or inexperience or customary reliance upon appellant's advice, etc.; and alleged, on the contrary, that respondent conveyed said property to appellant of his own free will and volition and without any solicitation of any one, and without menace, fraud, or undue influence of any person.

"The issues thus presented were tried on December 5, 1917, by the court sitting without a jury, and the learned judge who presided concluded to grant the prayer of the complaint."

Two points only are made by appellant why this decree should be reversed, to wit: (1) The insufficiency of the evidence to support it, and (2) the abuse by the trial court of its discretion in permitting respondent's counsel to persist in propounding leading questions on direct examination.

[1] We will discuss the above points in the order named. It will not be necessary to quote extensively from the record, as a careful perusal of the same discloses a sharp conflict therein upon the material points, with sufficient and ample evidence to support the judgment of the trial court.

Indeed, the inquiry might properly be limited to one question, and that is whether the son induced the father to execute the deed upon the promise that the former would reconvey to the latter upon demand. If there is evidence in the record to justify an answer thereto in the affirmative, the judgment of

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the lower court must be affirmed. This is admitted by appellant in the following language:

> "It will clear the atmosphere if we concede at the outset of this reply that if our client induced his father to execute the deed in question on a promise to reconvey on request, then the son's refusal to reconvey constitutes such fraud that a court of equity will impose a trust on the legal title the son derived under the deed."

One has only to read the father's testimony to find support for the conclusion that the deed was executed under such conditions. Two or three questions and answers will show this beyond peradventure:

> "Q. I say, did he ask you to deed it to him? A. Yes; he wanted me to give him the deed so Osborne would not do anything. Q. Frank made certain representations to you about the Osborne proposition. Did you depend upon those representations when you made the deed? A. Yes. Q. Was that the reason why you made the deed? A. He would keep it so it would not get out of his hand, so Osborne would not get it. Q. What did Frank say to you, if anything, about deeding it back? A. He said when Osborne left, the property would return to me. He left, so I knew there would be no trouble with his wife. * * * Q. Did Frank tell you that if Osborne left the place he would deed the property back to you? A. Yes."

The trial court undoubtedly believed the witness, and it surely cannot be seriously contended that it is not a fair construction of his language that his son requested the deed and promised to return the property. We discover nothing cryptic or complicated in the testimony of the old man. It is true that he did not express himself as accurately or happily as one might wish, but the learned trial judge apparently understood him, and we are satisfied that he interpreted the language of the witness in accordance with the fair import of its terms. Of course, we might expect some inconsistency, some hesitation, and some confusion on the part of the plaintiff in attempting to narrate the occurrence in reference to the deed. He was an old man, 83 years of age; he was quite deaf; he had been stricken with paralysis; he was feeble in body; his mind, we may surmise, was greatly disturbed by the contemplation of his troubles, and was not altogether unimpaired by the ravages of time. An artist could hardly paint a more vivid picture of his condition than is presented by his own language:

> "I have been very sick. I have been in very bad shape. I wish I had died last night than come up here to-day. I wished I had been found dead. The trouble I have had. The trouble I have over loss of property, loss of property and money and health, too. I wished I had died last night. This morning they make me get up and come here. I wished to God I had died last night."

[2] Appellant complains that so many leading questions were addressed to the witness. This is a matter largely within the discretion of the trial court, and we cannot say that it was abused. The physical and mental condition of the witness justified this manner of examination, and it may be added that there was no curtailment of the right and privilege of cross-examination. Indeed, the court invited the fullest inquiry on the part of appellant. Moreover, the witness, without the suggestion of a leading question, virtually stated that Frank had promised to deed the property back to him. That, at least, is a fair inference from the statement that we have already quoted in reference to the property returning to him.

Appellant contends that there are some inconsistencies in the testimony of plaintiff. That would not be surprising, and, granting the claim, they are not of such character as to demand the repudiation of the testimony as unworthy of belief. In this connection, it is claimed that the trial court misconstrued the following remark of respondent, made at the time of the execution of said deed: "It goes to Frank anyhow. He is going to get all I got. He is to have it." This was in response to the question of the scrivener, "Well, what is going to become of it if you should die?" The court below saw in the statement an implication that the deed was not intended as an absolute conveyance of the fee. Be that as it may, it is clear that the witness was referring to the time of his death, and it was then that Frank was to have all the property. This statement is not at all inconsistent with the theory that the property was to be returned to plaintiff upon the condition stated in his testimony. But the case is not to turn upon the proper construction of this somewhat doubtful expression, since there is direct evidence, as we have seen, in favor of respondent's position. It may be added that plaintiff was not required to explain to the scrivener the agreement between him and his son, and even if he had intentionally misled him in that respect no one would have any legal cause to complain.

[3] A further contention is that, if the father and son had such communications as are asserted by the former, they antedate the execution of the deed and constituted only negotiations that were superseded by the terms of the written instrument. As to this, appellant is in error. There is some evidence that said understanding was expressed at the time the deed was delivered. At any rate, it was not necessary for appellant to repeat the promise to make it binding, and it was just as significant made days before the transaction was consummated, provided it induced the father to convey the property. That the said promise did so move the father the trial court was entirely justified in finding.

[4] It is further contended that the general rule requiring only substantial support for

the finding of the lower court does not apply to this class of cases where an effort is made to set aside a deed or to have it adjudged as affected by a trust not expressed in writing. The claim is that the evidence of a verbal agreement in such cases must be "clear, satisfactory, and conclusive," and that this case does not meet that test. We reflect, though, that such rule is for the trial and not the appellate court (Brison v. Brison, 90 Cal. 334, 27 Pac. 186), and we have no doubt that the evidence so appeared to the judge below.

[5] Moreover, there are certain circumstances established by the evidence which take this case out of the general rule in reference to the burden of proof. These we may briefly mention. Of first importance is the fact that the relation of trust and confidence existed between the parties. This is virtually conceded by appellant. At any rate, besides the inference created by the natural relation of father and son, the evidence shows that the father reposed implicit faith in his son, and that he had for years relied upon his advice in business transactions and maintained the closest bond of intimacy.

The record reveals this intimacy and shows the willingness of the son to profit by the situation thus created. To this circumstance must be added the fact that plaintiff had no independent advice, and the conveyance was without valuable consideration. Under such circumstances, the decisions hold uniformly that the transaction resulting in benefit to the trustee should be viewed with "the most scrutinizing jealousy," and that the presumption of fraud attaches and must be overcome by evidence that the deed is what it purports to be. Yordi v. Yordi, 6 Cal. App. 20, 91 Pac. 348; Nobles v. Hutton, 7 Cal. App. 15, 93 Pac. 289; Piercy v. Piercy, 18 Cal. App. 755, 124 Pac. 561; Soberanes v. Soberanes, 97 Cal. 145, 31 Pac. 910; Odell v. Moss, 130 Cal. 358, 62 Pac. 555; Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509.

In the last of these decisions it is said:

> "The burden of proof usually rests upon the person asserting fraud, but when one bases a claim upon a contract obtained from a person to whom he stands in a relation of trust and confidence, it becomes his task to prove that he exhibited that uberrima fides which removes all doubt respecting the fairness of the contract."

However, the principle is well settled, and we need go no further in its exposition.

Viewing the evidence in the light of this presumption, there can be no earthly doubt of the justification for the court's finding.

What we have already said is, we think, a sufficient answer to appellant's second contention. We cannot say that the course pursued as to leading questions resulted in prejudice to appellant. It cannot be assumed that by the form of the question the witness was misled or induced to commit perjury. The trial court was in a position to determine whether such procedure was in the interest of justice, and it is not for us to say that error was thereby committed.

Probably the only surprising thing in the matter is that the son should have contested his father's claim. It is to be hoped that such cases are of infrequent occurrence. It is fair to suppose that nearly every son, even under the admitted circumstances of this case, would rather surrender the property to the father, who had earned it and believed he was entitled to have it reconveyed, than, by insisting upon a sordid legal right, bring his aged parent in sorrow to his grave.

It may be added that the son does not present a pleasing spectacle, when, by his testimony, he virtually brands his father as a perjurer. It would have been much better for him if he had obeyed the Commandment: "Honor thy father and thy mother."

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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41 Cal. App. 291

COLLINS v. BICKNELL. (Civ. 1870.)

(District Court of Appeal, Second District, Division 1, California. May 27, 1919.)

1. PLEADING 🔑355—ANSWER AFTER TIME—STRIKING.

A court in proper case may, in the exercise of its discretion, strike out an answer filed after time.

2. PLEADING 🔑358—FRIVOLOUS ANSWER—STRIKING.

Where the answer and cross-complaint, which were filed by defendant after expiration of the time for filing the same, were wholly frivolous and without merit, so that plaintiff would have been entitled to judgment on the pleadings, defendant cannot complain of a judgment entered on an order striking from the records the answer and cross-complaint.

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by S. L. Collins against Annie G. Bicknell. From a judgment, entered upon an order granting plaintiff's motion to strike from the record an answer and cross-complaint, filed by the defendant after expiration of time within which to file the same, defendant appeals. Affirmed.

J. Irving McKenna and Catherine A. McKenna, both of Los Angeles, for appellant.

Clyde Bishop and B. E. Tarver, both of Santa Ana, for respondent.

SHAW, J. This is an appeal from a judgment entered upon an order of court granting plaintiff's motion to strike from the records an answer and cross-complaint filed by defendant after the time within which to file the same had expired.

[1, 2] The action was to recover upon a promissory note, copy of which was set forth in the complaint. A demurrer to a former pleading had been sustained, and defendant granted 10 days within which to file an amended answer and cross-complaint. The pleading stricken out was not only frivolous, sham, and wholly without merit, but was not filed until after the expiration of the time granted for the filing thereof. That a court in a proper case may, in the exercise of its discretion, strike out an answer so filed, admits of no question. Bowers v. Dickerson, 18 Cal. 420; Acock v. Halsey, 90 Cal. 216, 27 Pac. 193; Lunnun v. Morris, 7 Cal. App. 710, 95 Pac. 907. In the absence of a showing of abuse of such power, no cause exists for complaint by reason of the making of such order. In the instant case, as stated, the answer was wholly without merit and alleged no facts constituting any defense to the cause of action stated in the complaint; nor were any facts alleged in the cross-complaint upon which any affirmative relief could be granted defendant. Indeed, waiving all objection as to the pleading not being filed within time, plaintiff, upon demand therefor, would have been entitled to judgment on the pleadings.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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41 Cal. App. 275

PEOPLE v. VICKROY. (Cr. 649.)

(District Court of Appeal, Second District, Division 1, California. May 26, 1919.)

1. Criminal Law ⚷1159(3, 4) — Review — Weight of Evidence — Credibility of Witnesses.

Court of Appeals is not empowered to weigh conflicting evidence or pass upon the credibility of witnesses.

2. Criminal Law ⚷747—Jury—Weight of Evidence.

The weight of evidence as to disputed fact is for the jury.

3. Rape ⚷54(1) — Evidence — Uncorroborated Testimony of Prosecutrix.

In a prosecution for rape of female under 18 years of age, defendant can be convicted upon the uncorroborated evidence of prosecutrix.

4. Criminal Law ⚷723(2) — Trial — Conduct of Counsel—Argument to Jury.

In prosecution for rape of female under 18 years of age, statements by district attorney during argument to jury: "A man who would commit such a crime as is here charged against this defendant is a moral leper. He is a Hun. He becomes a vile ulcer suppurating on the shoulder of decency. He is a moral cancer on the breast of humanity"—*held* proper.

5. Criminal Law ⚷1037(2)—Review—Misconduct of Counsel.

Alleged misconduct of counsel in argument to jury will not be considered on appeal, though exception thereto was taken, where court was not requested to instruct jury to disregard it, unless the character thereof be such that its effect cannot be removed by such an instruction.

6. Witnesses ⚷270(2) — Cross-Examination—Impeachment—Conspiracy.

In prosecution for rape of female under 18 years of age, defendant was not entitled, during cross-examination of prosecutrix, to impeach her testimony by showing acts and conversations of others in which she had no part, on theory that a conspiracy existed to have defendant arrested for chastisement of prosecutrix's sister, even though there was evidence of such conspiracy; the fact of such conspiracy being collateral to the issue.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Charles J. Vickroy was convicted of rape upon a female under 18 years of age, and from judgment of imprisonment and an order denying motion for new trial he appeals. Affirmed.

Irwin & McNamara, of Fresno, and Edwards & Smith, of Denuba, for appellant.

U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was charged with and convicted of the crime of rape, alleged to have been committed upon a female under the age of 18 years. Judgment of imprisonment followed, from which and an order denying his motion for a new trial he has appealed.

[1-3] Counsel for appellant, claiming the evidence is insufficient to justify the verdict, devote much of their argument, not to showing a want of sufficient evidence, but to a discussion of the weight which they claim should have been accorded the testimony of the respective parties. As we have so often said, but apparently without purpose, this court when considering cases on appeal is not empowered to weigh conflicting evidence or pass upon the credibility of witnesses. On this point, suffice it to say that the jury, whose province it was to weigh and determine the value of the evidence touching the fact in dispute, heard the direct and positive testimony of the prosecutrix, a girl some 12 or 13 years of age. If true, it proves conclusively that defendant was guilty of the crime charged. Nothwithstanding his denial and testimony tending to establish an alibi, the jury, under proper instructions as to the law applicable, found him guilty, thus, when

compared with evidence offered on behalf of defendant, showing its belief in the truth of her testimony. The fact that she was contradicted by defendant, or even though she told conflicting stories, raises no question of law for the determination in this court on appeal. In this connection, appellant insists that, since there was no evidence offered in corroboration of the testimony of the prosecutrix (which fact, for the purposes of this case may be conceded), it, standing alone, even if believed by the jury, was insufficient to justify the verdict. In other words, he claims that as a matter of law the testimony of one upon whom a statutory rape has been committed, unless corroborated, will not warrant the conviction of the accused. We do not so understand the law; indeed, the contrary is held in People v. Stewart, 90 Cal. 212, 27 Pac. 200; People v. Gardner, 98 Cal. 127, 32 Pac. 880; and People v. Akey, 163 Cal. 54, 124 Pac. 718, in the last of which cases it is said:

> "It is a rule of evidence in this state that, in a prosecution for rape, the defendant may be convicted upon the uncorroborated testimony of the prosecuting witness."

Hence, there is no merit in the appellant's contention that the court committed prejudicial error by instructing the jury that it was not essential to the conviction of defendant that the testimony of the prosecuting witness should be corroborated. While it is true that in exceptional cases judgments rendered upon convictions for rape where the testimony of the complaining witness was uncorroborated have been reversed, circumstances were made to appear throwing discredit upon such testimony or tending to show the improbability thereof. People v. Ardaga, 51 Cal. 371. No facts are made to appear bringing this case within the exception, and the rule announced above prevails.

The instructions given, taken as a whole, went to the full extent in protecting defendant in his substantial rights; the court, among other things, telling the jury that, owing to the nature of the charge from which it is difficult for a defendant to clear himself, they should examine the testimony of the prosecutrix with caution, and, unless they were "satisfied to a moral certainty and beyond a reasonable doubt that the case is made out by evidence convincing you to a moral certainty and beyond all reasonable doubt," should find defendant not guilty.

[4, 5] It is also claimed that the district attorney was guilty of misconduct, the effect of which was to prejudice the right of defendant in the minds of the jury. An examination of that part of the record upon which this claim is based discloses no ground therefor. Appellant's contention in this behalf is fairly illustrated by the fact that the district attorney in the course of his argument said:

> "I tell you, gentlemen of the jury, a man who would commit such a crime as is here charged against this defendant is a moral leper. He is a Hun. He becomes a vile ulcer suppurating on the shoulder of decency. He is a moral cancer on the breast of humanity."

To which, in response to defendant's objection, the court replied:

> "I see nothing wrong in counsel's remark."

That any decent person should entertain a contrary view to that expressed by the district attorney as to this most heinous offense is to us inconceivable. Moreover, even were there any merit in the claim that the district attorney was guilty as contended, the misconduct was not assigned as prejudicial, nor was any request made that the jury be admonished to pay no heed to it, without which action there is no ground for complaint in the appellate court. People v. Vaughn, 25 Cal. App. 736, 147 Pac. 116, 117. Where the district attorney is guilty of misconduct in the course of his argument to the jury, a mere exception thereto by the defendant is no ground for reversal of the judgment. It must be made to appear that it was improper and prejudicial and at the time assigned as error, accompanied by a request that the court instruct the jury to disregard it, unless the character thereof be such that its effect cannot be removed by such an instruction. People v. Shears, 133 Cal. 154, 65 Pac. 295.

[6] The court appears to have accorded appellant the widest latitude in the cross-examination of the prosecuting witness for the purpose of showing ill feeling or animus on her part toward defendant due to chastisement of her sister, for which act it seems there had been some talk among the members of the family of having him arrested. Upon this showing it is claimed a conspiracy existed which defendant was entitled to prove by independent evidence, followed by the claim that the prosecutrix was bound by the acts of her coconspirators. There was no evidence of a conspiracy to have defendant arrested for correcting the sister; but, assuming there was, such fact was collateral to the issue being tried, and neither tended to prove nor disprove defendant's guilt. In so far as he was entitled, defendant was given every opportunity in the cross-examination of the prosecuting witness, but he was not, upon the theory that a conspiracy existed, entitled to impeach her testimony by showing acts and conversations of others in which she had no part.

Owing to the gravity of the case, and notwithstanding the want of a proper and intelligible brief or argument on the part of appellant directing the court's attention to what he deems to be errors, together with the reasons for such claims, we have carefully examined and read the entire record and satisfied ourselves that in his trial defendant was accorded every right to which he was legally entitled, and that it discloses no error which can be held to have prejudiced him in his substantial rights.

The judgment and order are therefore affirmed.

We concur: CONREY, P. J.; JAMES, J.

41 Cal. App. 373

PEOPLE v. FLOOD. (Cr. 645.)

(District Court of Appeal, Second District, Division 1, California. June 5, 1919.)

1. CRIMINAL LAW 🔑383—EVIDENCE—IDENTIFICATION.

In a forgery case, a bank teller's testimony that accused presented the check in question, but that he could not positively identify him, is competent.

2. CRIMINAL LAW 🔑511(9)—CORROBORATION OF ACCOMPLICE.

In a forgery case, an accomplice's testimony was sufficiently corroborated, as required by Penal Code, § 111, by a witness' testimony that accused had borrowed his typewriter to aid in the forgery and by a bank teller's partial identifications of accused.

3. CRIMINAL LAW 🔑508(1)—TESTIMONY OF ACCOMPLICE—OTHER OFFENSE.

In a forgery case, an accomplice's testimony that he and accused had attempted to pass another forged check upon another bank the same day was admissible.

4. CRIMINAL LAW 🔑508(1)—EVIDENCE—ACCOMPLICES.

The competency of an accomplice's testimony is governed by the same rules as apply to the testimony of other witnesses.

5. CRIMINAL LAW 🔑383—ADMISSIBILITY OF EVIDENCE—CONVICTION OF ANOTHER.

In a forgery case, excluding court records in which another had pleaded guilty to the same offense is proper, since that would not tend to establish accused's innocence, for the same offense might have been committed by several persons.

6. CRIMINAL LAW 🔑419, 420(1)—EVIDENCE—HEARSAY.

In a forgery case, testimony that a third party had admitted to the witness that he had committed the forgery in question is inadmissible, because hearsay.

7. CRIMINAL LAW 🔑1186(4)—APPEAL AND ERROR—EVIDENCE.

Under Const. art. 6, § 4½, a forgery conviction will not be reversed for alleged errors in evidence rulings unless the record shows a miscarriage of justice.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Charles P. Flood was convicted of forgery, and appeals. Affirmed.

Paul W. Schenck and Richard Kittrelle, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

SHAW, J. Defendant, jointly with Robert A. Benkert, was, by information containing two counts, charged with the crime of forging two checks, copies of which are set forth in the information. Upon a separate trial given him, he was convicted upon both counts of the information. His motion for a new trial was denied, and from this order and the judgment of imprisonment pronounced he has appealed.

Of the several alleged errors assigned as grounds for reversal, the most important thereof, says counsel for appellant, is want of evidence sufficient to corroborate the testimony of Benkert, who was a self-confessed accomplice of defendant in the commission of the crime. It appears from the testimony of Benkert that in January, 1918, he and defendant, who were engaged in business together, conceived the idea of obtaining money from banks by means of forged checks. With that end in view, they procured a pad of checks upon the Exchange National Bank of Long Beach, and during the week ending with January 12, 1918, prepared the forged checks described in the information, one of which was made to the order of John Norton, signed by R. D. Lindsay and certified by W. J. Gardner, cashier of said Exchange National Bank, payable for the sum of $4,520.80; the other purported to be drawn by Ed Collins, payable to L. N. Brooks and likewise certified, calling for the payment of $4,855.75; and both of which purported to be indorsed by the payee named therein, and both of which were marked "O. K.," with the initials "J. A. G." following. The names of the makers and payees in these checks were fictitious, and the name of Gardner, as well as everything contained in the checks, was forged. The initials "J. A. G." purported to be the initials of J. A. Graves, vice president and manager of the Farmers' & Merchants' National Bank, by which the checks were paid when presented. It was the custom of the bank on Saturdays to close its doors at 12 o'clock, as a result of which there was more or less congestion of business immediately before that hour. On Saturday, January 12, 1918, shortly before 12 o'clock defendant and Benkert, pursuant to their agreement so to do, went to the Farmers' & Merchants' Bank, at which time defendant presented one of the checks to one of the tellers therein, who paid the same, and Benkert presented the other check to one of the tellers, who likewise paid it. Thereupon they left the bank and subsequently divided the money equally between the two.

That the uncontradicted testimony to Benkert conclusively shows that the defendant committed the forgery and unlawfully and feloniously uttered, published, and passed the checks upon which he fraudulently and feloniously procured the money, admits of no controversy. Nevertheless, under the provisions of section 1111, Penal Code, such testimony is insufficient upon which to warrant the conviction, unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense. It appears from Benkert's testimony that in the preparation of the checks a typewriter was used; that a few days prior to January 12th defendant and Benkert met in a saloon at Venice; that defendant left Benkert, stating that he would try to find a typewriter upon which to do the work; that shortly thereafter he returned and stated they could use the typewriter in the office of Mr. C. G. Parkhurst. Thereupon, it being in the evening and after dark, they went to the office of Parkhurst, Benkert taking in his hand the pad of checks, where the typewriting upon the checks was executed upon the typewriter of Mr. Parkhurst. The forging of the names of the purported makers to the checks was done in the office of defendant and Benkert, located in the city of Los Angeles. Other indorsements on the checks were made at the Farmers' & Merchants' Bank. In corroboration of this testimony Mr. Parkhurst testified that he remembered an occasion, soon after the first of the year, when Mr. Flood came to his office and asked for the privilege of using his typewriter; that it was after dark; that he replied in the affirmative; whereupon defendant went out and came back with Mr. Benkert, who had some papers in his hand; that they went into a back room and, turning on the lights, closed the door and used the typewriter; that he, telling them that when they got through to put out the lights and close the door, went away. The same typewriter was produced in court at the trial and an exemplar of the typewriting found upon the forged checks was introduced in evidence, which without contradiction showed that the work done upon the typewriter in court was identical with that upon the forged checks.

[1] That this evidence was inculpatory and tended strongly to connect the defendant with the offense, to our minds, admits of no doubt. People v. Morton, 139 Cal. 719, 73 Pac. 609. Moreover, Mr. Hogan, the teller who paid one of the checks, testified that, while he could not say absolutely that defendant was the man who presented the check, "my best opinion is that the defendant presented the check to me; that is my best opinion;" that in size, height, and general appearance he compared favorably with defendant and appeared to be the same man.

[2] While this witness was not absolutely certain of defendant's identity, nevertheless his testimony tended to establish such fact, and this was sufficient to entitle it to admission, the weight thereof being for the jury to determine. People v. Young, 102 Cal. 411, 36 Pac. 770; People v. Rolfe, 61 Cal. 540; People v. Barker, 114 Cal. 617, 46 Pac. 601. In addition to all of this, there was other equally cogent evidence which clearly tended to connect defendant with the commission of the crime. "Strong corroborative evidence is not necessary. * * * Even though the circumstances constituting the evidence offered and received in corroboration of the testimony of an accomplice be slight, such evidence is nevertheless sufficient to meet the requirements of the law if, in and of itself, it tends to connect the accused with commission of the offense." People v. Martin, 19 Cal. App. 295, 125 Pac. 919; People v. Garwood, 11 Cal. App. 665, 106 Pac. 113; People v. McLean, 84 Cal. 482, 24 Pac. 32.

[3] For the purpose of showing guilty knowledge and intent, Benkert was allowed, over defendant's objection, to testify to matters in connection with an attempt made on the same day and at about the same time to pass another forged check upon the California Commercial & Savings Bank, which ruling is assigned as error. While appellant concedes the general rule that such evidence is proper, as held in People v. Whalen, 154 Cal. 472, 98 Pac. 194, and People v. Bercovitz, 163 Cal. 636, 126 Pac. 479, 43 L. R. A. (N. S.) 667, he nevertheless insists that the rule does not apply to such testimony when given by a codefendant.

[4] The fact that a witness is an accomplice constitutes no ground upon which to base an objection to his testimony, which as to its competency is governed by the same rules applicable to testimony of witnesses having no part in the commission of the offense charged. People v. Grundell, 75 Cal. 301, 17 Pac. 214. The provision of the statute requiring that the testimony of an accomplice must be corroborated by other evidence tending to connect the defendant with the commission of the offense before he can be convicted, "does not mean that the accomplice may not be believed." People v. Hoosier, 24 Cal. App. 746, 142 Pac. 514. The testimony of Benkert with respect to the attempted negotiation of the check upon the California Commercial & Savings Bank is fully corroborated by two witnesses.

[5] It appears that one Carl Du Vey was charged with the same crime of which defendant was convicted, to which charge Du Vey entered a plea of guilty. Error is predicated upon the ruling of the court in refusing to permit the introduction of the judgment and records in the Du Vey case, and also in

sustaining objections to testimony sought to be elicited from one Stemshorn that Du Vey cashed one of the checks set forth in the information charging defendant with the commission of the crime, and that Du Vey made statements to one George Pross which tended to show that Du Vey committed the offense, the purpose of all of which was to show that defendant did not commit the offense. In the case of People v. Mitchell, 100 Cal. 328, 34 Pac. 698, a general statement is made that it is always proper to show that some person other than the defendant committed the crime with which he is charged. While a correct statement of the law as applied to the circumstances involved in that case, it is inapplicable where the offense charged could as well have been committed by a half-dozen persons as by one. Conceding that Du Vey was guilty, such fact would not tend to establish the innocence of defendant. "The evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence. * * *" 16 Corpus Juris, 560, § 1085.

In People v. Johnson, 47 Cal. 122, the defendant and one Emerson had been jointly indicted for the crime of burglary. It was there held that the conviction of Emerson did not raise a presumption that defendant was innocent.

[6] As to the testimony sought to be elicited from the witness Pross as to the statements made to him by Du Vey, it was clearly hearsay and the objection thereto was properly sustained. Evidence of "the declaration of another person that he committed the crime, is not admissible." Hence the court did not err in sustaining objections to the proffered evidence consisting of the record in the case of Du Vey and his admission that he passed one of the checks.

[7] There are a number of alleged errors predicated upon rulings of the court in the admission and rejection of evidence, appellant's contentions as to some of which are disposed of in the views hereinbefore expressed. As to the others, it may be said the record discloses beyond the shadow of doubt that defendant committed the crime with which he was charged, and, conceding that some of the numerous rulings of the court may have been erroneous, it it apparent that they did not result in a miscarriage of justice. "Charity covers a multitude of sins," and it is equally true that section 4½ of article 6 of the Constitution covers a multitude of errors; indeed, all errors predicated upon "the improper admission or rejection of evidence, * * * unless, after an examination of the entire case, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." To justify a reversal it is not sufficient, standing alone, that error be made to appear, but "that the error complained of has resulted in a miscarriage of justice." Unless such fact is made to appear from the record, it is the duty of the court, notwithstanding the alleged error, to affirm the judgment.

An examination of appellant's objections to the information, based upon alleged insufficiency thereof, shows the attack to be groundless, and it is unnecessary to discuss the same.

The judgment and order denying a new trial are affirmed.

We concur: CONREY, P. J.; JAMES, J.

41 Cal. App. 352

KLINGENSTEIN v. MIEHLE PRINTING PRESS & MFG. CO. et al. (Civ. 2827.)

(District Court of Appeal, First District, Division 1, California. June 3, 1919. Rehearing Denied by Supreme Court July 31, 1919.)

1. Master and Servant 🔑277 — Injury to Servant — Evidence of Relation — Independent Contractor's Assistant.

In an action for death of plaintiff's intestate by the fall of a printing press which he was assisting to move and install in the purchaser's pressroom under the direction of the seller's installer, evidence *held* to warrant a finding that the intestate was at the time in the service of the seller, and not of an independent contractor engaged to convey the press to the pressroom floor by whom intestate had been engaged.

2. Master and Servant 🔑189(2)—Injuries to Employé——Liability for Acts of Representative.

A printing press company's erector who is in charge of the work of uncrating, assembling and erecting a press sold by the company and who is its sole representative on the ground at the time of injury to one assisting him in the work has such authority that it is liable for his acts or omissions.

3. Trial 🔑133(2)—Misconduct of Counsel—Reference to Insurance.

Where one of defendant's witnesses, who was in its employ, stated that his expenses were being paid by an insurance company, *held* that, where the answer was stricken, and, when the subject was later opened up, the jury was instructed to disregard that matter, any error was cured.

Appeal from Superior Court, Humboldt County; Clifton H. Connick, Judge, at the trial, and George D. Murray, Judge, at the motion for new trial.

Action by B. Mary Klingenstein, as administratrix of the estate of Frederick Klingenstein, deceased, against the Miehle Printing Press & Manufacturing Company and another. From a judgment against it alone, the named defendant appeals. Affirmed.

Frank McGowan, Walter H. Linforth and Mastick & Partridge, all of San Francisco, for appellant.

Mahan & Mahan and Coonan & Kehoe, both of Eureka, for respondent.

RICHARDS, J. This is an appeal from a judgment in plaintiff's favor and against the defendant Miehle Printing Press & Manufacturing Company for the sum of $15,000 for damages arising out of the death of one Frederick Klingenstein, the husband of plaintiff, through the alleged negligence of said defendant. As to the codefendant McGaraghan the verdict and judgment exonerated him from liability.

There is no substantial dispute as to the facts of the case. On and prior to the 7th day of August, 1913, the defendant Miehle Printing Press & Manufacturing Company was the owner of a printing press described as a No. 1 Pony Miehle Printing Press, which it on said day contracted to sell and deliver to the firm of Lambert & McKeehan, printers, at Eureka, the purchase price to be paid in installments during a period of two years thereafter, title to remain in the seller until the installments were fully paid. On August 27, 1913, the said defendant Miehle Printing Press & Manufacturing Company, in contemplation of the delivery of said press to the purchaser, entered into a written contract with its codefendant McGaraghan, a drayman of Eureka, wherein the latter offered to "unload, haul and handle" said press and to convey the same "from the steamer to the pressroom of Lambert & McKeehan for the price of $7.50; we to furnish all necessary ropes, planks, tools, etc., and we to be responsible for damages done to property or persons while said press is in our care. And we agree to allow use of ropes, planks, tools, etc., free of charge to your erector while erecting press. Any labor desired by you to assist your erector in setting press will be furnished you by us on request at 50 cents per hour per man." This offer, which was upon one of the printed forms of the said printing press company, was negotiated, signed, and accepted by the parties thereto at the pressrooms of the said purchasers of the press and after an inspection of the premises by McGaraghan, accompanied by the agent of his said codefendant, during which it appeared that the press was to be delivered through a back way to the pressroom and admitted to the floor thereof through the back door. At the time this contract was entered into none of the immediate parties to it knew where the press was to be set up in the pressroom, since that, apparently, was a matter to be determined by the seller's erector, who was later to appear upon the scene. The press arrived at the steamer landing in Eureka on or about October 6, 1913, and on that day also one J. C. Nicholson also reached that city. Said Nicholson was an employé of the said defendant Printing Press Company charged with the duty of erecting and installing said press. He had been engaged in the business of erecting printing presses by his said employer for some eight or nine years, and his duties, as defined by himself when on the witness stand on behalf of his said employer, were "to assemble the machine and put it in running order; handle the various parts of it." In the performance of these duties, according to his own statement, he was to uncrate the several parts of the press for the purpose of assembling, putting in place, and erecting the same. Nicholson had been sent to Eureka by his said employer in conformity with its agreement with the purchasers of the press providing that—

> "The vendor agrees to send a competent man to erect and put said press in first-class running order."

On reaching Eureka, Nicholson went to the pressrom, and there determined the place upon the floor thereof where the press when erected was to stand, and directed the removal of certain other machinery and appliances then occupying said floor so as to make room for the assembling and erection of the press. He then inquired as to what drayman was to haul the press to its destination, and was informed that McGaraghan had the contract so to do. He sought McGaraghan and arranged for the delivery of the press on the following day, and for the engagement of two men who were to assist him in the installation of the press. McGaraghan thereupon enlisted the services of the deceased, Frederick Klingenstein, and of one P. W. Davis, who were to assist him in the performance of his agreement for the drayage of the press, and were also to continue to assist Nicholson in the erection of the press after McGaraghan's duties in respect to its delivery were done. On the following morning McGaraghan with his said two assistants loaded the main body of the press, weighing about two tons, on his dray, and hauled it to the rear of Lambert & McKeehan's printing office, unloading it in the alley, and, conveying it through the back door of the pressroom, deposited it on the pressroom floor inside the door. Nicholson was there clad in working clothes and ready to begin the work of assembling and installing the press. The work of conveying the heavy portion of the press, which was crated and lying on the floor of the pressroom, was immediately entered upon by Nicholson, and with the assistance of Klingenstein and Davis. McGaraghan went out to get some other parts of the machine, but presently returned, and was standing by while the work of moving the heavy crate in the direction of the spot which the press when fully assembled was to occupy. Mr. Nicholson suggested the advisability of putting rollers under the crate, but Davis thought it could be handled with a jack, and Nicholson apparently acquiesced in this suggestion. While the press was thus being moved across the floor, which at the time was greasy and slippery with oil, the crate tilted over and fell upon Klingenstein, causing his death, as a result of which this action was instituted by his widow against both of the defendants herein.

[1] It does not seem to be seriously contended that the plaintiff is not entitled to recover against one or the other of these defendants, the main question discussed upon this appeal being that at the moment of the accident it was McGaraghan, and not the appellant herein, who was in charge of the work of moving the crate containing said press across the pressroom floor, which work he was performing under the terms of his contract with his codefendant, and in the doing of which he was an independent contractor, for whose acts or omissions of duty this appellant cannot be held responsible. We are unable to give our support to this contention upon the facts of this case, which we deem amply sufficient to have justified the jury in finding a verdict against the defendant (appellant) and in exoneration of McGaraghan. The contract of appellant with McGaraghan was that he should convey the press in question "to the pressroom floor" of its purchaser. This contract had been fulfilled when the press was laid upon the pressroom floor, and when, as the evidence sufficiently showed, the appellant's employé Nicholson undertook the task of moving it to the particular place upon said floor where the work of its installation was to be performed. The two assistants of McGaraghan, who were his employés while his contract was being executed, became the employés of the appellant by the express terms of its agreement with McGaraghan from the moment Nicholson's duties began.

It is not necessary to further review the evidence which justified the jury in reaching this conclusion, but it might be pointed out that the acts of the appellant's employé, Nicholson, immediately attending and succeeding the death of Klingenstein, as testified to by himself, indicate that he considered himself as in charge of the situation at the time the casualty occurred, as, for example, he was actually occupied in helping to move the press when it fell upon Klingenstein; he directed Davis to hire another man to replace the deceased; he proceeded on the morrow to raise and uncrate the press; he paid on behalf of his employer the wages of Davis and of the successor of Klingenstein.

[2] It is contended by the appellant that Nicholson was a mere mechanic without authority in the premises, but the evidence of the nature, extent, and importance of Nicholson's past and present employment and duties does not support this view. His business was that of an erector or installer of printing presses. He had been in the employ of the appellant in that capacity for several years. He was in full charge of the work of uncrating, assembling, and erecting this press, of selecting its location and of putting it into operation. He had the power of selection and control of those who were to assist him in this work. He was, in fact, the appellant's sole representative on the ground at the time of the accident in which Klingenstein lost his life, and hence his acts or omissions in the premises must be held to be the acts or omissions of his employer, the appellant herein.

[3] There are several assignments of error in the rulings of the trial court and in its instructions to the jury. We have examined these, but do not deem it necessary to refer to them in detail. As to the rulings of the court in the admission or rejection of certain evidence we find no prejudicial error. Upon oral argument appellant's counsel waxed warm over the alleged misconduct of the plaintiff in respect to the question as to whether Nicholson's expenses at the trial were being paid by "an insurance company," as tending to prejudice the appellant's case in the minds of the jury; but the record shows that the basis for this inquiry was supplied by the witness Nicholson himself, who volunteered the statement that his expenses were thus being paid. This portion of his answer was stricken out by the court, and, the subject thus opened being later adverted to, the court ruled out all evidence on the subject as improper, and instructed the jury to disregard all questions and answers touching the subject. We are satisfied that the error, if any, growing out of the witness Nicholson's volunteered remark was thus sufficiently cured.

As to the matter of the court's instructions, we have examined these as a whole, and are satisfied that they fully, fairly, and adequately state the law of the case, and that whatever instructions asked by the appellant the court refused to give were fully covered by those which were given by the court.

Finding no error in this record, the judgment is affirmed.

We concur: **WASTE, P. J.; KERRIGAN, J.**

41 Cal. App. 292

TOBEY v. RANDALL. (Civ. 1883.)

(District Court of Appeal, Second District, Division 1, California. May 27, 1919.)

APPEAL AND ERROR 🔑766—BRIEFS—PRINTING PORTION OF RECORD.

Under Code Civ. Proc. § 953c, providing that in cases appealed upon typewritten transcripts the parties must print in their briefs the material portions of the record, etc., the court will not search typewritten transcript for further information; and, where parties disagree as to facts, and appellant has not complied with rule, the case will be affirmed.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Arizona Tobey against Frances H. Randall. Judgment for defendant, and plaintiff appeals. Affirmed.

Earl Rogers and Milton M. Cohen, both of Los Angeles, for appellant.

Gordon, Elliott & Gordon, for respondent.

CONREY, P. J. In the briefs of counsel for appellant we are informed that this is an action to compel specific performance of a contract; and that the appeal is from a judgment entered after an order sustaining a demurrer to the second amended complaint, without leave to amend. The opening brief contains a statement that the second amended complaint "alleges in summary" certain facts concerning transactions between plaintiff and defendant. But the learned writers do not favor us with even a summary statement of the contents of the demurrer which was so fatal to their third attempt to state a cause of action.

Where the record is prepared under the "alternative method" now allowed, and the parties do not cause to be printed in their briefs or in a supplement thereto those portions of the record which they desire to call to the attention of the court, the court will not search the typewritten transcript for further information. Code Civ. Proc. § 953c; Barker Bros. v. Joos, 171 Pac. 1085; Magee v. Burt Motorcar Co., 174 Pac. 687; Scott v. Hollywood Park Co., 176 Cal. 681, 169 Pac. 379; Chandlee v. McCalla (Sup.) 178 Pac. 709.

The arguments in the briefs in this case indicate (although the facts do not so appear in the "summary" of the complaint) that the agreement which plaintiff seeks to have specifically performed was one not to be performed within a year from the making thereof, and that the agreement was not in writing and subscribed by the defendant. Appellant in her brief says that respondent "agreed, contracted, and represented" that from the water supply owned by her on land adjoining that sold by her to appellant the respondent would furnish, from the system already in operation, ample water for all flats and dwellings erected by appellant on the property purchased by her. In the brief of respondent we are told that it is nowhere specifically alleged that the defendant entered into a contract to do any of the matters set forth in the complaint.

These illustrations show that counsel disagree about the facts, and that we cannot ascertain the precise facts upon which the appeal should be determined, without examining the typewritten record. While it would not be difficult, in the case of a short record, for the court to disregard the rule, it must not be forgotten that in many cases the records are long and complicated. The rule exists in the statute, for the very purpose of compelling counsel to select from the record, and accurately present for convenient reference, those portions of the record which are necessary to a decision. The time which judges might consume in searching through the original transcript of a case is time taken from other cases that wait for attention.

But the rule should be uniformly enforced, or else should be abandoned. We have no inclination to declare it abandoned, and such declaration would be out of harmony with the law, even if we were so inclined.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

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41 Cal. App. 308

HANNA v. INTERSTATE BUSINESS MEN'S ACC. ASS'N OF DES MOINES, IOWA. (Civ. 2779.)

(District Court of Appeal, First District, Division 2, California. May 28, 1919. Rehearing Denied by Supreme Court July 24, 1919.)

INSURANCE 🔑530 — ACCIDENT INSURANCE POLICY.

Though an accident policy, providing for payment of a specified sum in case of the death of the insured on account of bodily injuries accidentally sustained, declared that if injury should be a hernia the limit of liability should be $50, the beneficiary is entitled to recover the full amount, where the insured suffered an accident causing a hernia of which he shortly died; the hernia being regarded as the result of the accident and the accident itself and not the hernia as the cause of death.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Sam Ellen Hanna against the Interstate Business Men's Accident Association of Des Moines, Iowa. From a judgment for plaintiff, defendant appeals. Affirmed.

R. M. Haines and Dunshee, Haines & Brody, all of Des Moines, Iowa, and Hadsell, Sweet & Ingalls, of San Francisco, for appellant.

Jacobs & Oliver, of San Francisco, and Frank E. Green, of Seattle, Wash., for respondent.

HAVEN, J. Plaintiff sued as beneficiary under a policy of accident insurance issued to her deceased husband by defendant. Verdict and judgment were entered for plaintiff for the sum of $5,000 being the full amount specified in the policy, from which judgment defendant appeals.

Under the terms of the policy, the defendant agreed to pay to the beneficiary, in case of the death of the insured, "the sums hereinafter specified, for loss of life, * * * on account of bodily injuries sustained by the member * * * effected directly and independently of any other contributing, concurring or intervening cause, by external, violent and accidental means." Certain conditions and limitations were specified in the policy and made a part thereof. Those material to the consideration of this appeal are the following:

> "If, as a result of such injury, independently of all other causes, intervening, contributing or concurring, the death of the member shall occur within ninety days from the date thereof, the association shall pay the sum of five thousand dollars ($5,000.00), which shall be in full and complete satisfaction of every claim against it, including any claim for disability."

Then follows a specification of certain "Special Limited Benefits and Indemnities," among which is the following:

> "C. *Hernia.*—If the bodily injury be a hernia, the limit of the liability of the association shall be fifty dollars ($50.00)."

The appellant contends that its liability under the policy was limited to the sum of $50, for the reason that the death of the insured resulted from hernia. It was alleged in the complaint that the insured "received personal injuries through external, violent and accidental means, to wit: By being struck on his chest and abdomen by a heavy board, plank, or piece of wood, causing a strangulated hernia and a strangulation and paralysis of his bowels. That by reason of the aforesaid injuries and as the direct result thereof, independently of any other contributing, concurring, or intervening cause, the said insured died on or about the 30th day of November, 1916." The evidence disclosed that at the time mentioned in the complaint the insured was moving a heavy plank when he slipped and the end of the plank struck him on the chest and abdomen; that he immediately suffered great pain, and showed signs of serious injury; that a physician examined the deceased about 20 minutes after the accident and discovered a severe strangulated hernia, which was conceded to be the result of the fall and blow. The insured was operated on immediately and the hernia reduced, but he died seven days later from paralysis of the bowl and gangrene, resulting from the injuries received at the time of the accident. The appellant admits the above facts, but claims that the bodily injury from which death resulted was the hernia, and not the accidental blow from the plank.

The question involved is whether or not the liability of the defendant is limited to $50 under the terms of the policy, when death results from a hernia, which in turn is caused by an accidental blow of the character above set forth. Under familiar legal principles the hernia must be regarded as the result of the accident, and the accident itself, and not the resultant hernia, as the cause of the death. The provision in the policy for insurance against loss of life "on account of bodily injuries" is equivalent to loss of life caused by bodily injuries, which injuries under the further provisions of the policy must have been "effected directly and independently of any other contributing, concurring or intervening cause, by external, violent and accidental means." The cause of the injury is that which sets in motion a train of events which brings about a result without the intervention of any force operating or working actively from a new and independent source. In this case there can be no question but that the accidental blow from the plank was such cause. The hernia was one of the effects of such cause, but likewise was the resulting death.

The exact question here involved has been considered in a number of cases, all of which are in accord with the views above expressed. In several of such cases the reasons for refusing to insurance companies the benefit of a reduced liability on account of death resulting from hernia, under provisions of policies of accident insurance of like effect to those of the policy here involved, as far as the question now under consideration is concerned, received careful and exhaustive consideration. The courts to which such question has been submitted have been uniform in holding that, under facts similar to those in the case at bar, the death was caused by the accident from which the hernia resulted, and not by the hernia itself. They have refused, therefore, to reduce the liability of the insurance company. The leading cases so holding are: Berry v. United Commercial Travelers' of America, 172 Iowa, 429, 154 N. W. 598, L. R. A. 1916B, 617, Ann. Cas. 1918A, 706; Travelers' Ins. Co. of Hartford v. Murray, 16 Colo. 296, 26 Pac. 774, 25 Am. St. Rep. 267; Summers v. Fidelity Mutual Aid Ass'n, 84 Mo. App. 605; Atlanta Accident Ass'n v. Alexander, 104 Ga. 709, 30 S. E. 939, 42 L. R. A. 188. Appellant concedes that the authorities above referred to are contrary to its contention, but claims that provisions of the policies involved in said cases to the effect that the insurance "does not cover accident nor death resulting wholly or partly from * * * hernia" differentiate the cases from the facts of the instant case. In our opinion, the reasoning of the authorities referred to applies with equal force to the policy now under consideration. The only case cited by appellant which sustains a reduced liability of the insurance company for death resulting from hernia is Keen v. Continental Casualty Co., 175 Iowa, 513, 154 N. W. 409. In that case the exempting clause was:

> "Where accidental injury results in hernia * * * the amount payable shall be one-fourth of the amount which otherwise would be payable."

This is a very different provision from the one contained in the policy in the instant case or those involved in the other cases above referred to.

Appellant complains of certain instructions given by the trial court as being contradictory and as assuming facts not in evidence. The instructions as a whole correctly stated the law as applicable to the facts in issue, and we fail to find therein any prejudicial error.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

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41 Cal. App. 365

FORBES v. FORBES. (Civ. 1926.)

(District Court of Appeal, Third District, California. June 5, 1919.)

1. TRUSTS 🔑110—CONSTRUCTIVE TRUST—EVIDENCE.

Evidence, in action by administrator of J. against administrator of E., to establish a trust as to a half interest in land which J. and E. sold and deeded to W., and which W. being unable to pay the balance of purchase money deeded to E., the notes and mortgage for such balance being canceled, *held* sufficient to overcome any presumption of bad faith of E. in the transactions arising from his confidential relations with J.

2. EVIDENCE 🔑158(27)—BEST AND SECONDARY—GRANTEE IN DEED.

Testimony that witness deeded land to certain persons is open to objection that the deed is the best evidence.

3. APPEAL AND ERROR 🔑1033(7)—HARMLESS ERROR—FINDING ON DEFENSE.

Plaintiff cannot complain of failure of court to notice and find on the defense of limitations.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Edwin G. Forbes, administrator of John C. Forbes, deceased, against E. F. Forbes, administrator of E. A. Forbes, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

Michael & Nathan and Jacob Schlussel, all of San Francisco, for appellant.

W. H. Carlin, of Marysville, and C. W. Thomas, of Sacramento, for respondent.

HART, J. On the 19th day of August, 1889, Alexander Forbes and his two sons, E. A. and John C. Forbes, the latter known as Clarence Forbes, granted and transferred the lands and premises mentioned in the complaint and other lands to one Mary E. Wilson, for the sum of $18,000. Twelve thousand dollars of this amount was for the lands belonging to the two sons, and $6,000 was for lands belonging to the father. There was paid on account of the purchase price $6,000, which was divided between the grantors, and several promissory notes for the aggregate sum of $12,000, secured by a mortgage on all the property were executed by Mary E. Wilson and her husband. The Wilsons were unable to pay the notes, and on the 5th day of January, 1891, they reconveyed all the lands to E. A. Forbes, the promissory notes were canceled, and the mortgage was released. Subsequently, E. A. Forbes settled with his father for the latter's interest in the lands.

John C. Forbes died on or about the 20th day of April, 1891, and his son, Edwin G. Forbes, was appointed administrator of his estate on the 27th day of July, 1915. E. A. Forbes died on the 18th day of July, 1915, and his son, E. F. Forbes, was appointed administrator of his estate on the 20th day of July, 1915. This action was commenced March 30, 1917.

The complaint alleged that the deed from the Wilsons to E. A. Forbes was made without the knowledge or consent of John C. Forbes, he "expecting and believing that said deed of reconveyance would be made in the name of and would reconvey said property to" himself and E. A. Forbes; that John C. Forbes, at the time of his death, did not know that the property had been conveyed to "E. A. Forbes, individually and alone, and died in the belief and with the understanding that said property had been reconveyed to him and the said E. A. Forbes"; and that they were then the owners thereof. The prayer of the complaint was that the deed from the Wilsons be declared a trust and that E. A. Forbes hold the property as a trustee for the benefit of the heirs at law of John C. Forbes; that defendant account for the rents, issues, and profits of the property; and that he deed an undivided one-half interest therein to plaintiff.

The answer alleged that, prior to the 20th day of January, 1891, E. A. Forbes settled in full with John C. Forbes and became the sole owner of said lands. It was also alleged that

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the cause of action was barred by the provisions of the statute of limitations.

Judgment was in favor of defendant. Plaintiff appeals from the judgment and contends: That the evidence is insufficient to sustain certain findings of the court; that the trial court erred in certain rulings on the admission of evidence; and that the court should have found upon the issue as to whether the cause of action was barred by the statute of limitations.

The portions of the findings attacked by appellant are as follows:

Finding 6, referring to the deed from the Wilsons to E. A. Forbes, stated:

> "There was no agreement or understanding for any reconveyance of said real property to said John C. Forbes or to any person except said E. A. Forbes."

Finding 7 was that—

> Said deed from the Wilsons "was made with the full knowledge and consent of said John C. Forbes who at no time expected, believed, or desired that said deed of conveyance should be made in the name of himself and said E. A. Forbes."

Finding 8 was that John C. Forbes knew that said real property had been transferred to E. A. Forbes individually and alone, and that E. A. Forbes was the sole owner in fee and entitled to the possession of said lands.

It was found in finding 9 that E. A. Forbes never informed the widow of John C. Forbes that an undivided one-half interest in said property was preserved to herself or her son, Edwin G. Forbes, or to any other person than to himself.

Finding 10 was to the effect that E. A. Forbes had settled with John C. Forbes and paid to him his full interest in and to the canceled notes excepting the sum of $1,250, for which amount, at the request of John C. Forbes, E. A. Forbes, on the 21st day of April, 1891, delivered to the widow of John C. Forbes his promissory note payable to her, and that said note was fully paid by E. A. Forbes prior to his death.

Mrs. Emma Morse, formerly the widow of John C. Forbes and the mother of plaintiff, testified: That, on or about the last day of April, 1891, E. A. Forbes gave her a note, dated January 19, 1891, for $1,250 and at the same time gave to her the following document:

> "Marysville, Cal., January 19, 1891.
>
> "It is hereby understood by and between J. C. Forbes and E. A. Forbes, both of the county of Yuba, that if said E. A. Forbes, or his heirs sells the 'Forbes Ranch' in Oat Hills, in Yuba county, Cal., for $12,000 (twelve thousand dollars), or more, he shall pay to said J. C. Forbes, or his heirs, the sum of seven hundred and fifty ($750.00) dollars. E. A. Forbes."

The only testimony adduced at the trial was that of plaintiff's mother, now Mrs. Morse, who testified in behalf of the plaintiff, that of Mrs. E. A. Forbes, relict of the defendant's intestate, and the deposition of Mrs. Mary E. Wilson, one of the grantees of the Forbes of the land in question.

The facts stated in the complaint as to the sale of the property to the Wilsons for the sum of $18,000, the payment by them of $6,000 in cash on the execution and delivery of the deed, the execution by them of a mortgage for $12,000, balance of the purchase, their failure to pay the notes to secure which said mortgage was given, and the reconveyance of the land by them to E. A. Forbes, who subsequently passed away, are not disputed.

Mrs. Morse's testimony as it appears in the record before us, falls far short of sustaining the averments of the complaint. All she appears to have been able to say of the transaction between J. C. Forbes, her then husband, and the late E. A. Forbes, was that, after the death of her husband, E. A. delivered to her the promissory note for $1,250 and the conditional contract for the payment to her of the sum of $750. Although the complaint alleges that E. A. Forbes had told Mrs. Morse, after the death of J. C. Forbes, that "the undivided one-half interest in and to the above-described property was preserved to herself and her son, Edwin G. Forbes," there is not a particle of evidence supporting the claim so made. Indeed, about all that she testified to may briefly be stated as follows: That the promissory note for $1,250 was made payable in installments, and that the obligation had been entirely extinguished by the payment to her of the last installment some 14 years subsequent to the execution and delivery of the note; that no part of the $750 mentioned in the contract was paid to her; that for some years her husband had been suffering from tuberculosis; that he had been able to attend to his business until within two months of his death; that, about the first of March, 1891, he took a trip to Arizona; that for some time prior to her husband's death he and his family lived at the residence of E. A. Forbes in Marysville and they lived there for two weeks after Clarence returned. She said that from the time of her husband's death until the death of E. A. Forbes in 1915, the relations between the two families were of a friendly nature, though she had not seen the family of E. A. Forbes for quite a number of years. When E. A. Forbes handed her the promissory note for $1,250, she asked him no questions "because I trusted him to do what was right"; that he owed her nothing personally; that both the note and the contract were handed her by E. A. Forbes without comment and she received them in like manner, without comment or statement.

In rebuttal, Mrs. Morse testified that all she remembered about the contract for $750 was that when she received it E. A. Forbes had said: "Keep this contract. It will be of use to you some day." She said that both the promissory note and the contract were handed to her about ten days or two weeks after the death of her husband; that when he handed her the promissory note he said, "This is for you"; that he did not tell her to hold the contract for Edwin. The witness testified, on cross-examination, that when the note was handed her she took it and asked no questions; that she did not look to see the amount of it until later.

Mrs. Mary E. Wilson, in her deposition taken in the state of Vermont, deposed that her husband, Thomas Wilson, was dead; that she purchased the Forbes ranch for $18,000, paid $6,000 cash and gave promissory notes, secured by mortgage, for $12,000; that no interest on the notes was ever paid; that she, her husband and her son, joined in executing the deed back to E. A. Forbes; that she knew the latter, but that he never made any statement to her concerning the interest of his brother, John C., in the property.

Mrs. Jennie E. Forbes, widow of E. A., testified: That in a general way she knew about the sale of the ranch to Mrs. Wilson; that in January, previously to his death, Clarence Forbes had been at her residence in Marysville; that on the 3d of March, 1891, he went to Arizona for his health, and E. A. Forbes went with him; that the latter returned on the 14th of March; and that Clarence came later, lived at her residence, and died there. She said that about the 19th of January, 1891, while Clarence was at her house, she saw him and her husband "go over the books and examine them and heard them consent to the agreement, and that they agreed to have this note drawn up that was turned over to Mrs. Forbes; * * * that the $1,250 was the difference between them, and that this note was to be drawn up in favor of his wife on account of his poor health, and he expected to take this trip to Albuquerque, and in case anything happened him on his trip it was agreed that she should have this money." The difference between J. C. and E. A., spoken of by the witness, has reference to certain indebtedness of J. C., which E. A. agreed to and did liquidate. The witness said she heard them discuss the Wilson mortgage for $12,000 and that the difference agreed upon was $1,250; that she saw the note for $1,250 on the morning after Clarence died, about the 21st day of April, at her residence; that E. A. Forbes handed the note to Mrs. Clarence Forbes, in the presence of the witness, and that he said, "Emma, this is yours"; that at the same time her husband handed to Mrs. Clarence Forbes the contract for $750, saying to her: "Emma, he did this for Edwin (the son of Clarence). You keep this and put it away for Edwin."

The record presents no satisfactory explanation of what disposition was made of the contract for the conditional payment by E. A. Forbes of $750 to J. C. Forbes or his heirs. There is some testimony tending in a hazy sort of a way to show that E. A. Forbes settled an outstanding obligation against J. C. Forbes and in favor of one Phiningham for $1,000, in consideration of the cancellation of said contract. But be that as it may, the contract is of no importance in this case, and the court so treated it by failing to make any finding with reference to it. It may be added that it does not appear that the condition upon which the $750 was to be paid ever happened.

[1] Now, even conceding it to be true, as the complaint alleges, that E. A. Forbes was the attorney and legal adviser of J. C. Forbes and that by reason of that fact a confidential relation existed between them, or that such relation is to be presumed from the relationship by consanguinity in blood between them, and that the burden was therefore upon the defendant to show that the transactions between the deceased brothers relating to the property in dispute were conducted and consummated with fairness, honesty, and in good faith, it cannot be doubted that the evidence, of which the above is an epitomized statement, was sufficient, if accepted by the court as exposing the real facts of the transactions (and the result shows that it was so accepted), to overcome or dispel any presumption of bad faith in said transactions on the part of E. A. Forbes raised by the law as to such transactions executed under analogous circumstances—that is, such transactions, characterized by somewhat similar circumstances, as are treated in Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289, and in the many cases therein cited and examined, distinguishable, however, from the case at bar in one important particular, viz., that therein the property which was in controversy was transferred by gift to the defendants, whereas, in this case, there is no such element entering into the controversy.

[2] As to the objections involving certain rulings relative to evidence, the first called to our attention and to be considered is as to the action of the court in striking out from the deposition of the witness Mrs. Wilson the answer returned by her to the following interrogatory propounded by the plaintiff:

> "What disposition, if any, was made by you of the real property described in the deed and mortgage previously referred to by you?" Ans. "We deeded it back to E. A. Forbes and John C. Forbes."

The ground upon which the court, upon the motion of counsel for defendant, struck out the answer, was that it was "incompetent, immaterial, and not the best evidence." The objection to the testimony on the last-stated ground was good. Obviously, the deed itself was the best evidence of the contents of the deed and as to the identity of the party or parties named therein as the grantee or grantees of Mrs. Wilson.

What is said of the last considered point is equally applicable to the objection that the court erred in striking out the answer made by Mrs. Morse to the following question: "What knowledge did you have?" referring to her knowledge of the conveyance by Mrs. Wilson and the parties to whom the conveyance was made, the answer being: "My knowledge was that they (meaning J. C. and E. A. Forbes) both took the property back again."

[3] The complaint by appellant that the court erred by failing to find on the defense of the statute of limitations interposed by defendant is so plainly without merit, coming as it does from the plaintiff, who, of course, desired a trial on the merits, that further comment would be superfluous. It may be said, though, that the defendant seems not to have pressed that defense, and other than what was shown in that particular by the complaint itself there was no evidence to support the defense or authorize a finding thereon. But however that may be, it obviously does not lie in the mouth of the appellant (plaintiff in the case) to complain because the court omitted to notice the defense in its decision.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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41 Cal. App. 392

PEOPLE v. HUNTOON. (Cr. 642.)

(District Court of Appeal, Second District, Division 1, California. June 6, 1919.)

CRIMINAL LAW 🔑981(2) — INSANITY AFTER CONVICTION—DISCRETION OF TRIAL JUDGE—SUBMISSION OF CAUSE TO JURY.

Where, after plea of guilty had been made to a charge of forgery and before sentence was pronounced, a physician was called by the accused, and testified that in his opinion, based upon a brief observation, accused was not rational, it was within the discretion of the court to rule that such testimony did not produce in his mind a sufficient doubt as to the defendant's sanity, and to enter an order refusing to submit the question of sanity to a jury.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

James Harvey Huntoon pleaded guilty to a charge of forgery, and from the judgment of imprisonment he appeals. Affirmed.

Dana Ong, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

JAMES, J. On this appeal taken from the judgment of imprisonment the sole question presented is as to the alleged error of the trial judge in refusing to submit to a jury the question of the sanity of the defendant. The judgment was entered after plea of guilty had been made to a charge of forgery. Before sentence was pronounced a physician was called by the defendant, and he testified that, in his opinion, based upon a brief observation of the defendant, he was not rational. However, his testimony did not produce in the mind of the trial judge a sufficient doubt as to the defendant's sanity, and we think that the mere opinion of a medical witness was not sufficient to compel a determination of the question in the defendant's favor, but that the trial judge had discretion to make the ruling which he caused to be entered. People v. Hettick, 126 Cal. 425, 58 Pac. 918; People v. Keyes, 175 Pac. 6.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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40 Cal. App. 765

WEYER v. WEYER et al. (Civ. 2757.)

(District Court of Appeal, First District, Division 2, California. April 23, 1919.)

1. VENUE 🔑16½—JOINDER OF DIVORCE ACTION AND ACTION FOR RECOVERY OF REAL ESTATE.

Under Code Civ. Proc. § 427, wife's divorce action cannot be joined with cause of action to recover property situated in a county other than that of wife's residence, the statute requiring the divorce action to be brought in county of wife's residence, and section 392, and Const. art. 6, § 5, requiring the action to recover real estate to be brought in county in which it is situated.

2. ACTION 🔑50(4) — MULTIFARIOUSNESS — DIVORCE—FRAUDULENT CONVEYANCE.

A wife's action for divorce, and alimony, in which she seeks to have husband's assignment of notes secured by mortgages set aside as fraudulent, is not multifarious, in view of Civ. Code, §§ 136, 137, 139–141, and constitutes but one cause of action, though the notes are his separate property and not community property.

3. DIVORCE 🔑66—VENUE—SETTING ASIDE A FRAUDULENT TRANSFER.

A wife's action for divorce and alimony, in which she seeks to have husband's assignment of notes secured by real estate mortgages set aside as fraudulent, is properly brought in county of her residence, though land is situated in another county, notwithstanding Code Civ. Proc. § 392, and Const. art. 6, § 5; there being but one cause of action.

4. VENUE 🔑5(3) — RECOVERY OF REAL ESTATE—APPLICABILITY OF STATUTE.

An action must be wholly local in its nature to require it to be brought in the county in which land involved is situated under Code Civ. Proc. § 392.

5. Divorce ⚷90—Allegations as to Community Property—Presumption.

In the absence of an allegation in a petition for divorce that there is community property, court will presume that there is no community property.

6. Courts ⚷90(1)—Rules of Decision.

Under Civ. Code, § 3511, where reasoning of court in deciding one case is directly applicable to another case, the rule laid down in former case should be followed in latter case.

7. Divorce ⚷275(1)—Alimony — Fraudulent Conveyance.

A husband cannot put his separate property out of his hands for the purpose of defeating his wife in an anticipated application for alimony.

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by Madge Weyer against Gustavus A. Weyer and H. P. Weyer. From an order denying motion for change of place of trial, the last-named defendant appeals. Affirmed.

L. H. Dennett and J. C. Needham, both of Modesto, for appellant.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for respondent.

BRITTAIN, J. The appeal is from an order denying a motion for change of place of trial. The plaintiff wife sought divorce on the ground of extreme cruelty, and joined as a defendant her husband's brother, alleged to be the fraudulent grantee of the husband. The brother alone moved to change the place of trial.

The plaintiff alleged the husband is the owner of a one-third interest in four promissory notes of the aggregate face value of nearly $14,000, secured by mortgages and deeds of trust, and in certain described lands, some of which are in Stanislaus county and some in Tuolumne county. It is further alleged that on January 31, 1917, some eight months before suit was brought and three months before the separation of the parties, the husband purported to grant and convey to his brother, the appellant, upon no consideration, all the property without the knowledge of the plaintiff, and with the intent of defrauding her of her right to subject the same to her claim for maintenance, support, and alimony. After praying for a divorce the plaintiff prayed for a monthly sum for her support and lump sums for counsel fees and costs. She further prayed the conveyance and transfer of her husband to his brother be decreed to be fraudulent and void as to her, and that a lien be imposed upon the property as security for the payment of such sums as may be directed by the court to be paid by the husband to her for support, counsel fees, and costs.

The appellant moved for change of place of trial on the ground that San Francisco, the place of residence of the plaintiff, is not the proper county, and that Stanislaus is the proper county by reason of the residence of H. P. Weyer there. Further, that as to him, the action is for recovery of real property and the determination of the right or interest of the plaintiff therein, and that all the real property is in the counties of Stanislaus and Tuolumne.

The argument on behalf of the appellant in substance is that section 5 of article 6 of the Constitution provides that all actions for the recovery of possession of, or for the enforcement of liens upon, real property must be commenced in the county where the real property is situated, and, under Code of Civil Procedure, § 392, tried in such county; that so far as H. P. Weyer is concerned, the suit is simply one concerning title to his real estate, and that it is not in any way subsidiary to the suit for divorce, with which he has nothing to do. It is further argued there is a misjoinder of causes of action, one being the action for divorce in which the brother must sit as a silent spectator, and the other an action to set aside a conveyance in which the husband, the grantor, must remain equally quiescent.

[1-4] The statute required the action for divorce to be brought in the county of the residence of the wife. If the suit were, as claimed on behalf of the appellant, one involving two separate causes of action, and the second cause of action were for the recovery of the property, under the constitutional provision the second cause of action would necessarily have been brought in one of the counties in which the land is, and it would follow under the provisions of section 427, Code of Civil Procedure, that the two causes could not be joined. There are not two causes of action. The case is not within the provisions of section 5 of article 6 of the Constitution or section 392 of the Code of Civil Procedure. An action must be wholly local in its nature to require it to be brought in the county designated by section 392, Code of Civil Procedure. Smith v. Smith, 88 Cal. 573, 26 Pac. 356; Clark v. Brown, 83 Cal. 181, 23 Pac. 289.

[5] The appellant contends there is a different principle involved where separate property of the husband is conveyed from that where the property belonged to the community, and, further, that regardless of the power of a court of equity in a suit for maintenance, or more properly alimony, without divorce, there can be no joinder such as is here made in a suit for divorce. The Legislature has dealt with this subject. Even though divorce is denied, the court in the divorce action may provide for the maintenance of

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the wife (Civ. Code, § 136); it may provide for alimony pending the suit (Civ. Code, § 137); and for maintenance after divorce (Civ. Code, § 139). The court may require reasonable security for providing maintenance or making any payments required under the provisions of the chapter, and may enforce the same by an appointment of a receiver, or by any other remedy applicable to the case. Civ. Code, § 140. In executing the preceding sections, the court must resort: (1) To the community property; then (2) to the separate property of the husband. Civ. Code, § 141. The appellant asserts that it appears in this case the property transferred by the husband was his separate property. It further appears negatively from the complaint there was no community property to which the court might resort for the maintenance of the wife. In the absence of an allegation that there is community property, the presumption is there was none. No such allegation is made in the complaint in the present case. Kashaw v. Kashaw, 3 Cal. 312. Provision is to be made for the wife, and it must be from the separate property of the husband, either owned or to be acquired by him. No reason exists why either the wife or the chancellor should forego the certainty of recourse to property owned by the husband for the uncertainty of speculation regarding future earnings.

In Kashaw v. Kashaw, supra, the wife sued for divorce, joining certain other defendants to whom it was claimed by the wife the husband, with intent to defraud her of her community rights, had conveyed community property. It was contended there, as here, that the bill was multifarious. Basing its decision upon the then existing act in relation to husband and wife, which required a division of the community property, the Supreme Court said:

> "It seems, from this, to be beyond dispute that a partition of the common property is one of the direct results of a decree for divorce, and is part and parcel of the decree to be rendered, and consequently is necessarily one of the proper subjects of the action. How, then, can its introduction render the bill subject to the charge of multifariousness? The bill would really not be perfect without it, for the purpose of obtaining the decree of division, as contemplated by the law. * * * And as the one-half of it is equitably the right of the plaintiff, and to be so determined in this action, she may well make a party of any one claiming an interest in it, in order that she may obtain a complete determination."

[6] In the present case, as there is no community property, it is the duty of the court to make provision for the wife out of the separate property of the husband. The reasoning of the court in the Kashaw Case is directly applicable. Where the reason is the same, the rule should be. Civ Code, § 3511.

The rule of Kashaw v. Kashaw has never been questioned. It has been made the basis of numerous decisions in other jurisdictions. It is cited as a leading case in a note appended to a case decided in Alabama, where it was held that a bill for divorce was not rendered multifarious by a prayer for a conveyance by the husband to the wife of lands paid for by her with the title resting in him. Singer v. Singer, 165 Ala. 144, 51 South. 755, 29 L. R. A. (N. S.) 819, 138 Am. St. Rep. 19, 21 Ann. Cas. 1102. From the note it might seem that the Kashaw Case was limited to the division of the community property. The appellant in this case relies on a California case cited in the note. Cummings v. Cummings, 14 Pac. 562. It was published in the Pacific Reporter, and would seem to support the contentions of the appellant. It was not published in the official reports, no doubt because upon rehearing the Supreme Court expressly declined to determine the questions which in the unreported decision the department undertook to decide in a manner at variance with the Kashaw Case. In the unreported department opinion, which was concurred in by Mr. Justice McFarland, the wife, suing for divorce and a division of the community property, joined certain other parties in the litigation, alleging that they fraudulently entered into a contrivance with the husband to defeat the plaintiff of her rights. The argument was made, which is made here, that under Code of Civil Procedure, section 427, there was a misjoinder of causes of action. In the department opinion it was said:

> "We do not find the causes of action here united, * * * to belong to any of the classes of actions allowed to be united by the above section." Cummings v. Cummings, 14 Pac. 562.

Without reference to the earlier department opinion, in the same case, upon the same appeal, the Supreme Court in bank expressly determined it was not necessary to decide whether the court below did or did not err in overruling the demurrer, upon which ruling the department opinion was based, because on other grounds the judgment appealed from was reversed. The court in the final disposition of the case determined that the bank, which was the mortgagee defendant in the divorce suit, was a necessary party to the accounting. "Its mortgage is recognized as valid in the judgment, and no decree could properly be entered determining what sums had been paid to it by the defendant Ketchum, or giving priority to the alimony or suit money in the absence of the bank." Cummings v. Cummings, 75 Cal. 434, 17 Pac. 442. Mr. Justice McFarland concurred specially in the bank decision, saying:

> "The only proper parties to a divorce suit are, generally, the husband and wife."

His statement is fundamental, but under the rule of the Kashaw Case and in the

Cummings Case, where it is charged the husband has conveyed the community property, the grantee may be a proper party, as a third party may be a proper party under certain other circumstances. The appellant in the closing brief refers to the special concurring opinion of Mr. Justice McFarland in the Cummings Case. In another part of his concurring opinion, the learned justice said:

> "If, when such a suit has been commenced, or is about to be commenced, one of the parties having such suit in view colludes with a third party with intent to cover up community property, such third party may, perhaps, be made a defendant for the purpose of keeping the property in statu quo until after the determination of the action." Cummings v. Cummings, 75 Cal. 442, 17 Pac. 442, 446.

Mr. Justice McFarland, after the decision of Cummings v. Cummings, said:

> "The very purpose of alimony in such a case is to give support to the wife and to enable her to conduct her side of the litigation pending the trial of the issues made by the pleadings." Storke v. Storke, 99 Cal. 621, 34 Pac. 339.

[7] The husband cannot put his separate property out of his hands for the purpose of defeating his wife in an anticipated application for alimony. Murray v. Murray, 115 Cal. 266, 47 Pac. 37, 37 L. R. A. 626, 56 Am. St. Rep. 97. Counsel for the appellant state there is a broad distinction between suits for divorce and for support. Neither argument nor citation of authority is presented upon this claimed distinction. It does not exist. Under the broad equitable powers of the court, and in applying the provisions of the Civil Code sections to which reference has been made, the rule announced in Kashaw v. Kashaw must be held to extend to transfers of separate property where there is no community property.

In regard to the claim that the suit in so far as it affected the appellant's interest in real property was within the provisions of section 392 of the Code of Civil Procedure, in a similar case where the same question arose as to an alleged fraudulent conveyance of community property, the Supreme Court held that section does not apply, saying:

> "The object of the action, however, was not simply to procure the cancellation of the deed and reconveyance of the property. Another and probably much greater object was to secure a dissolution of the bonds of matrimony, and, so far as this last matter was the subject of the action, the proper county for the trial thereof was the county of the defendant's residence. It has been held here that if real and personal actions are joined in the same complaint the case falls within section 395 of the Code of Civil Procedure, and must be tried in the county of defendant's residence." Warner v. Warner, 100 Cal. 11, 34 Pac. 523.

In that case the plaintiff wife was a resident of San Bernardino. The real property was also in that county. F. R. Warner was joined as the alleged fraudulent grantee of C. A. Warner, the husband. The defendants sought to have the suit removed to their place of residence. The case was decided upon the construction of section 128 of the Civil Code, requiring the residence of the plaintiff in the county in which the action is commenced, and sections 395 and 397 of the Code of Civil Procedure, requiring personal actions on motion to be transferred to the place of residence of the defendants. Both defendants joined in the motion. Here the motion is made on behalf of one only of the defendants. The plaintiff in that case insisted upon the trial of the action in the county where the real property was, and which was her place of residence. The court determined that it was a personal action falling within section 395, Code of Civil Procedure, and not a local one under section 392, Code of Civil Procedure, and said the alleged fraudulent grantee "might perhaps have insisted upon the action being retained in the county of San Bernardino for trial." The statement of what Warner might perhaps have insisted upon, if not at variance with the matter decided, did not establish a rule of law contrary to the conclusions reached on this appeal.

The order appealed from is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

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41 Cal. App. 259

BAMBRIDGE v. CRANE. (Civ. 2692.)

(District Court of Appeal, First District, Division 1. California. May 23, 1919. Rehearing Denied June 21, 1919.)

1. FACTORS ⟹43—NEGLIGENCE—BURDEN OF PROOF.

In an action by a merchandise dealer against a commission merchant to recover damages claimed to have been suffered through negligence of defendant in the dispatch of the cablegram as to the price of an article, the burden of establishing that the cablegram was so negligently worded as to mislead him was upon the plaintiff.

2. FACTORS ⟹43—NEGLIGENCE OF FACTOR—SUFFICIENCY OF EVIDENCE.

Evidence *held* insufficient to establish negligence on the part of the sender in the wording of the cablegram.

3. FACTORS ⟹14—NEGLIGENCE OF FACTOR—INFORMATION BY CABLEGRAM.

In action by a merchandise dealer against a commission merchant to recover damages claimed to have been suffered through negligence of defendant in wording a cablegram, the message should be read as a whole and in light of relations of parties and circumstances surrounding transaction.

Appeal from Superior Court, City and County of San Francisco, James M. Troutt, Judge.

Action by George Bambridge against Douglas B. Crane, doing business under the firm name of Wightman & Crane. Judgment for defendant, and plaintiff appeals. Affirmed.

P. A. Bergerot and A. P. Dessouslavy, both of San Francisco, for appellant.

Goodfellow, Eells, Moore & Orrick, of San Francisco, for respondent.

RICHARDS, J. Plaintiff brought this action against the defendant for the purpose of recovering from him the sum of $1,691.35, the amount of damages claimed to have been suffered by him through the negligence of defendant, consisting in the dispatch of a cablegram to plaintiff by reason of which he made certain purchase of copra for shipment to San Francisco and which he was compelled to sell at a loss. The court gave judgment in favor of the defendant, and the plaintiff appeals.

The essential facts upon which the controversy depends are uncontradicted, and may be stated as follows: The plaintiff is a merchant of Tahiti, dealing in copra and other articles, and the defendant is a commission merchant of San Francisco. The business relations of the parties were initiated by a letter from plaintiff to defendant, dated November 18, 1915, in which the defendant was invited to communicate to the plaintiff the terms upon which business could be carried on between them, including the sale on commission by defendant of shipments of copra to be made by plaintiff. This letter was replied to by letter of December 8, 1915, in which the defendant stated the terms and conditions upon which he would engage in the business indicated. In this letter the defendant wrote:

> "We will by all steamers keep you advised of the current rate for this article (copra). * * * If you have anything to offer you can send us a wireless by means of the steamer, and we can offer you a price providing you will name a definite quantity with date of shipment."

Thereafter several shipments were made and sold and the proceeds duly accounted for, the business being done principally by correspondence. In the course of this correspondence plaintiff requested defendant to keep him informed of the price at which his shipments of copra were disposed of, and also of the market price at San Francisco of that article. Thus in one of his letters plaintiff writes:

> "Soon as you will sell the copra please send me a message via Awanui to Papeete as we have a receiving wireless station, and to let me know the rate per pound, as I will always be buying some more to prepare another next shipment. * * * You will not forget to send me a cable every time that the rate of copra will change in order for me to buy accordingly."

In reply to this letter the defendant wrote:

> "Regarding your request for information, we have to-day sent you the following cablegram: 'Copra Maitai five half cents Frisco,' and we trust that same will be entirely intelligible to you. It means that we have sold your copra per s. s. 'Maitai' at 5½ cents per pound delivered on wharf San Francisco. We have taken the matter up of further cables with your brother, and he is writing you in the premises. For your information we would say that we think your request is a very unusual one and one which will mean a great expense to you as the price of copra is changing daily. Rest assured that we will keep you advised of material changes in the market."

On January 14, 1916, plaintiff wrote to defendant as follows:

> "* * * I have received your cable of the 7th inst saying that 'Copra Maitai 5½ cents,' for which I thank you. You will not forget to send another cable when this lot will be sold" (referring to a shipment of which defendant was then being advised) "and to notify me every time that change of rate will occur."

On February 2d the defendant, having sold a shipment of copra by steamship Moana at the rate of 6 cents per pound, wrote plaintiff:

> "We have sold same at the high price of six cents per pound, and on the 31st ult. we sent you the following cablegram: 'Copra Moana six.'"

On February 18th the plaintiff wrote to defendant:

> "* * * You will receive by bearer 747 bags (21,566 kg.) of copra for which I will call your usual attention. Please send me a cablegram as usual. Your wireless message 'Copra Moana six' has not been received. * * *"

In a letter of March 11th the plaintiff advised defendant of another shipment of copra, and in that letter said:

> "I am sending to different fruit dealers some alligator pears, and as you will send me a cable for the copra as usual I will instruct my brother to see you for to add on your cable the approximate net proceeds obtained per case of fruit. For example 'pear six' will mean that pears have been sold at about six dollars a case."

On April 26th defendant wrote plaintiff as follows:

> "* * * On March 29th we cabled you as follows: 'Pears six copra Republic Moana six one-half.' * * * We trust to receive shipment of copra from you by next steamer. This article is quoted to-day in this market at 6½ cents per pound."

On May 8th the plaintiff wrote to defendant:

> "* * * I note that you have sold my two shipments of s. s. Republic and Moana at 6½

cents per pound, which I consider rather low, as news has arrived here by the same steamer saying that Moana copra has been sold for seven cents. * * * Please at all times inform me of the prospects of copra in order for me to be kept in the track. I do not mean to send me cable often, but from time to time and also write me fully."

On May 24th defendant wrote plaintiff:

"* * * We will follow your instructions as to keeping you advised both by mail and cable of the conditions here. We have to-day sent you the following cablegram: 'Moana seven cents,' from which you will understand that we have sold this cargo at seven cents per pound."

On June 3d plaintiff wrote defendant:

"In order to save cable expense regarding the insurance of copra can you arrange with some insurance house in advance to pay the insurance at the arrival of the copra in San Francisco. * * *"

On June 20th the defendant sent the following cablegram to the plaintiff:

"Maitai six one-half sold yours to arrive six three-quarters."

On June 3d plaintiff wrote to defendant:

"* * * I am shipping you by bearer 1,330 small and 147 large bags, representing about 52 tons of copra. * * * A wireless message as usual will be appreciated."

It is the cablegram of June 20th, reading, "Maitai six one-half sold yours to arrive six three-quarters," about which this controversy revolves, the plaintiff contending that he could only understand it to mean that the plaintiff had sold defendant's shipment per steamship Maitai at 6½ cents per pound, and that he had sold the next shipment that plaintiff would make (although the defendant had not been advised of any) at 6¾ cents per pound, and that, accordingly, after its receipt he purchased for shipment to San Francisco a quantity of copra at prices which would have netted him a profit if sold in San Francisco at 6¾ cents per pound, but from which he suffered a loss upon its sale at 5¾ cents. On the other hand, the information intended by the defendant to be conveyed to the plaintiff was that the general price for copra arriving at the port of San Francisco on the steamship Maitai was 6½ cents a pound, whereas he had sold the plaintiff's copra shipped on that vessel to arrive at 6¾.

[1-3] The burden of establishing that this cablegram was so negligently worded as to mislead him was upon the plaintiff; and we are clearly of the opinion that the conclusion of the trial court that he had not sustained this burden is correct. The parties were agreed that the expense of cabling made it advisable and even necessary when using this means of communication to be very sparing of words. The practice thus adopted, however, tended, of course, to render such communications ambiguous, which, in turn, necessitated caution in arriving at their meaning. The main argument of the appellant to establish the defendant's negligence in employing the language of the cablegram of June 20th in order to convey to the plaintiff the information that the general price of copra arriving on the Maitai was 6½ cents, and that the plaintiff's lot to arrive thereon had been sold before arrival at 6¾ cents, is that in previous cablegrams the name of a vessel followed by a price had been used to convey the information that the plaintiff's shipment by that steamer had been sold for the price named; that, accordingly, he could only understand the first part of the message of June 20th, "Maitai six and one half cents," to mean that his shipment on that vessel had been sold by defendant for 6½ cents, and that having thus interpreted the first part of the message he was naturally led to believe that the remaining part, to wit, "sold yours to arrive 6¾," was that defendant had sold plaintiff's next shipment at 6¾. But it appears to us, considering all the circumstances of the case, that the cablegram was plainly susceptible of the meaning that the defendant intended it to convey and which it very aptly does convey. The message should be read as a whole and in the light of the relations of the parties and the circumstances surrounding the transaction. The plaintiff had requested the defendant to supply him not only with information as to the price at which his particular shipments were sold, but also the market price generally. He had also recently complained to the defendant that a shipment made by him per steamship Moana had been sold at 6½ cents, while the general price of copra by that steamer was 7. A third fact rendering the meaning attributed by the plaintiff to the cablegram extremely improbable was that the defendant had never yet sold for the plaintiff a shipment of copra before he had been advised of its quantity and the vessel by which it was made; and, moreover, the defendant in his first letter to plaintiff at the inception of their business relations had stated:

"If you have anything to offer you can send us a wireless by means of the steamer, and we can offer you a price providing you will name a definite quantity with date of shipment."

The shipment by steamship Maitai was the last one of which defendant had been advised at the time of the dispatch of his cable message. These considerations all tended to negative the meaning attributed by the plaintiff to the message, as do also certain words of the message itself. Thus the words "sold yours to arrive" are plainly antithetical to the previous words. If, in fact, the message meant that the plaintiff's copra shipped by the Maitai had been sold by the defendant for 6 cents per pound, and the shipment to be made by the following vessel at 6¾, the words "sold yours" were entirely superfluous, and superfluity was the last thing to be expected in a cablegram of this nature. So far from the defendant being negligent in the dispatch of this message, the negligence, if any, was upon the part of the plaintiff in construing it as he did.

Having thus arrived at the conclusion that the plaintiff's proof failed to establish any negligence on the part of the defendant, it is unnecessary to consider the further question discussed in the briefs as to the proper calculation of the amount of the damage.

For the reasons given, the judgment is affirmed.

We concur: WASTE, P. J.; NOURSE, Judge pro tem.

Ex parte MASTERSON. (Cr. 861.)

(District Court of Appeal, First District, Division 1, California. June 2, 1919.)

Habeas Corpus 🔑92(1)—Scope of Review.

In a habeas corpus proceeding, court will not go behind the record of the judgment under review.

Petition by Thomas J. Masterson for writ of habeas corpus. Petition denied.

Thomas J. Masterson, in pro. per.

PER CURIAM. The petition filed in above matter is not in proper form; the record brought here is not authenticated, and, assuming it to be correct, the court will not go behind the record of the judgment.

The petition is denied.

41 Cal. App. 400

MEEKER v. SPENCER et al. (Civ. 2648.)

(District Court of Appeal, Second District, Division 1, California. June 6, 1919.)

1. Deeds 🔑56(2)—Delivery—Necessity of Intent to Part with Title.

An essential to a valid delivery of a deed is that grantor should have intended finally to part with title.

2. Deeds 🔑208(1)—Delivery—Evidence.

In a suit to quiet title, evidence that the notary handed plaintiff the deed from her husband without express authority from her husband but in his presence, that at the same time the notary handed the husband a deed for her property, but that both parties thereafter treated the property as though it had not been deeded, plaintiff selling that which she deeded to husband and after his death listing that deeded to her as part of his estate, *held* to sustain a finding that there was no delivery of the deed to plaintiff.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Carrie A. Deuress Meeker against Wilbur S. Spencer and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Andrews & Wright, of San Diego, for appellant.

Luce & Luce, of San Diego, for respondents.

SHAW, J. Action to quiet title. The complaint, in the usual form in such cases and filed on March 31, 1915, alleged that plaintiff is now, and for a long time has been, the owner of lot G, block 40, Horton's addition to the city of San Diego, as to which defendants, though having no title or estate therein, wrongfully and without right, claim an interest; followed by the usual prayer that defendants be required to set forth the nature of their claims, and that it be decreed that they have no title or claim to the lot. The answer, in addition to denials of plaintiff's allegations alleged that William A. Deuress, deceased, was at the time of his death in possession and the owner of the premises described in the complaint, and that his legal heirs, one of whom was defendant Taylor, were the owners thereof, subject to the rights of Wilbur S. Spencer, as administrator of the estate, and entitled to possession thereof; followed by a prayer for a decree in their favor.

The court found: First, that plaintiff was not then, nor at the commencement of the suit, owner of or entitled to the property. Second, that the claim of defendants Wilbur S. Spencer as administrator, and Katherine Taylor as heir of William A. Deuress, deceased, is not without right, but that said defendants have right, title, and interest in said land and every part thereof. Third, that the legal heirs of William A. Deuress, deceased, are the owners of the premises, subject to the administration of said estate by said defendant Wilbur S. Spencer as administrator thereof; followed by a conclusion of law in favor of said defendants, upon which judgment was entered in accordance therewith.

Plaintiff, claiming that the evidence is insufficient to support these findings, has appealed from the judgment.

Plaintiff at the trial founded her claim of title to the property upon a deed to her made by William A. Deuress on the 8th day of May, 1897, which she says her deceased husband, at the date of its execution, delivered to her. That the deed was signed and acknowledged by the husband admits of no controversy. The facts and circumstances touching the delivery of the deed are that on the day mentioned plaintiff and her then husband went to the office of a notary public, before whom three deeds were signed and acknowledged, one of which was a deed, signed by both parties, which purported to convey the real estate therein described to the defendant Katherine Taylor, stepdaughter of plaintiff; another was a deed by plaintiff purporting to convey certain property standing of record in her name to her husband William A. Deuress; and the other was a deed from plaintiff's husband to herself purporting to convey the property involved in this controversy and as to which the notary testified that, after it was executed, he, without any express authority so to do from the grantor, but of his own volition, handed it to plaintiff, saying, "Here, Mrs. Deuress, I deliver to you the deed to this property," and she took it. Mr. Deuress picked up the other deeds, and he and his wife went away. Plaintiff says they took the deeds to their home, where all three of them were together placed in a trunk which the husband and wife used in common. At the trial, occurring some 18 years later, she testified that, while she thought she had seen the deed after it was placed in the trunk, she was not certain. At all events, after a diligent search therefor, she was unable to find it. She did not record it for the reason that her husband wished to sell the property. The deed made to Mrs. Taylor was, a few weeks after its execution, taken from the trunk by Mr. Deuress and destroyed. Although she found the deed made by her to the husband, she did not inventory the property which it purported to convey as that of the estate, but, after the decease of her husband, she sold and conveyed it as her own property, which fact appeared of record. Her reason for making the deed to him was that she wanted him to have the property in case of her death, but as to the property in dispute, deed to which she claims was delivered to her, the reason for so doing was the desire of the husband to secure payment of money which she had loaned to him. Other evidence in favor of plaintiff was the testimony of a witness to the effect that Mr. Deuress had pointed out this lot to him, saying "that was one of his lots," but that he had given his wife a deed to it.

[1, 2] The one essential to a valid delivery of the deed in question is that the grantor should have intended to finally part with the title (Rice v. Carey, 170 Cal. 748, 151 Pac. 135; Williams v. Kidd, 170 Cal. 631, 151 Pac. 1, Ann. Cas. 1916E, 703), and this is a question of fact to be determined from all the evidence and circumstances of the transaction, together with reasonable inference which the court is entitled to deduce therefrom. In the instant case, while the evidence is not only meager and unsatisfactory in support of plaintiff's contention, it appears that the only act upon which delivery of the deed is based is that of the notary who, of his own motion and without authority so to do, handed the deed to plaintiff. Conceding the act done with the husband's assent, a like delivery of the deed executed by plaintiff was made to the husband, and this as shown by her own testimony and act in thereafter selling the property, was not intended as a transfer of the title which the deed purported to convey. The exchange of deeds so made constituted one transaction, and it is a fair inference from the circumstances shown that the purpose of the husband in executing the deed to his wife was identically the same as that had by the wife in executing a deed to him of her property, namely: That, retaining control over the instrument during his life, it should, if not destroyed, become operative in event of his death.

At the trial it further appeared that plaintiff was the widow of William A. Deuress, deceased, who died on the ——— day of ———, 1912, at which time the property in question stood of record in his name; that on October 11, 1912, she was appointed administratrix of his estate by the superior court of San Diego county, and as such administratrix she, on March 7, 1913, filed an inventory, duly verified by her, wherein she described, among other property of the estate, the lot in question, which was appraised at the sum of $40,000. On September 2, 1913, she, as widow of said deceased, filed a petition, alleging the total estate of deceased, which included the lot in question, was of the value of $65,237, and asking for an allowance of $250 per month to be made to her as widow of said deceased, which allowance was duly made. There was also filed by her a petition for an order of sale of said property for the purposes of paying the expenses of administration and the widow's allowance, which not being made, the court, upon her application, authorized her to negotiate a mortgage upon the property in the sum of $10,000 for said purpose. Her first annual account, duly verified, was filed March 30, 1914, which included rents received from said property by her as such administratrix, and the payment to her of said widow's allowance from June 15, 1912, to March 15, 1914, amounting to $5,250, which account was duly allowed by the court. On July 10, 1914, she filed a final account and petition for distribution and discharge, which exhibited the fact that she had borrowed $10,000 secured by mortgage upon the property, as per order of the court, and had paid balance due on account of widow's allowance and other expenses of $6,432.12, and showing that a further amount was due to her as the widow of deceased, from March 15, 1914, to July 15, 1914, in the sum of $1,000. And also by said petition showing that all of the property, including the lot in question, was community estate of herself and said deceased, and asking that the same be distributed to herself as widow, and defendant Katherine Taylor, as sole heirs of deceased. On August 3, 1914, prior to the court acting upon her petition for settlement of her final account and distribution of said estate as therein asked, she tendered her resignation as administratrix of the estate, upon acceptance of which and the appointment of Wilbur S. Spencer as administrator thereof, she instituted this action. As thus shown, her acts in regard to the property are wholly inconsistent with the claim asserted, but fully support the theory that the deed under consideration, like the one by her executed to the husband, was not intended as a present transfer of title, but rather in the nature of testamentary disposition of the property.

Under our view that the evidence supports the findings complained of, we deem it unnecessary to discuss the question of estoppel based upon the fact that she, upon representation that this property in value constituting nearly two-thirds of the estate, obtained $6,500 as widow's allowance, together with fees for administering thereon.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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41 Cal. App. 397

GERMAIN SEED & PLANT CO. v. JUSTICE'S COURT OF NO. 2 TP., IN AND FOR MERCED COUNTY et al. (Civ. 2951.)

(District Court of Appeal, Second District, Division 1, California. June 6, 1919. Rehearing Denied by Supreme Court Aug. 4, 1919.)

PROHIBITION ⚷3(2)—REMEDY BY APPEAL.

Conceding that the service of a summons out of the county was insufficient to vest a justice court with jurisdiction, the defendant's remedy was by an appeal to the superior court, and issuance of a writ of prohibition by the superior court was not justified, under Code Civ. Proc. § 1103, the action being a simple one on account for goods and merchandise sold, and an appeal being a plain, speedy, and adequate remedy.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Petition by the Germain Seed & Plant Company for a writ of prohibition commanding the Justice's Court of No. 2 Township, in and for the County of Merced, Cal., and Frank H. Farrar, as justice of the peace of said township, to desist from proceeding with the trial of an action. From an order granting the writ, defendants appeal. Reversed.

Croop & Croop, of Merced, for appellants.
Earl E. Sidebottom, of Los Angeles, for respondent.

SHAW, J. As disclosed by the record herein, one T. A. Griffin instituted a suit in the justice's court of No. 2 township, Merced county, against the plaintiff herein, which is a corporation having its principal place of business in the city of Los Angeles, to recover on an account for goods and merchandise sold and delivered in the city of Merced, county of Merced, to plaintiff at its special instance and request. The summons issued in said action so brought in the justice's court was served upon defendant in the county of Los Angeles. Thereupon Germain Seed & Plant Company, defendant in said action, appeared specially in said justice's court and moved to quash the service of the summons upon the ground that no facts were made to appear which, under the provisions of section 848, Code of Civil Procedure, warranted the service of said summons in a county outside of that in which the action was brought. This motion was denied by the justice's court. Thereupon petitioner brought this proceeding in the superior court of Los Angeles county for the purpose of securing the issuance of a writ of prohibition, commanding said justice's court and Frank A. Farrar, as justice thereof, to desist from proceeding with the trial of said action so pending in said court. Respondent interposed a general demurrer to the petition, which was overruled, and the writ of prohibition prayed for granted. Defendants appeal from the order so made.

The identical question presented has been before the courts in a number of cases, among which are Burge v. Justice's Court, 11 Cal. App. 213, 104 Pac. 581; Simpson v. Police Court, 160 Cal. 530, 117 Pac. 553; and Hamberger v. Police Court, 12 Cal. App. 153, 106 Pac. 894, 107 Pac. 614, in all of which it was held that, conceding the service of summons insufficient to vest the inferior court with jurisdiction, the defendant's remedy for threatened adverse action was an appeal to the superior court. Mere want of jurisdiction will not justify the issuance of a writ of prohibition. It must be made to appear that the applicant therefor has no plain, speedy, and adequate remedy in the ordinary course of law. Section 1103, Code Civ. Proc. Upon the authority of what is said in the cases cited, we are constrained to hold that the defendant's right of appeal upon questions of both law and fact from an adverse judgment rendered affords a plain, speedy, and adequate remedy, by means whereof it may have the alleged erroneous ruling of the justice reviewed.

The order of the superior court is reversed.

We concur: CONREY, P. J.; JAMES, J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

41 Cal. App. 408

PEOPLE v. FUNTAS. (Cr. 848.)

(District Court of Appeal, First District, Division 1, California. June 7, 1919.)

1. SODOMY ⚷6—EVIDENCE—SUFFICIENCY.

In a prosecution for the infamous crime against nature evidence *held* sufficient to sustain a conviction.

2. CRIMINAL LAW ⚷780(3)—ACCOMPLICE'S TESTIMONY—INSTRUCTIONS.

In a prosecution for the infamous crime against nature defendant was entitled, under Code Civ. Proc. § 2061, to an instruction that the testimony of his accomplice should be received with distrust.

3. CRIMINAL LAW ⚷1173(2) — APPEAL—HARMLESS ERROR.

In a prosecution for the infamous crime against nature, the failure of the court to instruct that the testimony of defendant's accomplice should be viewed with distrust *held* harmless; it being presumed that the jury as men of ordinary understanding would know that an accomplice ordinarily testifies with a view to protecting himself from prosecution, and the evidence as to defendant's guilt being uncontradicted.

Appeal from Superior Court, Alameda County; W. M. Conley, Judge.

Mike Funtas was convicted of the infamous crime against nature, and he appeals. Affirmed.

Frank M. Carr, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

KERRIGAN, J. Defendant was convicted of the infamous crime against nature, and prosecutes this appeal from the judgment. He relies upon two points for reversal, viz.: (1) That the evidence is insufficient to support the verdict; and (2) that the court erred in failing to instruct the jury that the testimony of an accomplice is to be viewed with distrust.

[1] The evidence in the case is of a sordid character, and it is not necessary to refer to it in any great detail. The testimony of the accomplice in the offense, a boy 14 years of age, shows when and where the defendant and himself met, the method adopted by the defendant for inducing him to visit defendant's room, all that was done there on the occasion of two of such visits, which comprehended the act upon which the charge was based. Notwithstanding the criticism of appellant's counsel, this testimony appears to be full, straightforward, and free from material discrepancies. Mrs. Bessie Preston, who conducted the lodging house where the defendant roomed, testified that several visits made by the defendant to the room of her own son aroused her suspicion as to defendant's conduct with Frank Lynch, the accomplice above mentioned. She accordingly caused to be bored two auger holes in a wall of defendant's room. On the evening of November 22, 1918, when the act charged is alleged to have been committed, she met the defendant on his way to his room where, as she knew, the boy was waiting for him, and invited him to join a game of cards with her and others. On the plea that he was tired he declined to do so. This refusal heightened her suspicions, and while the defendant proceeded to his room, she left the house and secured the co-operation of a policeman. She stationed him at the door of the defendant's room, and herself repaired to the auger holes and through them witnessed the act which led to the arrest of and charge against the defendant. The bedroom door was locked, but the officer testified to hearing the shuffling of feet, and conversation between the two occupants of the room conducted in a low tone of voice. The door then being unlocked the officer entered, and found the boy dressed and the defendant undressed. The officer insisted upon learning what had just occurred between the pair, and the boy finally confessed to the conduct described later by Mrs. Preston when a witness at the trial. The defendant denied the truth of the boy's account, and claimed that Lynch was present in his room solely for the purpose of assisting defendant in his study of the English language, but nevertheless attempted to bribe the arresting officer while being conducted to the jail. This was testified to by both the officer and the accomplice. The defendant did not take the witness stand in his own behalf. We are clearly of opinion that there is no merit in defendant's first point, for the evidence abundantly supports the verdict of the jury.

[2, 3] The second point, however, is more serious, for the court should have instructed the jury as requested by the defendant, to the effect that the testimony of an accomplice is to be viewed with distrust. The defendant was entitled to have this instruction given (Code Civ. Proc. § 2061; People v. Bonney, 98 Cal. 278, 33 Pac. 98; People v. Sternberg, 111 Cal. 11, 43 Pac. 201); so that the question we are confronted with is whether the refusal of the court to so instruct the jury was under the circumstances of the case so prejudicial to the defendant as to require a reversal of the judgment. A consideration of the entire record satisfies us that this question should be answered in the negative. An accomplice ordinarily testifies with a view to protecting himself from prosecution, or to concealing his own guilty conduct, or in the hope of earning a reward or gaining a pardon. Such testimony is tainted. But the jury, being presumably men of ordinary understanding,

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

know this; and the court having to some extent discredited such testimony by instructing the jury, as required by law, that they could not convict the defendant upon the uncorroborated testimony of an accomplice, they would, in following such instruction, closely scrutinize the testimony referred to, and naturally and necessarily view it with distrust. Moreover, the evidence is quite convincing of the defendant's guilt. There is no claim by the defendant that the witness introduced by the prosecution bore him any personal ill will, or that his prosecution was inspired by hostile motives. The testimony of these witnesses was not contradicted or even discredited, if we except that of the accomplice, which was subject to its inherent infirmity. The evidence thus adduced convincingly established the defendant's guilt; hence the verdict of the jury may not be disturbed.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

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41 Cal. App. 326

SILVA et al. v. RECLAMATION DIST. NO. 1001 et al. (Civ. 1972.)

(District Court of Appeal, Third District, California. May 29, 1919. Rehearing Denied by Supreme Court July 28, 1919.)

1. Judgment 🔑585(2)—Conclusiveness—Matters Concluded—Reassessment.

A prior judgment canceling an assessment made against plaintiff's land for reclamation purposes is not conclusive as to validity of a reassessment made after prior judgment, especially where principal ground for former judgment was errors in proceedings for the assessment which were corrected in the proceedings for reassessment.

2. Drains 🔑83—Reassessment—Statute.

Pol. Code, § 3466½, authorizing reassessment for reclamation purposes after the prior assessment has been declared invalid, is not limited to cases where the reclamation work has been completed, but applies to assessments to complete work under section 3459.

3. Drains 🔑76—Proceedings for Assessments.

Plans and statements for reclamation work are sufficient to sustain an assessment if they show the works to be constructed with some certainty and completeness of detail, though they would not be sufficient for a contract for the construction.

4. Drains 🔑14(1)—Districts—Plans—Approval by State Board.

St. 1911 (Ex. Sess.) p. 117, requiring reclamation plans to be approved by the state reclamation board, does not apply to plans made before the statute was enacted, though there were certain modifications made therein subsequent to the statute, so long as those modifications did not materially affect the general plan.

5. Appeal and Error 🔑762—Waiver of Errors—Failure to File Reply Brief.

A claim that the evidence is insufficient to sustain certain findings need not be specifically noticed where respondent's brief called attention to evidence apparently of sufficient force to justify the findings, and appellants did not reply thereto.

6. New Trial 🔑103—Newly Discovered Evidence—Materiality.

Newly discovered evidence that the commissioners in making a reassessment for reclamation purposes did not visit all the lands in the district does not require granting a new trial in a suit to cancel the reassessment when it appeared that the commissioners had visited all the lands in the district in making the original assessment.

7. New Trial 🔑102(5)—Newly Discovered Evidence—Diligence.

Newly discovered evidence consisting of testimony of a commissioner to make assessments for reclamation purposes that the commissioners did not visit all the lands before making the reassessment does not justify granting a new trial, where the commissioner testified at the former trial, but was not asked about visiting the lands.

Appeal from Superior Court, Sutter County; G. W. Nicol, Judge.

Action by Charles F. Silva and another against Reclamation District No. 1001 and others to cancel an assessment. Judgment for defendants, and plaintiffs appeal. Affirmed.

Driver & Driver, of Sacramento, for appellants.

W. H. Carlin, of Marysville, for respondents.

BURNETT, J. The action was to cancel and annul an assessment made for reclamation purposes. The district was organized in April, 1911, and it has been in effective operation ever since. On the 17th day of July, 1911, the board of trustees of the district presented to the board of supervisors of Sutter county, in which county the greater portion of the lands of the district is situated, the residue being in Placer county, the original plans for reclamation. The usual proceedings were had, and an assessment for $851,730 was levied upon the lands of the district, and this was fully paid. This, however, was insufficient to complete the contemplated work, and on September 25, 1914, the trustees of the district presented another report to the board of supervisors, showing the work already accomplished and the work to be done, together with its estimated cost, and asking for another assessment of $500,-

000. The request was granted, and the assessments were all paid except those of appellants herein and one C. F. Roth. They contested the assessment in the superior court of Sutter county, and, after trial had, their assessments were held to be invalid, and they were canceled and annulled. Thereupon the board of trustees proceeded, in accordance with section 3466½ of the Political Code, to obtain a reassessment of the two tracts of land owned by appellants and said Roth, and they caused a modification and amplification to be made to their report of October 25, 1914, and filed it with said board of supervisors on April 8, 1916. The same commissioners who levied the second assessment were appointed by the supervisors to make the reassessment on the lands of appellants and Roth. They proceeded with the work and made their report as required by law. Objections were made to this reassessment, but they were overruled by the board of supervisors, and the report of the commissioners was approved and ratified. Thereafter this action was brought in the superior court to annul said reassessment levied upon the lands of plaintiffs, but the judgment was against their contention, and from that judgment sustaining the action of said commissioners the appeal has been taken.

[1] 1. The first contention of appellants is that the question is res adjudicata by virtue of said judgment declaring the said second assessment to be null and void. Appellants indulge in a learned and comprehensive discussion of the doctrine, which is quite interesting and instructive, but we are satisfied that the principle does not apply to the case at bar. The main reason for holding said assessment invalid was that the "plans, location, and estimates of the costs of reclamation of said reclamation district adopted by its board of trustees and reported to the board of supervisors were too indefinite, uncertain, and incomplete to meet the requirement of the law." This objection was obviated, however, by the additional specifications to which we have alluded, but it is not deemed necessary to point them out specifically.

It may be stated, also, that the other important finding that the assessments were not levied on the various tracts of land belonging to appellants according to the respective benefits accruing thereto from said improvements would not be controlling, for the reason that a different apportionment was made by this assessment. But a more satisfactory and conclusive answer to the proposition is that we are herein dealing with a different cause of action. The said judgment of November 13, 1915, was based upon a cause of action arising out of the assessment of September 25, 1914, whereas the cause of action involved herein must have grown out of the assessment made in 1916, after said former judgment was rendered.

Appellants do not deny that the rule is:

> "A former judgment * * * constitutes no defense to a cause of action, which accrued between the same parties on the same subject-matter after the rendition." Jones v. Petaluma, 36 Cal. 230; Shanklin v. Gray, 111 Cal. 88, 43 Pac. 399; People v. Rodgers, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668; Code Civ. Proc. § 1911.

However, if the facts relating to the two assessments were identical or similar, the former judgment would be, of course, entitled to careful consideration, but it would not be controlling, since it was the judgment only of the trial court. The course pursued, it may be repeated, in reassessing appellants' property, was taken by virtue of the authority conferred by said section 3466½ of the Political Code, providing:

> "In all cases in which an assessment shall have been levied or shall hereafter be levied for reclamation purposes upon the lands embraced within any reclamation district now or hereafter formed or created, is thereafter adjudged invalid by any court of competent jurisdiction, or shall be adjudged invalid as to any tract or tracts of land within said district, or if for any reason, any tract or tracts within such district shall not have been charged with said assessment, * * * a subsequent re-assessment of such tract or tracts of land may be made separately for the purpose of charging said land with the proper proportion of the costs of reclamation," etc.

The section further provides that such reassessment must be made and approved in the same manner as other assessments.

[2] 2. We do not think that the application of this section is limited to cases wherein the work of reclamation has been completed. The reassessment may be made for the payment of work in the future as well as for that already done. There is nothing in the language of the section which supports this theory of appellants. The reassessment is not for the purpose "of paying costs already incurred," but it is to be levied for "reclamation purposes," and to understand the scope of the expression we must recur to section 3459 of the same Code, referring to the "additional assessment." Therein it is provided that, in order to secure an additional assessment where the first was not sufficient, the trustees of the district must present to the board of supervisors "a statement of the work done or to be done, and its estimated cost," and the said board of supervisors is required to appoint commissioners to assess the amount of such estimated cost as a charge upon the land in the district. It is necessarily implied by the term "reassessment," used in said section 3466½, that the levy is for the same purposes as are contemplated by said section 3459.

[3] 3. The plans and statement, including the modifications to which we have referred, prepared by the board of trustees of the district, answer sufficiently the requirement of the law as interpreted by the Supreme Court in Meyer v. Reclamation Dist., 172 Cal. 104, 155 Pac. 635, Spurrier v. Reclamation Dist., 172 Cal. 157, 155 Pac. 840, and some earlier decisions. As stated in the Meyer Case:

> "The Code does not require that such statement shall have the certainty and completeness of detail that would be necessary in a contract for the construction of the works, but only 'a plan showing in some detail and with some degree of certainty the extent and character of the proposed works.' It is difficult to draw a line of certainty and fullness of detail to which such statements must conform."

[4] As to the objection that the plan of reclamation adopted by the trustees of the district was not previously approved by the state reclamation board, as provided by the statute creating said board (Stats. of 1911, Extra Sessions, p. 117), it is pointed out by respondent that said statute was enacted after the organization of this district and the adoption by the trustees of the general plan of reclamation. It is true that certain modifications and additions therein were afterward made when said statute was in force, but we do not think they were of such vital importance as to require their submission to said board for its approval. As long as the modifications did not materially affect the general plan, it was within the discretion of the trustees to adopt them without the direction of said board. The purpose of said statute was, of course, to secure, as far as practicable, harmony and uniformity among the various districts in the promotion of reclamation throughout the Sacramento and San Joaquin valleys, and we can see nothing in the course pursued herein tending to nullify or defeat such purpose.

It is also suggested by respondent that the fact that these works have been in operation since July, 1911, that a large sum of money has been expended therefor and that the work of reclamation has been done openly and without protest from said state reclamation board would raise a presumption of the acquiescence and approval of said board. It is further claimed that such question cannot be raised by a property owner, but these considerations, while worthy of attention, we deem it unnecessary to determine.

[5] 4. Certain findings as to the sufficiency of the plans, reports, and estimates made by the trustees in reference to drainage canals, bridges, a pumping plant, and a certain road and telegraph lines within said district, and also as to the benefit to accrue to the land of appellants from these contemplated improvements, are challenged as not supported by the evidence. Respondent, though, in its brief calls attention to circumstances disclosed by the record, which seem to be of sufficient probative force to justify the conclusions of the trial judge, and, as appellants have not chosen to reply to said brief, we do not feel called upon to notice these matters more specifically.

[6] 5. A new trial was sought on the ground of newly discovered evidence, appellants relying upon the affidavit of Louis Tarke to the following effect:

> "That he is one of the commissioners of assessment who levied that certain reassessment on the lands of Silva and Randall and C. F. Roth in reclamation district No. 1001 on the 17th day of March, 1916; that Lee G. Roberts and A. A. McRae were the other two commissioners; that in levying said assessment all of said commissioners viewed the lands of Silva & Randall and C. F. Roth in said district, but did not view or inspect any of the other lands of said district upon said reassessment, nor in making said reassessment."

But it appears that these commissioners had made the previous assessment, and at that time had gone over all the land in the district. As to that Mr. Tarke testified:

> "Before the $851,000 assessment was put on we estimated the value of the land before reclamation; that is, we went all over the district and placed a value on the land—what it would be worth without reclamation according to the situation and according to the relative elevation and according to the quality of the land and the general situation of the land."

It would have been idle for them to do the same thing again. Assuming, therefore, for the sake of argument, that all of the lands should have been visited by the commissioners to enable them to make a proper reassessment of the lands of appellants and Roth only, the requirement was substantially met.

[7] Moreover, the showing of diligence was entirely inadequate. Mr. Tarke was called as a witness by plaintiffs and interrogated as to what he did in making said reassessment, and there is no excuse for the failure of appellants to ask him if he and his associates at that time visited the other lands in the district. The rule as to motions of this kind based upon such showing is quite familiar, and it is manifest that the court's action in denying a new trial is amply justified.

It is probably not necessary to allude to the importance of the work of reclamation undertaken in this and other districts and how largely it affects the welfare of the community and the state. Indeed, this consideration has been forcibly and even eloquently set forth by the Supreme Court in some of the cases cited. The work should not, of course, be impeded by vexatious litigation nor jeopardized by attaching too much weight to unimportant matters of procedure. On the other hand, notwithstanding the great importance of these schemes, the substantial rights of the property owners must be protected, but in the present instance we are led to believe that appellants have suffered no legal injury, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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41 Cal. App. 463

KLEIN v. LEWIS. (Civ. 2911.)

(District Court of Appeal, Second District, Division 2, California. June 7, 1919.)

1. LANDLORD AND TENANT ⚷172(2)—CONSTRUCTIVE EVICTION.

Any act of a permanent character, done by the landlord or by his procurement, with the intention and effect of depriving the tenant of the enjoyment of the premises demised, or a part thereof, to which he yields, and abandons possession, may be treated as an eviction from the whole, and the tenant may abandon the leased premises and recover damages.

2. LANDLORD AND TENANT ⚷172(2)—CONSTRUCTIVE EVICTION.

Where the lessor of two lots and a strip 35 feet wide on one side thereof wrongfully entered upon and took possession of 20 feet of the 35-foot strip and erected a house thereon, there was a constructive eviction from the entire leased premises.

3. APPEAL AND ERROR ⚷704(2)—FINDINGS—CONCLUSIVENESS.

In action for constructive eviction, where plaintiff appealed from an alleged insufficient judgment on the judgment roll, findings that plaintiff was not damaged in any sum whatever by reason of value of the unexpired lease, loss of business, or prospective profits were conclusive on appeal.

4. TRIAL ⚷404(2)—CONFLICTING FINDINGS.

In action for constructive eviction, where court expressly found "that plaintiff necessarily expended about $868 in removing from said premises," a declaration in the findings that the plaintiff was not damaged by the expense so entailed must be construed as a conclusion of law, and an erroneous one.

5. LANDLORD AND TENANT ⚷180(4)—EVICTION—DAMAGES.

The expenses necessarily incurred by a tenant in removing from premises upon an eviction are recoverable as damages.

Appeal from Superior Court, Los Angeles County; Louis W. Meyers, Judge.

Action by Eugene L. Klein against Fred R. Lewis. From an insufficient judgment for plaintiff, he appeals. Reversed and remanded, with instructions.

Frank Bryant and Oliver O. Clark, both of Los Angeles, for appellant.

Nichols, Cooper & Hickson, of Pomona (Bert L. Cooper, of Pomona, of counsel), for respondent.

SLOANE, J. This action was brought to recover damages for the eviction of plaintiff from leased premises. Judgment was for plaintiff in the sum of $81 and costs for defendant. Plaintiff appeals on the judgment roll, contending that under the facts as found by the court he should recover a much larger sum.

The material facts as found by the court are substantially as follows: The plaintiff was in rightful and peaceable possession, under a lease executed by defendant, of lots 1 and 2 of block A of the city of Pomona, together with an additional strip 35 feet in width on the easterly side of said lots. The lease was for the term of 5 years. The plaintiff, upon taking possession under his lease, expended several thousand dollars in establishing on the premises his business of manufacturing and selling crystallized and canned fruits. While the lease had still some 3 years to run, and plaintiff still being rightfully in the possession of the whole of said premises and in no wise in default, and during the absence of plaintiff in the East, defendant, without right and without the consent of plaintiff, entered upon and took possession of a portion of the leased premises, consisting of a strip 20 feet in width and 120 feet in length along the easterly side thereof, and erected a dwelling house and its appurtenances thereon. Thereafter, on the discovery of said eviction, plaintiff demanded that defendant vacate and return to plaintiff the possession of the portion of said premises so taken by him. Defendant, however, refused to, and never did thereafter, redeliver the portion of the leased premises so wrongfully taken. The strip of land so appropriated by defendant included the driveway, which was the means of ingress and egress between the buildings on the leased premises used by plaintiff in his business and the public street, which driveway he had graded and graveled at an expense of $81. After the refusal of defendant to vacate and redeliver possession of this strip of ground, plaintiff elected to abandon his lease and the entire premises, and brought this action to recover for constructive eviction from the entire premises, demanding damages for loss of prospective profits, loss of a large quantity of orange juice, expenses incident to his removal from the premises, and for the $81 he had expended for grading the driveway, aggregating the sum of $3,538.

[1] The court further found that, after the wrongful entry by defendant and the erection of the dwelling house and appurtenances aforesaid, "there remained on the east side of said dwelling house and its appurtenances a strip of land 15 feet in width and 120 feet in length which was clear and unobstructed for the use of said

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

plaintiff, and which said plaintiff could have converted into a practicable driveway by the expenditure of $81," and "that the acts of defendant in evicting plaintiff from the portion of the leased premises hereinbefore described did not render the said premises wholly unfit and useless to plaintiff for the purposes of said business." It does not appear from the record just what proportion of the entire leased premises was included in the strip taken by the defendant, or what its relative value was to plaintiff's business, as compared with the entire premises; but a strip of land 20 by 120 feet in its dimensions, in relation to two ordinary town lots, especially as it included the driveway used in the plaintiff's business, would seem to be of some material importance to the leasehold. The finding of the court that the lessee could construct another driveway on the land remaining to him which was clear and unobstructed, and that his eviction from the strip in question "did not render the said premises wholly unfit and useless to plaintiff for the purposes of said business," does not militate against such conclusion. A trespassing landlord cannot be permitted to "apportion his own wrong"; nor can it be assumed that because a tenant leaves a part of the leased ground unutilized, it constitutes an implied license to his landlord to build a house on it and come and live with him. When the landlord, in violation of the covenant of quiet possession under the lease, moves in, the tenant surely is justified in moving out, and suing for damages, if he so elects. "Any act of a permanent character, done by the landlord or by his procurement, with the intention and effect of depriving the tenant of the enjoyment of the premises demised or a part thereof, to which he yields, and abandons possession, may be treated as an eviction from the whole." Royce v. Guggenheim, 106 Mass. 201, 8 Am. Rep. 322; Smith v. Raleigh, 3 Camp. 513; Tiffany, Landlord and Tenant, § 185. When the lessor by an illegal act materially disturbs the possession of his tenant, which he should protect and defend, the latter may abandon the premises leased and recover damages." Central Business College v. Rutherford, 47 Colo. 277, 107 Pac. 279, 27 L. R. A. (N. S.) 637, 19 Ann. Cas. 688; Agoure v. Lewis, 15 Cal. App. 71, 113 Pac. 882; Skaggs v. Emerson, 50 Cal. 6; Osmers v. Furey, 32 Mont. 581, 81 Pac. 345.

[2] We are of the opinion, on the facts found, that there was such an invasion by the landlord of the rights of the tenant under the lease as to constitute a constructive eviction from the entire leased premises, and to justify its abandonment by the lessee and the recovery of all proximate damages resulting from an eviction.

[3] The court found for the plaintiff on the question of damages, apparently on the theory of a partial eviction, and allowed the claim for $81, the amount plaintiff had expended on the driveway, which was part of the strip of land on which defendant wrongfully entered. Under proper pleadings, evidence, and findings in this case, plaintiff would be entitled to recover the value of his unexpired lease, not only on the strip from which he was actually evicted, but, upon the constructive eviction, for the entire premises, together with any other loss the natural and proximate result of such eviction. The pleadings are very vague upon most of the allegations of damage, the evidence is not before us, and the court has found that plaintiff was not damaged in any sum whatever by reason of value of the unexpired lease, loss of business or prospective profits, or by reason of loss of the orange juice as alleged in the complaint. On this appeal these findings of fact are not open to attack, and must be held conclusive. The findings of the court relative to the profits derived from plaintiff's business, while he occupied under the lease, gave no indication as to whether his profits were decreased or increased by his change of location.

[4, 5] It is also declared in the findings that plaintiff "has not been damaged in any sum by reason of the entailed expense incident to enforced, or any, removal of plaintiff from said premises"; but, as the court elsewhere expressly finds "that plaintiff necessarily expended about $868 in removing from said premises as aforesaid," the declaration that the plaintiff was not damaged by the expense so entailed must be construed as a conclusion of law, and an erroneous one. Ions v. Harbison, 112 Cal. 260, 44 Pac. 572; Niles v. Edwards, 90 Cal. 10, 13, 27 Pac. 159, 296. That the expenses necessarily incurred by a tenant in removing from premises upon an eviction may be recovered as damages seems to be generally recognized by the authorities. Sutherland on Damages, § 865; Jennings v. Bond Ind., 14 Ind. App. 282, 42 N. E. 957; McElvaney v. Smith, 76 Ark. 468, 88 S. W. 981, 6 Ann. Cas. 458; Griesheimer v. Bothman, 105 Ill. App. 585.

The judgment is reversed, and the cause remanded, with instructions to include in judgment for plaintiff the cost of removal from premises as found on the trial, and his costs of suit.

We concur: FINLAYSON, P. J.; THOMAS, J.

41 Cal. App. 405

SHEA v. BRODE. (Civ. 2644.)

(District Court of Appeal, Second District, Division 1, California. June 6, 1919.)

MUNICIPAL CORPORATIONS 🔑581—SPECIAL ASSESSMENTS — SALE — NOTICE TO REDEEM —AFFIDAVIT OF SERVICE.

Affidavit of attempt to serve a notice to redeem property sold for a delinquent special assessment for municipal playgrounds which alleged posting of the notice on the property and search for the name of the owner in the municipal and telephone directories and at the office of a company claiming to list the addresses of property owners *held* to show due diligence in attempting to serve the notice.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Action by Barbara N. Shea against A. W. Brode. Judgment for plaintiff, and defendant appeals. Reversed.

George H. Moore, of Los Angeles, for appellant.

Conner, Heath & Maxwell, of Los Angeles, for respondent.

SHAW, J. Action to quiet title. Judgment for plaintiff. Defendant appeals.

Plaintiff was the record owner of the lot in question. Defendant asserted title to the property under and by virtue of a deed made and delivered to him by the board of public works of the city of Los Angeles, in pursuance of proceedings had and taken under the provisions of the Park and Playground Act (Stats. 1909, p. 1066) to condemn certain property known as Exposition Park, the assessment for the cost of acquiring which was levied upon lots and parcels of land which included that in controversy.

The legality and correctness of the proceedings had and taken prior to the time when the assessments made became delinquent are unquestioned. Plaintiff, respondent here, challenges the validity of the proceedings upon five grounds. She claims: First, that the signing of the certificate of delinquency by R. I. Follmer, assistant clerk, was irregular and insufficient to constitute a compliance with the provisions of section 18 of the act; second, that the certificate of sale was not executed in duplicate, because, while conceding that one copy thereof was properly signed by the president of the board of public works, the signature to the other copy was a fac simile stamp signature of the same officer, affixed at his request by the clerk; third, that the signature "Board of Public Works of the City of Los Angeles, by Lorin A. Handley, President," affixed to the deed, was unauthorized and insufficient to constitute an execution of the deed; fourth, that the notice to redeem is invalid in that, after the statement of the amount due for redemption, it contained the following words inserted in parentheses: "And three dollars for serving of this notice and making affidavit thereto, as allowed by law."

In the case of O'Neil v. Brode, Civil No. 2630, reported in 181 Pac. 91, all of these questions were presented to this court upon an appeal which involved the same proceedings and assessment, and decided adversely to the contention of respondent. It is unnecessary to repeat what was there said; suffice it to say that the members of this court adhere to the conclusions reached therein in disposing of the same questions now raised on this appeal.

The other point made in this case and not involved in the O'Neil Case is that the affidavit of service of notice to redeem is insufficient, for the reason that it fails to show an exercise of due diligence on the part of defendant in serving the notice, as required by section 24 of the act. It appears from the affidavit that, the property being vacant and unoccupied, affiant posted a sufficient notice thereon in a conspicuous place, tacked upon a board and nailed to an upright stake driven into the ground, that the assessment showed the name of the owner of the property to be Cornelius Shea, that after making inquiry in the immediate vicinity of said property in an effort to locate Cornelius Shea and obtaining no information as to him or his whereabouts, he searched the city directory of Los Angeles and the directories of the two telephone companies without finding his name therein, that thereupon he, for a remuneration paid, sought the assistance of a company known as the Los Angeles Map & Address Company, which claimed to possess knowledge of the names and addresses of people owning lots and lands in the city of Los Angeles, and from said company learned that Barbara N. Shea, plaintiff herein, was the then owner of the property, and that a letter addressed to her, care Spokane Title Company, Spokane, Wash., should reach her, that thereupon defendant mailed said notice to redeem to the address so given him, which letter was returned by the post office department, and that affiant does not know of any method or way to induce the owner of said property to redeem the same, followed by a statement that prior to the posting of notice upon said property he had exercised due diligence to find the owner thereof. In support of her contention that this affidavit fails to show an exercise of due diligence, respondent cites Hennessy v. Hall, 14 Cal. App. 759, 113 Pac. 350, wherein the affidavit was held insufficient by reason of the fact that no acts performed by the affiant in his efforts to discover the whereabouts of the party were shown; the averment being merely that he had used due diligence. This was held insufficient; but it is not authority for the contention here made, since the acts done by affiant are set forth in the affidavit. In our opinion, the averments are sufficient under the circumstances to show due diligence on the part of defendant in his effort to ascertain the whereabouts of plaintiff and serve upon her the notice to redeem required by the statute.

Upon the authority of what is said in O'Neil v. Brode, supra, and our conclusion as to the sufficiency of the affidavit, the judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

41 Cal. App. 506

ELLIS v. SANBERG. (Civ. 2645.)

(District Court of Appeal, Second District, Division 1, California. June 9, 1919.)

1. MUNICIPAL CORPORATIONS ⚷706(5)—AUTOMOBILE ACCIDENT—EVIDENCE.

In pedestrian's action for injuries from being run down by automobile, testimony that, when defendant apparently saw plaintiff and applied his brakes, he "skidded his machine for fully 50 feet, the fire flying from under the tires, trying to stop," *held* to support finding that defendant was traveling at a dangerous and unlawful speed.

2. MUNICIPAL CORPORATIONS ⚷705(10)—AUTOMOBILE ACCIDENT—CONTRIBUTORY NEGLIGENCE.

That plaintiff pedestrian, run down by defendant's automobile, endeavored to save himself by grasping the machine, and that in so doing he may have aggravated his injury, does not show contributory negligence on his part.

3. MUNICIPAL CORPORATIONS ⚷706(2)—AUTOMOBILE ACCIDENT—PROOF AND VARIANCE.

That plaintiff pedestrian, run down by defendant's automobile, may not have been actually thrown to the pavement, as he alleged, does not show failure of proof to sustain the complaint made, plaintiff being struck by the automobile in the manner described and suffering injuries, and it being immaterial whether, after being struck, he remained on his feet or fell.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by Loren Ellis against M. S. Sanberg. From judgment for plaintiff and order denying new trial, defendant appeals. Affirmed.

H. H. Appel and E. J. Dennison, both of Los Angeles, for appellant.

J. W. Hocker, Robert E. Austin, and Hocker, Morris & Austin, all of Los Angeles, for respondent.

JAMES, J. A judgment in this case was entered in favor of the plaintiff in the sum of $400 as damages which the court found plaintiff had suffered by reason of personal injuries caused by the negligence of the defendant. The defendant appeals from the judgment and from an order denying his motion for a new trial.

[1-3] In the complaint of plaintiff it was alleged that, while plaintiff was crossing a public street in the city of Los Angeles, the defendant came down the street operating an automobile, and that said automobile was traveling at a dangerous rate of speed and in excess of the speed permitted by law, and that defendant "so carelessly and negligently operated and drove his said automobile as to run the same into the person of plaintiff, running him down, and said automobile struck plaintiff with such force and violence that plaintiff was violently thrown to the pavement." Under findings made by the court the facts were determined to be as alleged by the plaintiff. Defendant in his answer denied that any negligent act had been committed on his part, and further alleged that the injuries to plaintiff were caused by the contributory negligence of the latter. It is here contended that the evidence was insufficient to justify the court in making findings in favor of the plaintiff and that the defense of contributory negligence should have been sustained. The case on the evidence was peculiarly one for the judgment of the trial court and was not a case where the evidence showed without conflict a lack of negligence on the part of the defendant. The plaintiff attempted to cross the street about midway between the corners of the block. He testified that he saw the machine of the defendant when it was 30 or 40 feet away, that he did not know upon which side the machine was going to pass, and, becoming confused in order to save himself he attempted to grasp the machine in front, and that as he did so the machine came to a stop, not before, however, his leg had been damaged by contact with it. Another witness testified to having observed the accident. He testified that he was in a machine following the machine of the defendant just before the accident, and that the machine of the defendant was traveling in the neighborhood of 40 miles an hour; that as the defendant apparently saw the plaintiff crossing in front of him he put on his brakes and "skidded his machine for fully 50 feet, the fire flying from under the tires, trying to stop the machine."

From this brief statement of the evidence it will at once be seen that, notwithstanding any contradictory testimony offered by the defendant, there was substantial evidence before the court tending to show that the defendant in driving down the street was traveling at a dangerous and unlawful rate of speed. Finding such to be the fact, the

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

court was justified in concluding that, had defendant's machine been traveling at a reasonable and safe rate, it would have been more easily controlled, and plaintiff would have advanced beyond its course before he found the machine upon him. That the plaintiff endeavored to save himself by grasping the machine, and that in so doing he may have aggravated his injury, does not show contributory negligence on his part. His act may have been, and we must assume the court so considered it, the act of a reasonable man under the circumstances. That he may not have been actually thrown to the pavement, as he alleged, does not show that there was a failure of proof to sustain the complaint made. The plaintiff was struck by the automobile of the defendant in the manner described, and suffered injuries. It is immaterial whether, after being so struck, he remained upon his feet or fell to the ground. In our opinion, the decision of the trial judge is fully supported by the evidence.

The judgment and order are affirmed.

We concur: CONREY, P. J; SHAW, J.

41 Cal. App. 380

McKISSICK CATTLE CO. v. ALSAGA.
(Civ. 1821.)

(District Court of Appeal, Third District, California. June 5, 1919.)

1. Waters and Water Courses 🔑152(8)—Irrigation — Appropriation — Sufficiency of Evidence.

Evidence that waste waters from plaintiff's irrigation project collected in a slough from which defendant constructed a ditch to his property, etc., *held* to sustain findings that plaintiff had continuously used all the waters of a creek for his purposes, and that defendant had no right to build a ditch across plaintiff's land to the creek and appropriate waters therefrom.

2. Waters and Water Courses 🔑42—Riparian Rights—Use of Water.

The owner of land riparian to a stream is entitled to exercise riparian rights, unless he has divested himself of such rights or otherwise lost them.

3. Waters and Water Courses 🔑40—Riparian Rights—Loss—Change of Course of Stream.

Where natural forces cause a stream to seek a channel outside of lands through which they formerly flowed, the landowner loses his riparian rights.

4. Waters and Water Courses 🔑40—Riparian Rights—Diversion of Stream.

While a riparian owner, who has lost his rights by avulsion, may ditch the waters back to its original channel within a reasonable time, he cannot disturb the rights of appropriators, or go upon the land of others for this purpose without their consent.

5. Appeal and Error 🔑1071(1)—Harmless Error—Findings.

An erroneous finding will be disregarded, where judgment is supported by other findings.

6. Words and Phrases—"Channel."

"Channel" is a generic term applicable to any water course, whether a river, creek, slough, or canal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Channel.]

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by the McKissick Cattle Company against Baptista Alsaga. Judgment for plaintiff, and defendant appeals. Affirmed.

F. A. Kelley, of Susanville, for appellant.

Dodge & Barry, of Reno, Nev., for respondent.

Pardee & Pardee, of Susanville, amicus curiæ.

HART, J. This action was instituted by the plaintiff to enjoin the defendant from maintaining on certain of the plaintiff's lands a dam and a ditch, whereby water is diverted from Secret creek to the lands of the defendant. Findings and judgment were in favor of the plaintiff, and this appeal is prosecuted by the defendant from said judgment.

The plaintiff claims the exclusive right to all the waters flowing in said creek, both as a riparian owner and as an appropriator, and sets up both those claims in two different causes of action. The defendant, besides specifically denying by answer all the material facts alleged in the complaint, filed a cross-complaint, in which he sets up a claim to 50 inches of the water of the creek, measured under a 4-inch pressure, by virtue of appropriation and also by prescription. The facts, as disclosed by the findings, are these:

The plaintiff is the owner of a little more than a quarter section of land in township 26 and a number of other quarter sections in township 32, in Lassen county, and has been the owner of said lands for many years. The waters of Secret creek, above mentioned, in a well-defined channel, between well-defined banks, flow over and across said lands; the latter being, therefore, riparian thereto and susceptible of irrigation from the waters thereof. All the waters of said stream are necessary for the irrigation of said lands for the purpose of growing crops thereon.

More than 25 years prior to the commencement of this action a grantor of plaintiff appropriated all of the waters of said stream by constructing dams in the channel thereof at various places in and upon said stream and constructing ditches leading from said dams to and upon said lands, and for more than 25 years prior to the institution of this action the plaintiff and its said grantor have appropriated and diverted, by the means above indicated, all of the waters of said stream and, except when interfered with by defendant, have continuously used said waters for the irrigation of crops of hay and grasses for pasture standing and growing on said lands; that, inasmuch as the climate of that section of the state in which said lands are situated is arid, it is absolutely necessary and, in fact, indispensable to the growing of hay and grasses on the lands of plaintiff to irrigate the same; and that properly to irrigate said lands, or so that they will produce crops of hay and grasses, it is necessary for plaintiff to use all of the waters of said stream.

The defendant is, and for more than 10 years prior to the beginning of this action had been, the owner and in the possession of fractional portions of certain sections, in quantity amounting in the aggregate to a quarter section, in said township 32. Over a corner of the said lands of the defendant the creek above mentioned traversed, and the said lands, although (as the court found) riparian to said creek, are not susceptible of irrigation from the waters of said creek without the necessity of going upon the lands of plaintiff for the purpose of diverting the waters from the stream to the lands of defendant by the construction and maintenance of a dam on plaintiff's lands and constructing and maintaining a ditch leading from such dam to defendant's lands.

As above stated, the defendant in his cross-complaint claimed title to 50 inches of the waters of the creek by appropriation and prescription, and in this behalf alleged that in the year 1894 one Edward W. Tregaski, a grantor of defendant, at a time when said Tregaski was the owner of defendant's lands, constructed a ditch at a certain point on plaintiff's land connecting with Secret creek and leading to defendant's lands, and thereby appropriated and diverted to the latter lands 50 inches of the waters of said stream "for a useful and beneficial purpose"; that at the time of the appropriation so made such waters were unappropriated and unclaimed waters flowing in said stream, and that said appropriation was made "peaceably, quietly, and without objection or interference by the owners of said lands upon which said diversion was made"; that ever since the time of said diversion, in the year 1894, the defendant's said grantor and the defendant have continuously, in each and every year thereafter and until the year 1915, appropriated, diverted, and used 50 inches of said waters, measured under a 4-inch pressure, for the necessary irrigation of crops of hay, grain, and grasses growing upon defendant's lands. It is then averred that in the month of April, 1915, the plaintiff willfully, wrongfully, and without right, and against the consent of defendant, constructed a dam in said creek at the point where the ditch leading to defendant's land tapped said creek, and by means thereof and a ditch constructed by said plaintiff turned the waters of said stream away from the defendant's lands on to the lands of plaintiff, thereby depriving defendant of any use of the waters of said creek, etc.

As to the above allegations of defendant's cross-complaint, the court, after finding that said Tregaski did not in the year 1894, or at any other time, build the ditch referred to or otherwise make an appropriation of any of the waters of said stream to be used on defendant's lands or for any purpose, further found:

> "That prior to the winter of 1913 and 1914 there was an ancient channel heading upon the lands of plaintiff, lying on said stream above the lands of defendant, and that said ancient channel caught up the waste waters from the said lands of plaintiff so lying above on said stream, as aforesaid, and said Tregaski did construct a ditch from said ancient channel to and upon defendant's said lands, and said Tregaski and said defendant down to the winter of said years 1913 and 1914, used the waters of said ancient channel and ditch as the same wasted or flowed from the said lands of plaintiff, situated on said stream above said lands of defendant, that, in the winter of the years 1913 and 1914, the natural channel of said stream, by reason of unusual flood or freshet, washed out to such an extent that no water would or could flow from said stream to the lands of defendant, or to the head of said ancient channel, except by defendant constructing a ditch over the lands of plaintiff on said stream, and above the lands of defendant, and constructing a dam in the channel of said stream on the lands of plaintiff in the channel of said stream above the said lands of defendant.
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> "That in the year 1914, after said flood or freshet, defendant, for the purpose of causing the water of said stream to flow into said ancient channel willfully and unlawfully, and without right, and without the consent of plaintiff, entered upon the west half of the northeast quarter of said section 26, township and range aforesaid, and erected a new dam in the channel of said stream, and constructed a new ditch leading from said dam upon and across a portion of the said west half of the northeast quarter of section 26, and to lands occupied and claimed by defendant lying west of said lands, and said defendant now claims the right to maintain said dam in the channel of said stream, and to maintain said ditch and take water therethrough, across a portion of the said lands of plaintiff, to and upon lands so claimed and occupied by defendant."

It was further found that the defendant "has no right to maintain said dam in the channel of said stream or said ditch across said lands." The findings further show that in the month of April, 1915, plaintiff, in the manner charged and described in defendant's cross-complaint, stopped the flow of the waters from the creek into the ditch leading to defendant's lands, but it was found that the act of the plaintiff in that respect was not unlawful or wrongful. Neither the defendant nor his grantors (so it was found)—

> "have ever diverted 50 inches of water, or any number of inches of water whatever, from said stream for any length of time whatever, openly, notoriously, continuously or adversely to the plaintiff or its grantors, or either of them, or under any claim of right and title against said plaintiff, and that neither defendant nor his grantors have ever appropriated and diverted, or used and appropriated and diverted, or used and appropriated the waters of said stream, or any portion thereof, openly, notoriously, continuously, or adversely to the plaintiff or its grantors, or either of them."

The appellant contends: (1) That the findings are not supported; and (2) that certain findings are so irreconcilably inconsistent with each other that the incongruity is fatal to the judgment.

[1] We do not intend, nor is it necessary, to present herein a detailed or an extended statement of the testimony, to show that the first point above stated is wholly destitute of merit. It will suffice to state that there is disclosed by the record ample evidence to show that since the year 1895, and down to the time in 1914 when the defendant constructed the ditch on the plaintiff's land to carry water from the creek to his land, the plaintiff had continuously and uninterruptedly used for the purpose of irrigating its lands all the waters of Secret creek, and that all the waters flowing in the creek were necessary for that purpose. Indeed, it was sufficiently made to appear that there was not enough water flowing in said creek to provide properly or adequately for the crops grown on all the plaintiff's lands. It was further shown by what appears to be sufficient proof that none but waste waters from the creek ever did reach the defendant's land, and this waste water was small in quantity and came from the irrigation by plaintiff of that portion of its lands known as the "upper meadow"; that the waste water referred to ran into what the court in its findings characterizes as an "ancient channel." Said channel, it seems, was an old slough which had ceased to carry water; that the use of the waste water emptying into said channel or slough as the result of the irrigation of plaintiff's "upper meadow" was accomplished by the defendant's grantor, said Tregaski, by a ditch connecting with said slough; that the use in such manner of said waste water was continued by the defendant's grantor and himself until the rainy season of 1913–14, when, as seen, the channel of Secret creek was so washed out by a freshet as to render it incapable of carrying its water so that it would empty the waste waters into the old slough.

In addition to the foregoing, it may be stated that certain witnesses testified that in certain years prior to that in which the defendant constructed the ditch in controversy, they had worked on the land owned by the defendant and that they knew that no water from Secret creek, except the waste above referred to, was ever used on said land. It may also be added that it appears that, just prior to the construction by the defendant of the ditch in question, the latter stated to the witness Enyart, who was foreman or superintendent of the plaintiff and as such had charge of its lands and stock business, that he (defendant) desired the use of the water of the creek for the period of 10 or 12 days only; that Enyart replied to the defendant, "I can't let you have it—it would be against the company's wishes, and I can't do it; I said, 'You can write out an agreement and pay me a dollar,'" whereupon a written agreement or promise was prepared and signed by defendant and delivered to Enyart, in which he promised "to pay the McKissick Cattle Company $1 for the water for my ryefield for 12 days." In this connection, it may be well to state that Enyart testified that the defendant, at the time of making said agreement, made no claim whatever to the water flowing in Secret creek, nor, from the time he (witness) first entered into the employment of plaintiff, in the year 1895, to the "present time," did any one living on or occupying "the Tregaski place or Alsaga land" make "any claim [to witness] of any right to use the waters of the creek, except in the last couple of years," when the witness discovered the ditch complained of.

The testimony further shows that the plaintiff has utilized the waters of the stream for its purposes by putting dams therein and building small ditches on its lands, and that there is no way in which the defendant can divert the water from the creek to his lands except by doing what he did in the year 1914, viz. by maintaining a dam in the channel of the creek in the meadow field of plaintiff and a ditch leading from the dam to the defendant's land. There is ample testimony from which the trial court was authorized to find that the ditch in question was constructed by the defendant in the year 1914.

It is clear from the foregoing statement of the evidence that (as above declared) the finding that the plaintiff for more than 20 years prior to the commencement of this action had continuously and uninterruptedly used, by virtue of rights acquired as an appropriator, until interfered with by defendant, as above explained, all the waters of Secret creek for a beneficial purpose and that all said waters were necessary for such purpose, is supported.

[2] The claim that there is a fatal inconsistency between certain of the findings is based upon the fact that while, as above shown, the court found that the plaintiff was entitled to take and use all the waters of said creek, it also found that the lands of the defendant were riparian to said stream. It must be conceded that the idea that a person may be a riparian owner and at the same time not entitled to exercise the rights which are the necessary corollary of such ownership is inherently inconsistent. If he be a riparian owner, or his lands are riparian to a flowing or any stream, he is ex necessitate, entitled to exercise riparian rights, unless he has by his own acts divested himself of such rights or otherwise suffered the loss of them. It is probable, however, that what the court meant to declare by said finding was merely that the lands of defendant were riparian to the creek so long as water flowed therein so as to reach that part of the creek passing over said lands.

But, assuming that the cross-complaint of defendant sufficiently shows by its averments that defendant's lands were ever riparian to the creek in question (an assumption directly opposed to the contention of counsel for plaintiff), we still have here this situation: The evidence shows, the court finds, and the defendant expressly admits in his briefs, that in the winter of 1913–14 the natural channel of said creek was, from natural causes, so changed as that the waters thereof no longer thereafter flowed to defendant's lands, the same being caused by a flood or freshet which washed out the natural channel to such an extent and in such manner as that it brought about the results indicated. And the defendant further admitted (and the court found upon evidence sufficient in itself, and independently of such admission, to warrant the finding) that the defendant could not restore the water without ditching the water from the creek at a point upon the plaintiff's lands. In other words, it was not only found by the court, but it was admitted by the defendant that he cannot secure a return of the water into the channel of the creek, so that it will reach his lands without using the plaintiff's lands for that purpose. It follows, therefore, that, even if it be true that defendant's lands were formerly riparian to the waters of Secret creek, the finding that they were riparian to said waters at the time of the commencement of this action is entirely devoid of any justification whatsoever; for when, solely by an act of Providence, the channel of riparian waters has been so changed as that such waters cease to flow over and across the lands of a riparian owner—that is to say, when such waters cease through the operation of some natural force to pursue their accustomed course and in consequence cease to flow in a portion of that natural channel, which portion of such channel passes or crosses over certain lands—then in that case the owner of such lands loses the rôle of a riparian owner. Or, as this proposition is learnedly and lucidly explained by former Justice Henshaw, in Wholey v. Caldwell, 108 Cal. 95, 41 Pac. 31, 30 L. R. A. 820, 49 Am. St. Rep. 64:

> "The foundation of the riparian proprietor's rights rests upon the universally accepted maxim adopted by the common law from the civil law: 'Aqua currit, et debet currere ut currere solebat ex jure naturæ.' These rights thus draw their support from the laws of nature, but they do not rise superior to those laws. When, by their operation, the flow is lost, the right is lost with it. The new channel itself becomes the natural channel. Otherwise a riparian proprietor would hold all lands above him in an extraordinary and perpetual servitude. If, by the forces of nature, the stream should change its course at a point miles above him, he would still be empowered to subject any and all of the intermediate territory to operations requisite to enable him to turn the water back upon his own premises, and this power would be his to the very fountainhead of the stream. Such a doctrine could not be tolerated."

The doctrine thus declared is so obviously the product of sound principle and sound sense that it would be wholly supererogatory to multiply authorities expounding and upholding it, although, for the convenience of the profession, we may with no impropriety refer to the following authorities in this connection: Hale's (Sir Matthew) De Juro Maris, c. 1; Kent's Commentaries, 428; Blackstone's Commentaries, 262; Angell on Water Courses, § 57; Gould on Waters, § 159, and cases mentioned thereunder; 1 Wiel on Water Rights, § 862.

[3, 4] Without doubt a riparian owner, having lost his rights as such by avulsion, may ditch the water back to its original channel, if he does not delay doing so beyond a reasonable time. 1 Wiel on Water Rights, § 862; Morton v. Oregon Short Line Ry. Co., 48 Or. 444, 87 Pac. 151, 152, 153, 7 L. R. A. (N. S.) 344, 120 Am. St. Rep. 827; Mathewson v. Hoffman, 77 Mich. 420, 43 N. W. 879, 6 L. R. A. 349; Farnharm, Waters, § 491. But in restoring the water to its original channel he will not be permitted to disturb the rights of appropriators, nor has he the right to go upon the lands of others, without their consent or acquiescence, and build thereon dams and ditches, or either, whereby he may restore the lost waters to their original bed. The defendant in this case entered upon the lands of the plaintiff and constructed the ditch complained of without the consent of the latter, and, as in no other way can he bring back to the portion of the channel of Secret creek passing over and across a corner of his lands the waters which had theretofore flowed therein, he stands as one

who has lost his riparian rights with respect to the creek in question.

[5] The result of the foregoing considerations is, as above stated, that the finding that defendant's lands are riparian to Secret creek is wholly out of place in the judgment roll and is to be disregarded. The judgment is amply supported by the other findings.

[6] It is next contended that there is no evidence supporting the finding of "an ancient channel heading upon the lands of plaintiff, lying on said stream above the lands of defendant and into which flowed the waste waters from plaintiff's lands," and that defendant's grantor, Tregaski, maintained a ditch from said "ancient channel to and upon defendant's said lands," by means whereof he utilized for the benefit of said lands the waste waters from plaintiff's lands. The specific objection to said finding is that there is no evidence of the existence of an "ancient channel." The witness Enyart testified that "Alsaga takes the water out in a ditch above the deep channel in the upper field; his ditch runs into an old slough; that is, the waste water from the irrigation of the upper meadow, and that was all of the water that was used on the Tregaski place at that time"—referring to the time intervening between the years 1896 and 1900.

It is doubtless true that the "ancient channel" found by the court to exist is the "old slough" mentioned by the witness Enyart. Counsel for defendant undertake to differentiate an "old slough" from an "ancient channel," declaring that, while a slough is "an inlet from a river or a wet and marshy place" (Webster's Dict.), "an ancient channel no longer holds or carries water." The distinction is verbal rather than real. The word "channel" is, as we understand it, a generic term, and applies to any water course, whether a river, a creek, a slough, or a canal. If the phrase "an ancient channel" means an abandoned water course, we can see no reason why the phrase "old slough" should not imply the same thing, if it be true that water once flowing in it has ceased permanently so to flow. But the discussion is academic and without importance, since the finding that the defendant had never used any but the waste waters flowing from the plaintiff's lands after the irrigation thereof from Secret creek is alone sufficient; it being immaterial in what manner such waters reached the defendant's lands, whether by means of an "old slough," an "ancient channel," or an artificial waterway.

There is no just reason presented for disturbing the judgment, and it is therefore affirmed.

We concur: CHIPMAN, P. J., BURNETT, J.

(41 Cal. App. 315)

VOORHEIS v. TIDEWATER SOUTHERN RY. CO. et al. (Civ. 1973.)

(District Court of Appeal, Third District, California. May 28, 1919.)

1. RAILROADS ⟹222(3) — OPERATION — NUISANCE—TRAINS IN STREET.

Allowing long freight trains to stand a long time on a street *held* to constitute a public nuisance, and an obstruction to the free use of abutting business property, resulting in an unlawful obstruction of a highway.

2. RAILROADS ⟹222(3)—PUBLIC NUISANCE—RAILROAD IN HIGHWAY.

A public nuisance is created by construction of a railroad in a highway without legal authority.

3. RAILROADS ⟹222(5)—OPERATION—ACTION TO ENJOIN NUISANCE—COMPLAINT.

Unnecessary allegations in an abutting owner's complaint against a company operating a railroad in a street, as to violation of its franchise may be disregarded, and the complaint treated as one for restraint of a public nuisance so far as injurious to plaintiff; it being enough to show the acts or facts constituting the nuisance, and the resulting injury, and for defendant to show justification.

4. NUISANCE ⟹72—ENJOINING—ACTION BY PRIVATE CITIZEN.

For a private citizen to be entitled to an injunction for a public nuisance, it is only necessary to show he has suffered an injury peculiar to himself, and not suffered by the public in general.

Appeal from Superior Court, Stanislaus County; W. H. Langdon, Judge.

Action by Mary A. Voorheis against the Tidewater Southern Railway Company and another. From an adverse judgment, plaintiff appeals. Reversed.

Brown & Hindman, of Modesto, for appellant.

Arthur L. Levinsky, of Stockton, and Arthur J. Carlson, of Modesto, for respondents.

CHIPMAN, P. J. Plaintiff brought the action to have the defendant railroad corporation restrained from performing certain acts in connection with the operation of its railroad. Defendants filed general and special demurrers to the complaint, which were sustained. Plaintiff elected to stand upon her complaint, and judgment was entered against her for costs, from which judgment she prosecutes this appeal.

The complaint alleged: That plaintiff was and is a citizen, householder, freeholder, and taxpayer of the city of Modesto, in Stanislaus county; that the defendant Tidewater Southern Railway Company is a corporation organized under the laws of the state of California, "and the direct successor in interest of the Tidewater & Southern Railroad Company";

that the city of Modesto is a municipal corporation; that on or about May 17, 1911, the city of Modesto granted to said railroad company a franchise whereby it was granted the right and privilege of constructing, maintaining, and operating a railroad over certain streets and alleys in said city. A copy of said franchise is attached to and made a part of the complaint. It was then alleged that said railroad was to be constructed of standard gauge and to run between Stockton and Turlock; that cars were to be operated thereon "by electricity, gasoline, or any other lawful motive power, except steam, horses, and mules." The route of said railroad through the city of Modesto was then set forth. It was then alleged that among the provisions of said franchise were the following:

> "All freight and express matter shall be hauled and transported in closed cars having the same general appearance as passenger cars, but omitting the windows in the sides and ends thereof, and said cars shall be painted the same general color as the passenger cars, and shall have a generally neat appearance, save and except, however, that between the hours of 10:30 p. m. and 6 a. m. freight matter may be transported in cars such as may generally be used upon steam railroads for the transportation of freight, and save and except, further, that during any hour of the day or night perishable freight only may be transported in such freight cars as may be used by steam railroads for the transportation of freight in trains of not more than five cars."

And also the following:

> "That said grantee, its successors and assigns, shall not permit nor suffer nor allow any freight or express cars to be side-tracked, or to stop on said Virginia avenue or N street or Ninth street for more than five minutes in any one block."

It was then alleged that Virginia avenue and Ninth street are in a residence portion of the city of Modesto, and that Ninth street is a business street; that plaintiff is the owner of a business block fronting 90 feet on Ninth street, with stores on the ground floor and hotel and living apartments above. Violations of the two provisions of the franchise above set forth were alleged, as follows: That defendant railroad company was using locomotives propelled by steam "and equipped with loud and shrill steam whistles," bells, valves for blowing off surplus steam, and smokestacks; that said company was engaged in hauling freight of every character, at every hour of day or night, by freight trains composed of from 10 to 30 cars of various kinds, including box cars, flat cars, stock cars, and refrigerator cars, hauled by means of steam locomotives; that freight cars have been permitted to stand and remain on Virginia avenue, and Ninth streets for more than five minutes in one block, and for more than half an hour at a time, "thereby obstructing and impeding travel and traffic on said streets to the great detriment, annoyance, and inconvenience of the citizens of said city and of the public"; that large quantities of smoke and steam are emitted from the locomotives and carried into the faces of those in the vicinity and into the homes and business places in the vicinity of said streets so traversed by said railroad. Noises from the steam valves, steam whistles, bells, and by the rumbling and screeching of wheels, both day and night, were set forth, whereby "patronage is driven away from the business houses located on said streets, guests are turned away from hotels and rooming houses, homes in the vicinity are rendered uncomfortable and undesirable," and "the value of property and its rental value are greatly lessened and reduced, to the great injury, damage, and detriment of all persons living along or engaged in business in the vicinity of said streets so traversed by said railroad, and of all persons who own property abutting upon any of said streets, including the plaintiff herein." It was then stated that defendant railroad company had many times been requested to desist from violations of its said franchise, to which it had given no heed; that at a meeting of citizens to protest against further violations of said franchise the president of said defendant railroad company declared "it to be the intent and purpose of said defendant to continue to ignore and disregard the provisions of said franchise." Plaintiff avered that she made the city of Modesto a defendant because the officers and governing body of said city, though implored by plaintiff and other citizens to enforce said franchise, have failed, refused, and neglected so to do.

The complaint prayed that defendant railroad company, its servants, agents, etc., be enjoined from violating any of the terms of said franchise, particularly in five particulars, appearing in the provisions of the franchise above set out, and for general relief.

Separate demurrers by the defendants were filed. In ruling upon the demurrers the court said:

> "I have come to the conclusion that a citizen cannot maintain an action to restrain the violation of a franchise. He is not without remedy, however. If the facts warrant, he may proceed against the company for maintaining a nuisance, provided he can show that his injury is different in kind from that of his neighbors, not merely different in degree. He may also, through the Attorney General of the state, bring an action to forfeit the company franchise for the violation thereof."

Section 3479 of the Civil Code defines a nuisance as follows:

> "Anything which is injurious to health, * * * or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner of any

* * * highway is a nuisance." "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." Civ. Code, § 3480.

Section 3493 of the Civil Code provides as follows:

> "A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise."

[1, 2] That the acts complained of constituted not only a nuisance, but also a public nuisance, very clearly appears; and that they were an obstruction to the free use of plaintiff's property and resulted in an unlawful obstruction of a highway is equally clear. Admitting the facts to be true, as does the demurrer, a case for abatement of the nuisance or for relief through the restraining power of the equity court is, we think, satisfactorily shown. A public nuisance is created by the construction of a railroad in a highway without legal authorization. The quasi public character of railroads does not relieve them of liability; and if they have done acts which result in a nuisance, they are in no different situation than an individual proprietor. 20 R. C. L. p. 454.

[3] The demurrer seems to have been sustained on the ground that plaintiff was seeking to restrain the violation of a franchise which apparently the learned trial judge thought he could not do in this action. The court, however, added that plaintiff was not without remedy. "If the facts warrant," said the court, "he may proceed against the company for maintaining a nuisance, provided he can show that his injury is different in kind from that of his neighbors, not merely different in degree." And this brings us to what we regard as the only question to be decided. It is true that plaintiff in her prayer asks that defendant be "enjoined from violating any and all of the terms, provisions, or conditions of said franchise," and "particularly from violating said franchise in these particulars [there follows an enumeration of the various provisions of the franchise which it is claimed had been and were being violated]; that the plaintiff have all of the relief which to the court may seem meet and proper in the premises, and which may to equity appertain."

From our view of the case we do not think it was necessary that plaintiff should have pleaded the franchise and its violation. The acts and conduct of defendant were such as to constitute a nuisance. If the franchise furnished justification, it was for defendant to plead it or otherwise meet the effect of the acts charged in the complaint. Plaintiff chose to show by what right defendant was using the streets and its violation of that right. But this was immaterial. If defendant was maintaining a nuisance injurious to plaintiff which the law affords a remedy to have abated, it was only necessary to show the acts or facts constituting the nuisance, that defendant was the author of them, and the resulting injury to plaintiff. Disregarding, therefore, the matters set forth relating to defendant company's franchise and its violation and considering the acts alleged to have been committed and the threat to continue them unless restrained and the prayer for such relief as the facts set forth would warrant, we think the complaint sufficient to constitute a cause of action to restrain defendant company from further committing such acts, at least, as may be shown to be injurious to plaintiff's property which defendant is unauthorized to commit in the operation of its cars.

[4] The rule is stated as follows:

> "A private citizen is entitled to an injunction for a public wrong if he suffers an injury peculiar to himself, and not sustained by the general public in general, and the rule applies to nuisances as well as other wrongs. But unless the complainant has suffered special damages equity will not enjoin a public nuisance on the application of an individual, either in his own behalf or in behalf of himself, and others of like interest who either do or do not join in the application." 20 R. C. L. p. 477.

The question to be determined in this class of cases is whether in the particular instance in hand the plaintiff has suffered or is suffering an injury peculiar to himself and not sustained by the public in general.

Plaintiff is the owner of business block of buildings fronting on one of the streets of the city of Modesto over which defendant operates its cars. The injury complained of consists of an unwarranted interference with the free, unobstructed, and comfortable use of this property caused by the unlawful obstruction of the street by defendant company and the use of the street in a manner to injuriously affect the enjoyment of said buildings. The appellate courts of this state have had occasion to deal with such a situation in many cases, to some of which we will call attention.

Under section 249 of the Practice Act provisions relating to nuisance similar to those in the Codes are found. In Blanc v. Klumpke, 29 Cal. 156, it was held that, if a nuisance in a highway affects the plaintiff in common with the public at large in the use of the highway, he cannot have his private action; but, if the free use of his private property is interfered with by such nuisance, he may have his private action to abate the same. The principle was applied in Gardner v. Storrer, 89 Cal. 26, 26 Pac. 618.

The question was carefully considered in McLean v. Llewellyn, 2 Cal. App. 346, 83 Pac. 1082, 1085. The case was reheard in the appellate court, and hearing in the Supreme Court denied. It was the case of an obstruction in a street placed by defendant; the alleged injury being to the lot fronting on the street owned by plaintiff. Said the court:

> "It is a familiar and well-established rule that the owner of a lot abutting on a street has an easement or right of way over it, which in the strictest sense of the word is property [citing cases]. And though this right is one that he holds in common with the public, yet in so far as it affects the value * * * of his property it is a right peculiar to himself, and any interference with it constitutes a private as well as a public nuisance. * * * The test is, not the greater or less number of persons who are affected by the nuisance, but whether the particular right of a landowner is affected."

It was claimed by appellant when the streets became public, private rights of the kind claimed by appellant (obstructing the streets) are merged in the public right, and that interference with them cannot be the subject of a private action. Said the court:

> "But we can conceive of no principle upon which this contention can be allowed. The circumstances alleged in support of it is that a multiplicity of suits might be brought; but under the authorities last cited this is immaterial. To what extent such suits might be brought is to be determined by the simple consideration whether the land of plaintiff has been injuriously affected."

Williams v. Los Angeles Ry. Co., 150 Cal. 592, 89 Pac. 332, is an instructive case, in which plaintiff sought injunctive relief against defendant company for obstructing the public streets of the city of Los Angeles. Mr. Justice Shaw, speaking for the court, said:

> "Every lot fronting upon a street has, as appurtenances thereto, certain private easements in the street, in front of and adjacent to the lot, which easements are a part of the lot, and are private property as fully as the lot itself, though exercised in the street and extending into and over the street. Any obstruction to the use of the street which impairs or destroys these easements is a private injury, special and peculiar to the owner of the lot, and different and distinct from the injury to the general public and from that which the owner suffers as a part of the general public. * * * As an abutting owner, he has the right to the private easements in question, and for an injury thereto he may sue for damages or to enjoin the continuance of the injury, regardless of the fact that the same obstruction also constitutes an injury to his public right of travel and regardless of the number of persons who may suffer a similar injury to similar private easements appurtenant to other lots fronting on the street."

See, also, Cushing-Wetmore Co. v. Gray, 152 Cal. 118, 92 Pac. 70, 125 Am. St. Rep. 47.

In the very recent case of Strong v. Sullivan, 181 Pac. 59, the question was again before the Supreme Court, and it was there said, Mr. Justice Melvin writing the opinion:

> "The finding that defendant's wagon obstructed the ingress and egress of plaintiff and his tenants to and from his * * * building was equivalent to a holding that defendant was maintaining a public nuisance which was especially injurious to plaintiff, and which, therefore, might be enjoined at his suit, because any injury to the use of the street which impairs plaintiff's private easements in the street in front of and adjacent to his lot amounts to an injury giving plaintiff, as an abutting owner, the right to maintain an action for damages or for an injunction."

It would have strengthened the complaint had plaintiff been more specific in showing in what way the railroad company's acts caused injury to his property in particular and bestowing less attention to its acts in affecting the public in general or other private property. But we think enough is shown to entitle her to such relief as the facts proven may warrant.

The judgment is reversed.

We concur: HART, J.; BURNETT, J.

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41 Cal. App. 362

DUFF v. HOGAN et al. (Civ. 2820.)

(District Court of Appeal, First District, Division 1, California. June 5, 1919.)

FRAUD ⚷58(2)—SUFFICIENCY OF EVIDENCE—MARKET VALUE.

In an action for damages for fraudulent misrepresentations as to the market value of the land taken by plaintiff in exchange, testimony for plaintiff that defendant stated that land was worth a certain sum, and defendant's testimony that the only values represented were trading values, *held* sufficient to sustain a finding that there were no false representations as to the market value.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Maria Sjoholm Duff against Walter L. Hogan and others. Judgment for defendants, and plaintiff appeals. Affirmed.

J. L. Smith, of San Francisco, for appellant.

H. M. Anthony, of San Francisco, for respondent Hogan.

Arthur W. Perry, of San Francisco, for respondent Dean.

RICHARDS, J. This is an action for damages alleged by plaintiff to have been sustained by her by reason of having entered into a contract with the defendant William B. Dean, for the purchase of real property, induced by the false representations of his agents, Walter L. Hogan and William Burns. Judgment was entered in favor of defendants

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Dean and Hogan for their costs, the action having been dismissed as to Burns. The plaintiff appeals.

It appears from the record that the plaintiff was the owner of a house and lot in the city of Alameda, upon which there existed a mortgage of $2,000, when she was approached by the defendant Burns, with whom she had a business acquaintanceship, with a proposal that she should exchange said property for country lands. Burns had a working agreement with Hogan, a real estate dealer and broker who was engaged in selling farm lands in San Joaquin county, including a tract of 25 acres belonging to his codefendant Dean, by which Burns introduced to Hogan prospective purchasers, and received, as compensation for such introduction and any further services rendered in assisting subsequent negotiations, a part of Hogan's commission. Burns having reported to Hogan the possibility of selling land to the plaintiff if her Alameda property were taken in whole or part payment therefor, Hogan examined her property, and a few days later with Burns accompanied her to San Joaquin county, and there showed her various tracts of land that he had for sale, including the 25 acres above mentioned. After some negotiations, a contract was entered into between plaintiff and Dean, through the agency of Hogan, by which plaintiff agreed to buy said acreage for the price of $6,250, being at the rate of $250 per acre, payment to be made by transferring to Dean said Alameda property, subject to the mortgage thereon, and paying $2,000 in two years, with interest. The plaintiff had expected to be able to sell this acreage in a comparatively short time at an advanced price, and for that purpose listed it with Hogan, but no sale having been effected at the time the said balance became due, she visited the locality of the land, and there made inquiries as to its value, and learned that it could not be sold for any sum approaching the price at which she had agreed to buy it. The defendant Dean having in the meantime disposed of the Alameda property, the plaintiff commenced this action for damages, alleging that the contract entered into by her was obtained by the false representations of Dean's said agents.

The alleged false representation, and the only one upon which she bases her action, is that Dean's agents represented to her, in order to induce her to enter into the contract, that the market value of the acreage property was $250 per acre—the price at which it was valued in the transaction. The making of this representation was denied by the defendants' answer, and the court found that such representation was not made. The court also found that Hogan was not the agent of Dean in the transaction, and it also made findings as to the value of the two parcels of property involved. These findings are attacked by the appellant as not supported by the evidence.

The findings as to the agency of Hogan and the market value of the respective pieces of property may be disregarded, for it is clearly apparent from the record that the court was fully justified in its finding that the alleged false representation was not in fact made. Hogan, who is charged in the complaint with having made this representation as to the market value, categorically denies it, his testimony being that the values placed upon both the plaintiff's and the defendant Dean's land were trading values, and that the question of market value was never mentioned. Even the testimony of the plaintiff herself falls short of substantiating her charge. She testified:

> "I asked him the price of it and he said it was $250 an acre. He said * * * the land was worth $250 an acre."

The plaintiff's husband was the only other witness on the subject of Hogan's representations as to value, and he testified:

> "He said the land would produce almost anything; it was a very fine piece of land, and I asked him if he was selling land around that price, and he said Yes, and he said land there was worth $250, $275, and $300 an acre right around there."

Even if we regard this testimony as relating to market value, it at most produces a conflict of evidence, upon which a reversal of the finding of the trial court cannot be predicated. The finding is fortified by the trial court's further finding that the figure at which the plaintiff's own property was taken in the transaction was far in excess of its market value. Under these circumstances, we think the finding of the trial court that the representation complained of was not made is amply sustained by the evidence.

The plaintiff having thus failed in the proof of her cause of action, the remaining questions discussed in her brief are of no practical interest.

The judgment is affirmed.

WASTE, P. J.; KERRIGAN, J.

41 Cal. App. 287

MOODY v. PACIFIC SURETY CO.
(Civ. 2762.)

(District Court of Appeal, First District, Division 1, California. May 27, 1919.)

1. EXECUTORS AND ADMINISTRATORS ⚿537(8)—ACTION ON ADMINISTRATOR'S BOND—COMPLAINT—"ACCOUNT FOR."

A complaint alleging that the administrator had never accounted for the money, that the court had found the sum to be due, but that the surety had refused to pay it, sufficiently alleges the administrator's failure to pay the money; since "to account for" includes not only the filing of an exhibit required by Code Civ. Proc. § 1622, but also paying over the money as required by sections 1613, 1697.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Account For.]

2. PLEADING ⚿403(2)—ACTION ON ADMINISTRATOR'S BOND — COMPLAINT — CURE BY ANSWER.

The insufficiency of a complaint against the surety on an administrator's bond, which failed to allege refusal by the administrator to pay over the amount due, is cured by allegations in the answer that he had properly paid out all moneys received by him, which clearly put in issue the material fact insufficiently stated in the complaint.

3. EXECUTORS AND ADMINISTRATORS ⚿537(9)—ACTION ON ADMINISTRATOR'S BOND—EVIDENCE—FAILURE TO PAY.

Evidence that an administrator in his account charged himself with the sum sued for, that he was removed for failure to account for the money received by him, that he still failed to pay over the money, three years later refusing to answer citation, is sufficient to sustain finding, in an action against the surety on his bond, that he had failed to pay over the amount received by him.

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

Action by E. A. Moody, as administrator of the estate of A. E. Moody, deceased, against the Pacific Surety Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Louis Oneal and Wm. F. James, both of San José, for appellant.

R. C. McComish and D. M. Burnett, both of San José, for respondent.

NOURSE, Judge pro tem. This is an appeal from a judgment in favor of plaintiff and against the surety on the bond of W. M. Smith, as administrator of the estate of A. E. Moody, deceased.

The conceded facts are that in January, 1905, Smith was appointed administrator of the estate. In February, 1911 he filed his account as such administrator, showing $2,577.66 in his hands belonging to said estate. In January, 1914, the probate court removed Smith as administrator and appointed respondent in his stead. In February, 1917, a citation was issued to, and personally served on, Smith, requiring him to render an account; upon his failure to appear the respondent, by order of the court, rendered an account for him, showing $2,577.66 in Smith's hands owing to the estate; this account was settled, and in April, 1917, a written demand for the payment to respondent of this sum was made on appellant before the commencement of this action. Respondent in this action sued the surety for the amount shown by this account to be due from Smith to the estate, and recovered judgment for that amount.

[1] Appellant insists that the complaint failed to state a cause of action, in that, it failed to allege nonpayment by Smith to the respondent, but merely alleges that "said W. M. Smith * * * has never accounted to the plaintiff or to the heirs of said A. E. Moody * * * for said sum," and that "defendant has failed, neglected, and refused to pay the same or any part thereof."

Of course, the allegation that the defendant has failed to pay, standing alone, is not a sufficient allegation of nonpayment, because payment might have been made by another. But the complaint alleges that neither the administrator nor any one in his behalf has accounted for said sum or any part thereof. This is followed by the allegation that the administrator charged himself with the exact amount sued for; that upon his failure to appear in answer to the citation to account, the court found that same amount to be still due; and that the defendant after demand refused to make payment.

The bond, which is made a part of the complaint, contained the condition that the administrator would "faithfully execute the duties of the trust according to law." An administrator is chargeable with the whole of the estate coming into his possession. Code Civ. Proc. § 1613. One of the duties of an administrator is to pay over all sums of money due from him to the distributees in accordance with the decree of distribution, and this he must do before he may be discharged. Code Civ. Proc. § 1697. Another duty is to "render an exhibit under oath showing the amount of money received and expended by him, * * * and all other matters necessary to show the condition of its [the estate's] affairs." Code Civ. Proc. § 1622.

The phrase "to account for" means more than the mere filing of a paper statement of account which is referred to as an exhibit in the preceding section. In State v. Williams, 77 Mo. 463, the contention was made that the condition of a guardian's bond "that he would well and truly account for" the moneys received by him, was satisfied when the guardian charged himself with the ward's money in the annual settlement. And, as in the instant case, the breach assigned in the petition was the failure "to account for" the moneys of the estate. But the court (77 Mo. page 471) said:

> "This is not all that is embraced in this term 'account for.' It is a condition not satisfied short of paying over the trust fund to the cestui que trust."

To a like effect is Cushman v. Richards, 100 Mass. 232. Thus the allegation of failure to account for the funds of the estate sufficiently raises the issue of failure to pay over the funds of the estate to respondent. Though the complaint is by no means a model, it contains a sufficient statement of facts which, taken with the inferences which may be properly drawn from the facts stated, is sufficient to sustain it as against a general demurrer. Jones v. Int. Indemnity Co., 179 Pac. 692.

[2] But even if the complaint were defective in this respect, it is cured by the allegations of the answer, which read:

> "That said W. M. Smith, as such administrator, has properly paid out and disbursed in the course of said administration all moneys received by him as such administrator except such moneys as were delivered into the hands of said plaintiff herein, and that all moneys not so paid out and disbursed by said W. M. Smith were received and retained by said plaintiff."

When a pleading is defective on account of an insufficient statement of material facts rather than on account of a statement of insufficient facts, the defect in such a pleading may be cured by the filing of a controverting pleading which clearly and unequivocally places in issue the material facts which have not before been put in issue on account of the insufficient statement of the former pleading. Lugiani v. Landau Economic Syphon Co., 175 Pac. 648.

[3] Appellant further insists that the finding of the trial court that Smith had not paid the amounts sued for is not supported by any evidence. The evidence is that in February, 1911, Smith filed his account as administrator, charging himself with the exact sum here sued for; that in January, 1914, after the probate court found his continued failure to account for the moneys in his hands, he was removed as such administrator. It became his duty at that time to pay over to his successor all of the funds of the estate then in his possession. This he failed to do, and three years later refused to answer the citation requiring him to account. There is ample evidence of a most flagrant breach of trust on his part as such administrator, shown by the record. The settlement of respondent's account in April, 1917, taken with the administrator's own admissions, was sufficient to fix the amount.

This evidence of the liability of the administrator was sufficient to support the finding of nonpayment as against the appellant. In a similar case the Supreme Court, in holding that the settlement of the account of the administrator was conclusive against his sureties, said:

> "When the liability of the principal thus became fixed, that of the surety also attached, and upon the failure of the principal to pay the money an action could have been maintained against the surety. In such case the decree of the probate court would have been conclusive upon the status of the account as respects the sureties as well as the administrator." Chaquette v. Ortet, 60 Cal. 594, 599.

To the same effect is Evans v. Gerken, 105 Cal. 311, 313, 38 Pac. 725.

For the foregoing reasons the judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS J.

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41 Cal. App. 393

PEOPLE v. KHAN. (Cr. 646.)

(District Court of Appeal, Second District, Division 1, California. June 6, 1919.)

1. FALSE PRETENSES 🔑14 — ISSUANCE OF CHECKS IN EXCESS OF DEPOSIT.

Under Pen. Code, § 476a, making it a felony for any person with intent to defraud to draw or deliver to another a check or a draft on a bank, knowing at the time that he has not sufficient funds in or credit with the bank to meet the check, it is not necessary that it be shown, in order to establish the fraudulent intent, that the recipient of the check was actually defrauded, and where defendant gave the check in payment of a debt due the payee, representing thereby that it was good and valid, it is immaterial that the debt was past due and the payee parted with no new consideration.

2. FALSE PRETENSES 🔑22 — DRAWING CHECKS IN EXCESS OF DEPOSIT—CREDITS.

In a prosecution under Pen. Code, § 476a, making it a felony for a person with intent to defraud to draw or deliver to another a check or draft on a bank, knowing at the time that he has not sufficient funds in or credit with the bank to meet the check, it is no defense that defendant, the drawer of the check, had a credit with the bank for checks given to garages for gasoline, where payment on all other checks had been stopped and checks as the one in question not bearing the word "gas" on them were not cashed, unless defendant came to the bank and requested that they be cashed.

3. FALSE PRETENSES 🔑42—DRAWING CHECK IN EXCESS OF DEPOSIT—EVIDENCE.

In a prosecution, under Pen. Code, § 476a, for drawing a check in excess of his deposit

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

and which he had no credit with the bank to meet, evidence, that when defendant was informed the check had been dishonored he laughed and said he would sometime pay it is admissible on the question of defendant's knowledge and guilty intent.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

R. Khan was convicted, under Penal Code, § 476a, of passing a check without having sufficient funds on deposit in the drawee bank to pay the same, and he appeals. Affirmed.

Jas. W. Glassford, of El Centro (Hickcox & Crenshaw, of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

JAMES, J. Having been convicted of the crime of passing a check without having sufficient funds on deposit in the drawee bank to pay the same, defendant appeals from a judgment of imprisonment entered against him.

The crime charged was that described in section 476a, Penal Code, which makes it a felony for a person, "with intent to defraud," to draw or deliver to another a check or draft on a bank, knowing at the time that he has not sufficient funds in or credit with the bank to meet the check. The concluding portion of the section reads as follows:

> "The word 'credit' as used herein shall be construed to be an arrangement or understanding with the bank or depositary for the payment of such check or draft."

The appellant owed the complainant money on account of work done, and, the debt being due and payment being demanded, he issued his check to the complainant in payment of the same. The bank refused to cash the check on the ground that there were not sufficient funds available to the credit of appellant for that purpose. Appellant presents two main contentions, to wit: (1) That the check being issued in payment of an antecedent debt which had matured prior to the giving of the check, no crime was shown to have been committed. (2) That under the evidence in the case the conviction was improper, because it was shown that there was on deposit in the drawee bank at the time of the making and delivery of the check more than sufficient money to the credit of appellant to cover the same. Some other errors are assigned which will be later noticed.

[1] Under the first contention appellant insists that, in order for an intent to defraud to exist within the meaning of the section, the probability must appear that damage may result to the person to whom the check is delivered, and that, where such check is given for a debt past due and the recipient parts with no new consideration, it is impossible that he may be damaged. We do not think that the words of the section as requiring that an intent to defraud shall exist should be so narrowly construed; we do not think that it is necessary that it be shown, in order to establish such intent, that the recipient of the check as the result of the passing thereof may be actually defrauded. To our minds, the fraudulent intent here was shown when it was made to appear that the appellant gave the check, representing thereby that it was good and valid, and that it was given and received with the intent that it should pay appellant's debt. It seems to us immaterial as to whether the acceptance of the worthless check actually had the effect of extinguishing the debt. The language of the court in People v. Wilbur, 33 Cal. App. 511, 165 Pac. 729, while not fitting the facts here presented, supports our view of the law, where it is said:

> "And the fact that the check may be 'a worthless piece of paper' in the hands of the person to whom it was delivered, because it has not been properly indorsed, does not enter as an element into the crime defined by the section upon which the information is based."

The argument there was that because the check was not in form sufficient to authorize its payment, assuming that the defendant had funds to meet it at the bank, there could be no intent to defraud. The contrary was held in that case.

[2] Under the second point made, the evidence is pointed to which shows that, at the time of the making and delivery of the check in question, defendant did actually have a credit at the bank of a sum of money in excess of that called for by the check. However, prior to the making of this check, the defendant had delivered to the bank a writing in the following words:

> "This is to authorize the American State Bank to honor all checks I write to garages for gasoline. However, payment is stopped on all other checks."

The president of the bank testified that by this order it was understood between appellant and the bank that no checks drawn by appellant should be honored except those having the word "gas" on them. On cross-examination, when it was shown that other checks had been cashed without having the word indicated upon them, he testified that the bank did pay other checks than those bearing the prescribed word where the appellant personally came into the bank with the holder of the check and requested the bank to pay. In other words, that the instructions to the bank were partially oral and partially in writing. Clearly under this state of facts, the arrangement and understanding with the bank was that the appellant had no credit within the meaning of section 476a, Penal Code, to meet a check drawn as the one in question here was drawn.

[3] As to other points argued: We think the court properly admitted the testimony of the prosecutor who told how, after the check had been dishonored at the bank, he accosted appellant and informed him of the situation, and that appellant laughed and responded "Sometime I pay him." This testimony was entitled to be considered by the jury as indicating the guilty knowledge of appellant and as affecting the question of his good intent in passing the check. In the view we take of the case, appellant was not entitled to the instructions offered advising the jury that there could be no conviction unless the defendant, at the time of passing the check, obtained something of value from the complainant. The evident unintentional omission of the word "not," in one instruction given by the court, we think was without prejudice, because upon the whole instruction the jury could not reasonably have been misled, and if they had misinterpreted the instruction we cannot conclude, considering the text thereof, how it might have operated to prejudice the case of appellant. The court omitted the word "not" which we show in parenthesis in the instruction which we quote:

> "It is (not) for you to consider the penalty prescribed for the punishment of the offense, and if you are aware of the penalty prescribed by law it is your duty to disregard that knowledge. In other words, your sole duty is to decide whether defendant is guilty or not guilty of what he is charged with. The question of punishment is left wholly to the court except as the law circumscribes its power."

We find no errors in this record which would justify an order of reversal.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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41 Cal. App. 483

ARNOLD et al. v. SAN FRANCISCO-OAKLAND TERMINAL RYS. (Civ. 2828.)

(District Court of Appeal, First District, Division 1, California. June 9, 1919. Rehearing Denied July 9, 1919; Denied by Supreme Court Aug. 7, 1919.)

Appeal and Error ⚷1213—Reversal—Directed Verdict on Retrial.

In action for death, where there was no material difference in the evidence from that which, on former appeal, the Supreme Court had declared showed such contributory negligence of deceased as precluded recovery, a directed verdict for defendant was proper.

Appeal from Superior Court, Contra Costa County; J. E. Barber, Judge.

Action by Elsa U. Arnold and others against the San Francisco-Oakland Terminal Railways. From judgment for defendants and order denying new trial, plaintiffs appeal. Affirmed.

Jay Monroe Latimer and J. E. Pemberton, both of San Francisco, and J. E. Rodgers and A. F. Bray, both of Martinez, for appellants.

W. H. Smith, of Oakland, Geo. W. Mordecai, of Madera, A. L. Whittle, of San Francisco, M. C. Chapman and E. Trefethen, both of Oakland, W. S. Tinning, of Martinez, and Morrison, Dunne & Brobeck, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment entered upon a verdict rendered by a jury pursuant to direction of the trial judge, and from an order denying plaintiffs' motion for a new trial.

The same case was before the Supreme Court upon a previous appeal, and the law of the case upon that appeal is declared in the opinion of Mr. Justice Shaw, rendered in Arnold v. San Francisco-Oakland Terminal Railways, 175 Cal. 1, 164 Pac. 798. That action was, and it is here, one to recover damages for death from a collision between an automobile which plaintiff's deceased husband was driving, and an electric street car, and it was there held that the contributory negligence of the deceased was such as to prevent recovery, it being shown that he was mentally and physically sound and in possession of his usual faculties, familiar with the conditions of the crossing where the accident happened, and that he saw the car coming when he was within 45 or 50 feet of the tracks, and that instead of turning aside or stopping so as to avoid danger, he first turned to the left, then to the right, and finally attempted to cross the tracks in front of the car.

The only question presented by appellants for a reversal of the judgment is the action of the trial judge in directing the verdict herein. The trial judge, in granting the motion for a directed verdict, acted upon the theory that the evidence was the same in both trials, and that he was bound by the law of the case. Appellants contend, however, that their evidence upon the second trial upon the issue of contributory negligence, and upon elements of fact constituting the basis of reversal on the former appeal, was materially different, and that the trial judge committed error in concluding that the evidence was the same in both trials. Mr. Justice Shaw, the writer of the opinion in this case upon the first appeal, succinctly outlined the controlling facts on the question of contributory negligence as matter of law, and from a careful review of the record we fail to see how the testimony herein is materially different from or additional to that given on the former trial, which the Supreme Court declared conclusively showed that deceased was guilty of contributory negligence which precluded a recovery by plaintiffs. The issues are identical upon both trials, consisting of the negligence of the defendant and the contributory negligence of deceased; and, while there were new witnesses, there is no change in the testimony under these issues such as might be considered to have created a material difference in the evidence.

In both trials the testimony as to the physical conditions surrounding the accident is identical, as is also that relating to the mental and physical condition of deceased and to his acts and omissions, both prior to and immediately preceding the collision.

The Supreme Court, in discussing the evidence given at the former trial, indicated that the deceased was at a given distance from the railroad track when he saw the car; and it is here contended that the evidence on the second trial is at variance with such declared distance, which constitutes a material difference, thereby destroying the efficiency of the rule of law of the case, and, further, that the evidence relative to the ability or lack of ability of deceased to stop or turn the machine is likewise materially different.

Without reviewing in detail the testimony it is sufficient to say that it does not present a material difference upon these questions from that given at the former trial. It is only upon the theory that deceased did not see the car until within a certain distance that the testimony has any value at all, and no new evidence permits of this assumption, nor has it any bearing upon the issue of contributory negligence on the part of deceased, nor does it establish a material difference as to the negligence of defendant. One of the new witnesses testified as to distance within which automobiles operating at various speeds could be stopped, but when analyzed this testimony does not result in any material difference from that given upon the subject at the former trial. Other witnesses gave testimony concerning the distance of deceased from the track when they first observed him. No new testimony, however, was presented upon the question as to when deceased first saw the car or when it was first possible for him to do so. The testimony of the occupants of the automobile which compelled the conclusion on the appeal in the first trial that deceased was guilty of contributory negligence, preventing a recovery by plaintiffs, was the same upon all the material and essential facts, except that one of them did not testify at the second trial, and whatever variance appeared therefrom was admitted by them to be due to that clearer and better recollection of the facts at the time of the first trial than at the time of the second, and that their former testimony was probably correct.

Tested by the standard of the evidence given at the former trial as recited by the Supreme Court, the evidence here is without material difference or addition, and presents, in substance, the identical case which has been declared by the Supreme Court to be without legal merit; and, as no verdict other than one for defendant could have been rendered under the evidence, the trial court was justified, and it was its duty, to direct a verdict in favor of defendant.

For the reasons given, the judgment and order are affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

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41 Cal. App. 312

THIELEN v. THIELEN. (Civ. 2656.)

(District Court of Appeal, Second District, Division 1, California. May 28, 1919.)

1. Deeds ⟾208(5)—Delivery—Sufficiency of Evidence.

Conflicting evidence *held* to sustain a special verdict finding that deceased grantor handed deed to son for unconditional delivery to his sister, and that such delivery was not to be dependent upon grantor's death.

2. Deeds ⟾194(2) — Delivery — Presumption.

The grantee's possession of a deed constitutes prima facie showing of delivery.

3. Deeds ⟾200—Delivery—Evidence.

Testimony that deceased grantor expressed her intention of giving the property to her daughter and, after the deed's execution, stated that she had conveyed it to her, is competent to show the deed's delivery.

4. Appeal and Error ⟾1011(1) — Question of Fact.

Whether a grantor intended to divest herself of title by parting with deed is a question of fact to be determined by the trial court, and its finding, based upon a special jury verdict and conflicting evidence, will be accepted as conclusive.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Ralph A. Thielen, administrator of the estate of Regina May Thielen, deceased, against Lillian R. Thielen. Judgment for defendant, and plaintiff appeals. Affirmed.

D. H. Laubersheimer, of Los Angeles, for appellant.

Gurney E. Newlin, of Los Angeles (W. W. Hyams, of Los Angeles, of counsel), for respondent.

SHAW, J. In this action, plaintiff, as administrator of the estate of his deceased mother, Regina May Thielen, sued to quiet title to certain real estate described in the complaint, and to have a deed made by said decedent to Lillian R. Thielen, and under which she claimed title to the property, canceled and annulled.

An appeal is prosecuted from the judgment entered in favor of defendant.

As alleged in the complaint, the grounds upon which plaintiff sought the relief asked for were that at the time when deceased made and executed the deed she was of unsound mind and mentally incompetent to transfer the property, and that no legal delivery of the deed was ever at any time made.

As to both of these allegations, denied in the answer, the court, in accordance with the special verdict of the jury to which the issues were submitted, found adversely to plaintiff. Appellant challenges the findings, claiming the evidence is insufficient to support them.

As to whether at the time of the execution thereof the grantor in said deed was of sound mind and in mental condition to execute a valid conveyance of the property, there is a sharp conflict of evidence, in the consideration of which the determination of the jury is conclusive. There is abundant evidence to support the conclusion reached; indeed, the extent of appellant's contention with respect to this point is limited to the claim that, while conceding the existence of such conflict in the testimony, the preponderance of the evidence adduced thereon was in favor of plaintiff.

[1-4] As to the other question, namely, that the deed was never delivered to defendant, it appears from plaintiff's testimony that he, on June 20, 1912, at the request of deceased, who was then confined to her bed by illness, prepared the deed, in the form of a grant, and called in a notary, who at the trial testified that he fully explained to her the nature and purport of the instrument, stating that it was a conveyance of the property made by her to Lillian R. Thielen; that thereupon she signed and acknowledged the same, which the notary left with the plaintiff, whose testimony is that his mother told him to keep it in his possession and that if she got well to hand it back to her, otherwise to deliver it to Lillian, who should distribute the property between himself, Lillian, and his brother George; that some two weeks thereafter, but several months prior to the death of deceased, which occurred on December 10, 1912, he delivered the deed to Lillian, telling her that he "at last had mother's affairs in shape and had a deed made to her," and telling her further "that in the event mother got well to hand it back to her, but in the event anything happened to her she was to distribute the property according to mother's wishes, as it was to be held in trust"—all of which, other than the delivery of the deed, is flatly denied by Lillian.

It is apparent that neither the court nor the jury believed that plaintiff betrayed the confidence in him reposed by the grantor when she intrusted him with the deed, but that in giving it to Lillian he acted in accordance with her instructions. This conclusion finds ample support not only in the fact that Lillian's possession of the deed as grantee therein constituted a prima facie showing of its delivery (Ward v. Dougherty, 75 Cal. 240, 17 Pac. 193, 7 Am. St. Rep. 151; Devlin on Deeds, § 294), but there was much testimony, both from Lillian and disinterested witnesses, to the effect that deceased, prior to the execution of the deed, expressed her intention of giving the property to her daughter, and that after its execution she stated that she had conveyed the same to Lillian. This evidence was not only competent (Williams v. Kidd, 170 Cal. 631, 151 Pac. 1, Ann. Cas. 1916E, 703), but the inferences fairly deducible therefrom and from the acts of plaintiff, among which was the fact that after giving the deed to his sister he asked her to mortgage the property for his benefit, strongly tended to prove that plaintiff, in delivering the deed to Lillian, acted in accordance with instructions given him by the grantor, who intended that it should be at once delivered for the purpose of divesting herself of the title and transferring it to her daughter. "It is essential to the validity of a transfer of real property that there be a delivery of the conveyance with intent to transfer the title, and the true test under which delivery is to be determined is in ascertaining whether in parting with the possession of the conveyance the grantor intended thereby to divest himself of title." Williams v. Kidd, supra. This question of intention is one of fact to be determined by the trial court from a consideration of all the evidence in a given case; and, conceding in the instant case a conflict of evidence touching the issue, the finding of the jury, adopted by the trial court, must be accepted as conclusive thereon.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

41 Cal. App. 297

PELUSO v. CITY TAXI CO. (Civ. 1980.)

(District Court of Appeal, Third District, California. May 27, 1919.)

1. MUNICIPAL CORPORATIONS 🔑706(5)—AUTOMOBILE ACCIDENTS—SUFFICIENCY OF EVIDENCE.

Evidence regarding circumstances under which defendant's taxicab overtook and ran down a minor riding a bicycle in a city street, etc., *held* to sustain a verdict finding defendant negligent.

2. MUNICIPAL CORPORATIONS 🔑706(5)—AUTOMOBILE ACCIDENT—CONTRIBUTORY NEGLIGENCE.

Evidence regarding circumstances under which defendant's taxicab overtook and ran down a minor riding a bicycle in a city street, *held* to sustain a verdict that minor was not guilty of contributory negligence.

3. DEATH 🔑99(3)—DAMAGES—EXCESSIVENESS—DEATH OF CHILD.

Three thousand five hundred dollars damages for the death of a 15 year old boy earning $45 or $50 a month, which he gave to his father, who had a life expectancy of 25 years, *held* not excessive.

4. TRIAL 🔑256(1)—INCOMPLETE INSTRUCTIONS—FAILURE TO MAKE REQUESTS.

Appellant cannot complain of an incomplete instruction, which did not misdirect the jury, where he did not ask for a more specific instruction.

5. TRIAL 🔑256(10)—INSTRUCTIONS—OMISSIONS—REQUESTS.

An instruction in action for death which did not caution the jury not to allow for plaintiff father's sorrow over his son's death, nor state that future benefits father might have received from son should be discounted to present value, etc., *held* omissions not constituting reversible error, in absence of requests for more explicit instructions.

6. EVIDENCE 🔑14—JUDICIAL NOTICE—EXPECTATION OF LIFE.

Judicial notice will be taken as to expectation of life.

7. APPEAL AND ERROR 🔑1068(5)—REVERSIBLE ERROR—INSTRUCTIONS.

In a father's action to recover for the death of his minor son, failure to instruct that the father had a life expectancy of 25 years *held* not prejudicial error, where the verdict was moderate.

8. APPEAL AND ERROR 🔑882(4)—PREJUDICIAL ERROR—DISMISSAL.

In action for death against a taxicab company, plaintiff's action in joining stockholders as codefendants and later dismissing as to them, after taxicab company had demurred on ground of improper joinder of defendants, did not prejudice defendant taxicab company.

9. CORPORATIONS 🔑215—STOCKHOLDERS—LIABILITY.

While the stockholders of a taxicab corporation may eventually have to share a personal injury claim against the corporation, yet primary liability is against the corporation.

10. PLEADING 🔑364(6)—STRIKING OUT MATTER.

A personal injury complaint alleging that defendant taxicab company "carelessly and negligently" drove an automobile, etc., *held* not subject to motion to strike the words quoted.

11. APPEAL AND ERROR 🔑1042(4)—PREJUDICIAL ERROR—PLEADING.

Conceding that words "carelessly and negligently," in complaint for wrongful death, were surplusage, the court's refusal to strike them does not constitute reversible error, where it is apparent that defendant was not injured by the ruling.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Pasquale Peluso against the City Taxi Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. A. Gett, of San Francisco, for appellant.

A. M. Seymour, Sheridan Downey, and Hyman W. Zagoren, all of Sacramento, for respondent.

BURNETT, J. This action was brought to recover damages for the death of a minor son, and the verdict and judgment were in favor of plaintiff for the sum of $3,500.

[1, 2] The evidence abundantly supports the finding that appellant's negligence was the proximate cause of the death of the minor. Indeed, we rarely have a case wherein such affirmation can be made with equal assurance. The overwhelming weight of the evidence shows that the minor was riding slowly on a bicycle on the proper side of Eighth street, in Sacramento. A taxi driven by an employé of appellant came from behind, going in the same direction and traveling at a high rate of sped. No signal was given by the driver to warn the boy of the approach of the taxi, and when the machine was within a few feet of the bicycle the driver swung it to the wrong side, trying to pass to the right of the bicycle, thereby causing a collision, which resulted in the almost instant death of the minor. Several disinterested witnesses testified substantially to the foregoing facts. Of these we may quote Mrs. Mary Silva, as follows:

> "Well, as we was going down Eighth street, my attention was directed to a boy on a bicycle, and he was just coming along, and all of a sudden I heard a terrible noise, just a buzz, and I noticed it was a taxicab, and I noticed them about the—just a little ways past the car track in the intersection on P street line, just 4 or 5 feet maybe, something like that, and the taxi was just coming at such speed that it swerved between the boy on the bicycle and the curbing, and the left of the automobile struck the hind end of the bicycle and threw the boy some distance from the bike and he landed on his head."

She further testified that the automobile was traveling "at least 30 miles per hour," the boy on the bicycle not more than "7 or 8 miles per hour," and that she did not hear any signal given and that the deceased "was coming straight." The testimony of the witnesses for the plaintiff, it may be added, shows that the boy was exercising ordinary care, that he was where he had a right to be, and he had no opportunity to escape the danger, if he really had any apprehension of it. The principles of law applicable to such a situation are plain, have often been stated by this and other courts, and they need no repetition. As we are required to view the facts, it must be said that appellant was palpably negligent, that there was no contributory negligence on the part of said minor, and that appellant is legally responsible for the accident.

[3] It can be said with equal confidence that the verdict is not so large as to be properly characterized as excessive. In fact, under the circumstances the amount seems to be quite reasonable, and it can be properly said that the jury manifested a degree of moderation and justice that is not always shown in such cases. To set the verdict aside upon this ground, the excess must appear as a matter of law, or "the facts must be such as to suggest at first blush passion, prejudice, or corruption on the part of the jury." Bond v. United Railroads, 159 Cal. 270, 113 Pac. 366, 48 L. R. A. (N. S.) 687 Ann. Cas. 1912C, 50; Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 147 Pac. 90. Nothing of this kind appears in the case at bar. The boy was 15 years of age, strong and healthy, was working regularly in the boiler-making shop of the Southern Pacific Company; he was receiving $45 or $50 a month, was the eldest of six children, and gave all of his earnings to his parents, for the support of the family. Regarding the question from a financial standpoint, which the law demands, and keeping in view the probabilities of the future if his life had run its natural course, it is reasonable to suppose that he was worth more to his parents than the sum of $3,500. The recovery was not limited, of course, to the earning capacity of the son during his minority, but it included the present value of the reasonable benefit which the parents would probably have received after his majority and during the period of their common expectancy of life. Bond v. United Railroads, supra. The boy's expectancy was about 45 years and the father's 25; the common expectancy being therefore the latter period. We think we have stated sufficient facts to indicate the moderation of the award in view of the probable deprivation of the father of the services, earnings, society, comfort, and protection of his son for so many years. In the Bond Case, supra, the minor was of the age of 20 years and the award was for the sum of $4,500; and in the Slaughter Case the verdict was for $10,000, the deceased being of the age of 23 years at the time of the fatal accident. In neither of these cases was the verdict held to be excessive. The facts of this case disclose even less reason for setting aside the verdict as immoderate and unconscionable.

[4, 5] Complaint is made of the action of the court as to the instructions, and particularly of the following:

> "The word 'damages' as used in the preceding instruction (section 377, Code Civ. Proc.) includes pecuniary loss of every kind, which the evidence in this case established with reasonable certainty has been suffered and will in future be suffered by this plaintiff because of the death of his son, Antonio Peluso. To arrive at the total amount of damages to be awarded you may consider not only what support plaintiff, with reasonable certainty, would have derived from the earnings and services of his son until he reaches 21, but also, with reasonable certainty, after such age, and also what pecuniary loss this plaintiff has suffered and will in future suffer, with reasonable certainty, by being deprived of the comfort, society, and protection of his said son, Antonio Peluso, not only until he reaches majority, but thereafter."

Appellant claims that there are two fatal defects in the instruction:

> First, "nothing was said to the effect that the jury should determine whether there was a reasonable probability that the conditions as to health and earning capacity of the minor son would continue 'for some time after he became of age,'" and, second, "nothing was said about the point that the damages were to include 'the present value of the benefits which it could reasonably be expected' the minor son 'would have bestowed upon his parents during' his 'expectancy of life,' though this element of the expectancy of life of the father was mentioned in the course of the proceedings."

Another contention of appellant is that the instruction failed to contain a caution against the allowance of compensation "for sorrow or distress" or for "a remote and conjectural pecuniary loss."

The defects, however, if they may be called such, constitute "sins of omission rather than of commission." The instruction did not contain a misdirection to the jury, but rather an incomplete direction. In such case, an appellant is in no position to complain, where he does not ask for a more specific and explicit instruction. Rice v. Whitmore, 74 Cal. 619, at p. 624, 16 Pac. 501, 5 Am. St. Rep. 479; Nicol v. Laumeister, 102 Cal. 658, at p. 660, 36 Pac. 925.

We think said instruction is fairly construed as meaning that in awarding damages the jury might consider the two elements, namely, the loss that might accrue to the father during the minority of the son, and also the loss that might be suffered by the former after the latter had reached his majority. In other words, an attempt was made to state the factors embraced in the question of damages as they are set forth in the decision of the Supreme Court in the Bond Case, supra.

It is to be observed that the instruction begins with the statement: "The word 'damages' as used in the preceding instruction includes," etc. It certainly does include what was thereinafter stated. The second sentence is: "To arrive at the total amount of damages to be awarded you may consider," etc. This is probably more objectionable than the first part, as possibly subject to the implication that the jury should award the future value of such services. But we must assume that the jurors were persons of intelligence, and would know that they must make allowance for the difference in value between the present and future use and enjoyment of the same sum of money. By said instruction, the jurors were not required to award the amount of the probable future benefits that would have accrued to the father from the services of the son in case the accident had not occurred, but they were instructed that in awarding damages they might consider such benefits. This it was proper for them to do, and, while the instruction is not as complete and accurate as it might be, we think it cannot be said that thereby appellant suffered any injury. In other words, a finding of the present value of said benefits as the proper verdict to award is not irreconcilable with said instructions, and under well-settled principles we must assume that the $3,500 represents the judgment of the jury as to the amount of said present value.

[6, 7] As to the expectation of life, that is a matter of which the courts take judicial notice. 20 Am. & Eng. Ency. of Law (2d Ed.) p. 886; Valente v. Sierra Railway Co., 151 Cal. 534, 91 Pac. 481. It was, though, virtually agreed by counsel that the American table of mortality should be considered as received in evidence, as shown by this colloquy:

> "Mr. Downey: * * * We wish to prove the expectancy of life of Mr. Peluso, the father, by the mortality tables. If the court takes judicial notice of that I will look it up and let the court know so that it can instruct the jury.
>
> "The Court: Well, I don't know that I do. I think that would probably have to be offered. I think counsel would consent that it be admitted.
>
> "Mr. Gett: No objection to that; but there are three or four mortality tables; which one are they going to admit?
>
> "Mr. Seymour: The American table.
>
> "Mr. Downey: They are all about the same.
>
> "The Court: Well, with that understanding you submit your case."

The court, no doubt, intended to call the attention of the jury to said table in reference to the expectancy of life as to one of Mr. Peluso's age, but probably overlooked it. This was excusable, since neither party requested such instruction. But, at any rate, how can it be said that appellant was prejudiced by such failure or omission? If the court had so instructed the jury, it would have been to tell them that Mr. Peluso would probably live 25 years. Is it probable that the verdict would have been reduced? It is entirely improbable that it would have affected the verdict in the least. Speaking of the probabilities, it is quite likely that the matter was fully explained, without objection, in the argument of plaintiff to the jury, and that it was carefully considered in the determination of the verdict. We cannot suppose that the able counsel would fail to elucidate the subject in the development of their view of the case, if, indeed, the jury needed any enlightenment upon that subject, concerning which information is so accessible to all. We may add that all the instructions requested by appellant were given except one which was a mere repetition of another.

[8, 9] We can see no merit in appellant's complaint because the plaintiff made the stockholders codefendants and afterwards dismissed the action as to them. Indeed, appellant demurred to the complaint on the ground that it was improperly joined with the other defendants in the action, and respondent seems to have reached the same conclusion and to have remedied the defect by said dismissal. At any rate, it is difficult to conceive how appellant has been injured by said action. The other defendants may eventually have to bear the loss, since they are stockholders, but the primary liability is against the corporation.

[10, 11] With equal zeal appellant complains because the court below refused to strike out the words "carelessly and negligently" in the complaint, wherein they appear in the sentence, "the defendant, City Taxi Company, carelessly and negligently drove an automobile," etc., and, also, "then and there so carelessly and negligently managed said automobile," etc. The action of the court was entirely proper. The significance and character of these expressions, as used in a pleading of negligence, are fully considered in Ellis v. Central California Traction Co., 174 Pac. 407. But even if we were to concede that they constitute surplusage, it would be apparent that appellant suffered no damage by the ruling of the court.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

41 Cal. App. 340

EDDLEMON v. SOUTHERN PAC. CO. et al. (Civ. 2783.)

(District Court of Appeal, First District, Division 2, California. June 2, 1919. Rehearing Denied July 2, 1919. Denied by Supreme Court July 31, 1919.)

1. Courts ⚿91(1)—Precedents—Intermediate Appellate Court.

The Court of Appeals is bound to follow the law of the state as established by the Supreme Court in a similar case.

2. Railroads ⚿330(3) — Accidents at Crossings—Contributory Negligence.

The driver of an automobile approaching a grade crossing from behind a station, who could see the track plainly for a quarter of a mile on arriving within 17 feet of the track on which he was struck by a train, was guilty of contributory negligence in driving on the track, although proper warnings were not given, and the headlight of the locomotive was defective.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Lewis E. Eddlemon against the Southern Pacific Company and H. C. Bradley. Judgment for plaintiff, and defendants appeal. Reversed.

M. R. Jones, of San Francisco, for appellants.

Theodore A. Bell and Arthur L. Shannon, both of San Francisco, for respondent.

HAVEN, J. Plaintiff sued to recover damages for personal injuries suffered by him, arising out of a collision between an automobile which the plaintiff was driving and a train operated by the defendants, at a grade crossing at Stege station in the city of Richmond. A verdict was rendered in the sum of $7,000, which was reduced by the judge of the trial court, upon a motion for a new trial, to $4,000. Judgment was entered against the defendants for the reduced amount, from which they prosecute this appeal.

The plaintiff was a police officer of the city of Richmond. On the night of the accident, in the discharge of his duties as such, he and another police officer of said city proceeded by automobile to the vicinity of the station of the defendant Southern Pacific Company at Stege, for the purpose of examining vacant buildings and cars for detection of undesirable persons. Plaintiff was driving the automobile, and was seated on the left side thereof. On leaving the main part of the city of Richmond, he ran along the tracks of the Southern Pacific Company north of Stege station for a distance of about a mile and a half to a point back of the railroad station at Stege, where he stopped his machine, at the south end of the station toward Oakland, in a public street. During this trip he saw an engine, headed south toward Oakland, switching cars on one of the tracks which he passed. Plaintiff and his companion alighted from the automobile, went around back of the station and inspected some empty cars and buildings, and then returned to their automobile. They stopped there and chatted from two to four minutes, and then decided to again cross the tracks to another portion of Stege and inspect other buildings. Plaintiff got into the driver's seat of the automobile; his companion cranked the car; they started the machine in low gear, and proceeded to cross the track at the grade crossing. neither plaintiff nor his companion went in front of the station building to look up the track toward the north before starting the machine. They both testified that, before starting the automobile, they listened for any train approaching from either direction, and heard no bell, whistle, or other indication of an approaching train. Plaintiff further stated that just about the time he reached the track he saw the engine right upon him. The automobile was struck by a switch engine with cars attached, proceeding southerly on the inner or "house" track, at a point slightly more than 32 feet southeasterly from the point where the automobile started, and between 17 and 18 feet distant from the front or easterly line of the station. Upon the front side of the station as a small projection or bay window, extending about 2 feet from the side of the station. From this was a slanting roof 9 or 10 feet from the ground. Plaintiff's eyes, when he was sitting in the driver's seat, were approximately 6 feet from the ground, or 3 or 4 feet below the projection of this small slanting roof. From the point of starting the view of plaintiff to the north, from which direction the train was approaching, was interrupted by the station building, so that he could see the track for a distance of only about 15 feet northerly from the point where it would have been intersected by the southerly line of the station building if extended to the track. In proceeding from the point of departure to the point of the accident, the course of the automobile was in a southeasterly direction away from the station, so that the line of vision to the north along the track was extended more rapidly than if the automobile had proceeded along the southerly line of the station or along a line exactly parallel thereto. When the automobile had proceeded a sufficient distance from its starting point toward the place of the accident so that the front wheels were in a line with the front of the station building, and the driver, who was seated 6 feet in the rear of such point, was approximately 23 or 24 feet from the point of the accident his line of vision across the southeasterly corner of the station building would have enabled him to observe the track for a distance of approximately 100 feet to the north of the point of the accident. The distance from the front wheels of the automobile before starting to the nearest rail of the track was 32 feet. The distance from the front or easterly line of the station building to the nearest track was between 17 and 18 feet, and the distance from the projecting bay window to the nearest track was approximately 15 feet. Before starting, the automobile stood approximately 15 feet westerly or behind the front line of the station building, and also the same distance to the south of that building. Plaintiff testified that he did not see the engine until he was right on the track, "practically, say a foot or two"; that when he was sitting in the automobile, prior to starting, he could see down the track in a southerly direction toward Oakland for at least a quarter of a mile; that for a space of 15 feet back from the track toward the station, and parallel to the station, there was an unobstructed view along the tracks in a northerly direction, toward Richmond, as far as he could see, at least a quarter of a mile; that when he first saw the locomotive it was within about 16 feet of him; that he immediately applied the brake, but did not stop until the front wheels of his car had crossed the first rail, and the engine had struck the front of the automobile and swung it around; that his hearing and eyesight were both normal at the time of the accident; that at the time of the accident the train was running at not to exceed 15 miles an hour, and the automobile between 8 and 10 miles an hour. Plaintiff and his companion further testified that the light on the switch engine was poor and did not shine brightly at all. In that connection plaintiff stated:

> "As I approached the track on the night of the accident I saw absolutely no reflection on the track or roadway ahead of me. After I passed the building going towards the railroad track I looked in the direction of Richmond just as quick as I passed. After seeing the engine and realizing that it was coming, I went about 4 or 5 feet before the car came to a standstill. The front wheels of the machine were about 4 feet from the rails when I first saw the engine. It was a very dark night."

The latter statement as to the darkness of the night loses its importance in view of the testimony of plaintiff that he could see along the track in both directions for a distance of a quarter of a mile. It thus appears from plaintiff's testimony that as soon as the automobile had proceeded approximately 15 feet from the point of starting, so as to enable the plaintiff to look past the station building northerly along the track, he had a space of approximately 17 feet within which to observe the approaching train and stop his machine. Instead of doing so, he did not see the engine until the automobile was within about 4 feet of the track.

Defendants moved for a nonsuit upon the ground that the evidence disclosed that the accident was caused by plaintiff's contributory negligence. This motion was denied by the trial court. Appellants contend that said motion should have been granted, and that the verdict is unsupported by the evidence for the same reason. Respondent calls attention to the fact that, under the testimony, the time elapsing between the opportunity afforded plaintiff for observation of the train and the time of the accident was but a fraction of a second. He argues that reasonable men might differ as to whether or not the accident could have been avoided by the exercise on the part of plaintiff of ordinary care and prudence, and that therefore the determination of that question was properly left to the jury.

[1] The facts above set forth are remarkably similar to those involved in the case of Griffin v. San Pedro, L. A. & S. L. R. R. Co., 170 Cal. 772, 151 Pac. 282, L. R. A. 1916A, 842, even as to the distances afforded to plaintiff for observation. The only essential difference between the facts of that case and this one is that in the Griffin Case the accident happened at midday, while in the case at bar it occurred between 2 and 3 o'clock in the morning. As above stated, this fact is not material, for the reason that plaintiff testified that he could see the track plainly for a quarter of a mile in either direction. The determination of each case involving contributory negligence on the part of plaintiff is dependent upon the particular set of circumstances presented by the record. This court is bound, however, to follow the law of this state as established by the Supreme Court in a similar case. In the Griffin Case above referred to, the majority of the court held that under the circumstances there presented, which cannot be distinguished in any material respect from those in the instant case, the plaintiff was guilty of contributory negligence, and reversed the judgment in favor of the plaintiff for that reason. The contrary view is forcibly presented in the dissenting opinion of the learned Chief Justice, in which Mr. Justice Sloss concurred. The numerous decisions of the Supreme Court which discuss the question of plaintiff's contributory negligence as applied to accidents at grade crossings, and which are cited by opposing parties to the case at bar, are referred to and distinguished in one or the other of the opinions in the Griffin Case. The ruling in that case is approved in Larrabee v. Western Pacific Ry. Co., 173 Cal. 743, 749, 161 Pac. 750, 752, and the case is cited as a basis for the general rule that a person about to cross a railroad is not entitled to rely upon a performance of duty by the employés of the rail-

road company, "so as to relieve him from the necessity of looking if he does not hear, and of stopping if he cannot see.

[2] Applying the rule announced in the prevailing opinion in the Griffin Case to the facts of this case, we are compelled to hold that the facts contained in this record show the plaintiff to have been guilty of contributory negligence, which should have prevented his recovery.

The judgment is reversed.

We concur: LANGDON, P. J.; BRITTAIN, J.

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41 Cal. App. 333

HORAN et al. v. CONSOLIDATED ST. GOTHARD GOLD MINING CO.
(Civ. 1994.)

(District Court of Appeal, Third District, California. May 29, 1919.)

1. EQUITY 🔑39(2)—JURISDICTION—COMPLETE RELIEF.

When a court of equity acquires jurisdiction, it will proceed to do complete justice and administer full relief, even to the extent of adjudicating matters of purely legal cognizance.

2. ACCOUNT 🔑4—JURISDICTION OF COURT OF EQUITY—TRUST RELATION.

Where a contractor failed to finish work after receiving part of the contract price, and a supplemental contract was entered into by which the employer agreed to finish the work and to account to the contractor for any surplus, a trust or confidential relation was thereby created between them, and a court of equity had jurisdiction of an action for an accounting, and had the right to determine damages due the contractor by reason of the conversion by the employer of personal property turned over in connection with the work.

3. ACCOUNT 🔑17(5)—PLEADING—PROOF.

While personal property which is a part of an account between parties may have been converted by one of them, it is not necessary, in an equitable action for an accounting, to aver facts essential to the statement of a cause of action in conversion in order to recover its value.

4. TROVER AND CONVERSION 🔑40(4)—SUFFICIENCY OF EVIDENCE.

In an action for an accounting, wherein plaintiffs alleged that defendant had converted personal property belonging to plaintiffs which was an item in the transaction involved, evidence *held* sufficient to show a conversion.

5. TROVER AND CONVERSION 🔑40(6)—DAMAGE—SUFFICIENCY OF EVIDENCE.

Where plaintiff alleged that defendant had converted horses, harness, and wagon constituting an item in the transaction, evidence *held* sufficient to sustain a finding that plaintiff suffered damage by reason of the converson.

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Action by Thomas Horan and others against the Consolidated St. Gothard Gold Mining Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Searls & Searls, of Nevada City, and tum Suden & tum Suden, of San Francisco, for appellant.

J. M. Walling, of Nevada City, and E. H. Armstrong, of Grass Valley, for respondents.

HART, J. In December, 1911, plaintiffs and one Murphy contracted to build a flume in Nevada county for the defendant to furnish water to its mine, for which they were to receive $26,000. The contractors failed in their undertaking, after having drawn nearly half the contract price on account, leaving creditors to the extent of $6,213.72, with less than one-third of the flume completed. On the 18th day of November, 1912, a new agreement was entered into between the parties hereto, under which defendant agreed to complete the flume, applying so much of the unpaid balance of the contract price as was necessary for the purpose; the remainder, if any, to be applied, first, to the payment of the debts incurred by the contractors, the balance, if any, to be paid to the contractors, the defendant to use in such completion all tools, machinery, supplies, and lumber on hand provided or used by the contractors in connection with said contract. The flume was completed in September, 1913, at an expense of over $20,000, leaving nothing for the creditors or the contractors.

In June, 1914, plaintiffs brought this action, alleging a number of defaults and violations of the supplemental contract on the part of defendant, praying for an accounting; for judgment for any credits that may be found due plaintiffs on such accounting; "for such other and further relief in the premises as may seem meet and agreeable to equity"; and for costs.

The trial of the case began on June 12, 1917, before the court without a jury, and on March 25, 1918, the court made the following findings: That by virtue of said supplemental agreement of November 18, 1912, plaintiffs assigned to their creditors all rights to any money or damages that might thereafter accrue in their favor from or against defendant to the extent of $6,213.72; that plaintiffs were not entitled to recover against defendant any sum unless the amount of damage accruing in favor of plaintiffs under said contract should be found to be in excess of said sum; that no sum amounting to $6,213.72 is shown to have accrued in favor of plaintiffs; that, in accordance with the terms and conditions of said contract, "defendant received from plaintiffs two horses, harness and wagon to be used by defendant in connection with the construction and completion of said flume, which said horses and wagon were to be returned to plaintiffs after such completion; that defendant failed to return the same or any part thereof and subsequently converted the same to its own use to plaintiffs' damage in the sum of $500." It was then found that under said contract defendant received from plaintiffs a sawmill and equipments which, after defendant had completed the manufacture of lumber thereat, plaintiffs were at liberty to have taken possession of.

Judgment was entered against defendant for the sum of $500 and for costs, amounting to $263.30. The appeal is by defendant from said judgment.

It is first contended by appellant that, as the action was solely one for an accounting and there was no allegation in the complaint of conversion, there should have been rendered no judgment for conversion.

In its answer defendant denied "that it received from the plaintiff two horses, harness and wagon"; denied "that defendant has or does now retain the said horses, harness, and wagon"; denied "that the plaintiffs are damaged thereby in the sum of $500 or in any sum or at all."

[1, 2] 1. No question is here raised as to the propriety of the remedy by bill for an accounting between the parties hereto. While by the supplemental contract a sort of novation was invoked, yet under said agreement the plaintiffs were still interested in the contract and the results thereof, and a trust or confidential relation was thereby created between them.

While courts of law and equity are possessed of concurrent jurisdiction in matters of account and accounting, this is, concededly, a suit in equity for an accounting, and it is the settled rule that—

> "When a court of equity once acquires jurisdiction upon equitable grounds, it will proceed to do complete justice and administer full relief to this end, will order an accounting, and will settle the whole controversy, even to the extent of adjudicating matters of purely legal cognizance." Ency. of Law & Proc. p. 418.

See, also, Pomeroy's Eq. Juris. § 255; Smith v. 49 & 56 Quartz M. Co., 14 Cal. 242, 248; Cal. Raisin Growers' Ass'n v. Abbott et al., 160 Cal. 601, 607, 117 Pac. 767.

The obvious object of the rule as it is so stated is to prevent a multiplicity of suits in those cases where, as to the same parties or parties united in interest by a common tie (although one may sue on behalf of himself and others), there are several different actions, even though different in nature, depending upon similar facts and circumstances, and involving the same legal questions, so that the decision of one would virtually be a decision of all the others. 1 Pomeroy's Eq. Juris. §§ 254, 255. Here the allegations in the complaint charging the retention by the defendant of certain horses, harness, and wagon delivered by the plaintiffs to the corporation to be used by it in fulfilling the terms of the contract, merely involve the statement or setting forth of certain items in the account between the parties as to which an accounting is asked. While the complaint in effect charges a conversion of the property, the action is obviously not one in conversion. The allegation is, as to those items of the account, as will be observed, that the defendant received from plaintiffs said property "to be used by said defendant in connection with the construction and completion of said flume," and that defendant still retains said horses, etc., to the damage of plaintiffs, etc. This allegation in this action must be construed simply to mean that there is certain property which belongs to the account between the plaintiffs and the defendant which, among other items, should be accounted for by the defendant in the proceeding. We cannot perceive that the allegation would be any different if the subject thereof were money received by the defendant as compensation for executing and completing the terms of the contract or if it were money wrongfully paid out or retained by the defendant. The allegation as to the damage which the plaintiffs therein assert that they have sustained by reason of the retention of the property mentioned involves merely the statement of the value of the property, which is not only a proper but a necessary fact to be stated in an action for an accounting to meet the possible contingency that the party charged with having possession of the assets of which the accounting is asked has disposed of or in some way divested himself of such possession, and is therefore in no position to account for the property in kind. The horses, wagon, and harness constituted a part of the account between the parties as to which an accounting is sought, and, this being a suit in equity for an accounting, it was, as above indicated, proper herein to allow damages as an essential element of the accounting, if it was made to appear that the property itself could not be accounted for. 1 Cyc. p. 408, and cases cited in footnote.

[3] It is obviously true that, while property which is a part of the account between the parties may have been converted by one of the parties, it is not necessary in such case in an equitable action for an accounting to aver facts essential to the statement of a cause of action in conversion, and therefore the cases cited by counsel for defendant, among which are Triscony v. Orr, 49 Cal. 612, and Edwards v. Sonoma V. Bank, 59 Cal. 136, are not in point here. Those cases did not involve an accounting, but were strictly actions in trover for the conversion of certain property, and the complaints were held to be wanting in facts sufficient to state such a cause of action.

2. It is next contended that there is no evidence which supports the finding that the defendant converted the horses, harness, and wagons. This contention cannot be sustained.

[4, 5] The defendant admitted receiving into its possession the horses, etc., in question, with other equipments owned and used by the plaintiffs in the work of constructing the flume. It was further admitted by the president of the defendant that he shipped the two horses to the city of San Francisco and there sold them for the sum of $100. There is no testimony showing definitely what became of the harness and wagon. The plaintiffs testified that they never received back the last-mentioned property, and their testimony as to that was not contradicted. The plaintiffs further testified that the horses, harness, and the wagon were reasonably of the aggregate value of $550. They said that the horses were young—about eight years old—and in excellent physical condition. This testimony was sufficient, if believed by the court, as evidently it was, to warrant the finding made by the court that the damages suffered by the plaintiffs for the detention and conversion of the horses, harness, and the wagon amounted to the sum of $500. Much stress, however, is laid upon the statement made by one of the plaintiffs, when testifying, that he did not care whether the horses in question had also died; two of their other horses let to defendant to be used in the construction of the flume having died during the progress of the work. The inference from that statement is, it is assumed, that the plaintiffs regarded the horses in question as of no substantial value. But we cannot say that such is necessarily the inference to be drawn from the said statement. At any rate, it was for the trial court to draw its own inferences from the testimony, and, as to the statement in question, it appears that that court attached to it no significance in connection with the determination of the value of the horses or the damages resulting from their conversion. We must so assume from the findings.

Emphasis is also put upon the testimony of the defendant's witnesses that, after the completion of the contract, the possession of the horses, wagon, harness, and other equipments was available to the plaintiffs, and that all the said property would have been delivered to them if they had called for it. But the fact remains that the property was not turned over to the plaintiffs and no explanation was given why it was not, other than that above indicated, viz., that the plaintiffs did not themselves take possession of it. There is no satisfactory showing that the plaintiffs knew when the work of construction was completed and the further use of the property by the defendant became unnecessary.

Counsel for appellant also emphasize the fact that there is no testimony showing or tending to show that the harness and the wagon were sold or converted by the defendant. The company's president testified that, as far as he knew, the harness and the wagon "were still at the mine." But it is immaterial, in our opinion, whether the harness and the wagon in question were or were not sold by the defendant. It was not denied by the president of the company or any other witness connected with the defendant that they were either in the possession of the defendant or had been disposed of by it. It was therefore the duty of the defendant to account for said property in this action, and, it having failed to do so, it was within the right and power of the court to make an allowance for their reasonable value as damages. It was undoubtedly the duty of defendant, upon completion of the contract, to return the horses, the harness, and the wagon to the plaintiffs, and its failure to do so, under the circumstances of this case, amounted in legal effect to a conversion of said property, whether the cause of such failure was that defendant had sold the property or itself wrongfully retained possession of it.

We have discovered no substantial reason for disturbing the judgment, and it is therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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41 Cal. App. 487

GILL v. PEPPIN et al. (Civ. 2786.)

(District Court of Appeal, First District, Division 2, California. June 9, 1919.)

1. Mortgages 🔑559(3)—Foreclosure—Presumption—Deficiency Judgment.

Under Code Civ. Proc. § 1963, subds. 5, 20, 28, in the absence of any showing in record of mortgage foreclosure to the contrary, it is presumed that the proceeds from the sale of the mortgaged property satisfied the judgment and that there was no deficiency judgment.

2. Judgment 🔑345—Setting Aside—Effect of Previous Satisfaction.

Subject to the power of a court of equity to set aside a judgment in a separate suit for fraud or mistake, or, within the period limited by Code Civ. Proc. § 473, for the trial court to vacate the judgment on motion under that section, the satisfaction of the judgment renders it conclusive, and even within the period limited by that section the court may not vacate the judgment ex parte and without a showing of equitable considerations.

3. Mortgages 🔑496—Foreclosure—Judgment—Vacating.

A mortgage foreclosure judgment, satisfied by sale of the mortgaged property, which judgment determined in favor of defendants the amount of the mortgage debt and eliminated in their favor an onerous mortgage provision for quarterly compounding of interest and further determined that certain premises only were subject to the mortgage lien, under Code Civ. Proc. § 1908, as effectually bound the court and plaintiff as the defendants, and could not be vacated without notice to defendants, upon plaintiff's motion, even within the period limited by section 473.

4. MORTGAGES 🔑496—FORECLOSURE—VACATING DECREE.

Where order, vacating on plaintiff's motion a mortgage foreclosure decree, in terms stated that good cause therefor appeared "by the annexed affidavit," and such affidavit was made by plaintiff's attorney, and did not state why it was not made by plaintiff, nor that the attorney was familiar with the facts and he believed or had advised plaintiff that he had a meritorious cause of action or grounds for setting aside decree and the sale made under it, and the only averment concerning mistake was that after the sale "it came to the knowledge of plaintiff that by mutual mistake of all the parties * * * said mortgage did not cover and describe the property intended to be covered and described therein," etc., and there was no statement to explain why the mistake was not previously discovered, nor how intervening rights might be affected, the affidavit was insufficient to support the order.

5. APPEAL AND ERROR 🔑935(1)—PRESUMPTION.

Where the trial court's order vacating its decree foreclosing a mortgage recited that the order was based on the affidavit of plaintiff's attorney, which was insufficient, it could not be presumed that the court acted on the allegations of the proposed amended complaint.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by J. J. Gill against Eva E. Peppin and others. Decree for plaintiff, and from an order vacating the decree, and an order refusing to set aside the first order, Jennie F. Stone and certain other defendants appeal. Order vacating judgment reversed.

Raymond Perry, of San Francisco, for appellants.

A. A. Rogers, of San Leandro, and Walter J. Burpee and T. P. Wittschen, both of Oakland, for respondents.

BRITTAIN, J. After the sale of mortgaged property under a decree of foreclosure, the plaintiff ex parte procured an order vacating the decree, annulling the sale and permitting the filing of an amended complaint to reform the mortgage for mistake. Subsequently on notice, separate motions to set aside the ex parte order were made by new defendants brought into the suit under a summons issued on the amended complaint, and by those of the original defendants who were directly affected by the decree of foreclosure. Both motions were denied. The new parties appeal from the second order only, and the original defendants appeal from the ex parte order and from the order refusing to set it aside. Under stipulation the appeals are presented on one record and are determined together.

On behalf of the respondent, it is contended that neither appeal from the second order may be considered because the order vacating the decree was appealable. The case appears to be within recognized exceptions to the rule in that the order was made on an ex parte application and it was adverse to the new defendants who claimed under the original defendants. Pignaz v. Burnett, 119 Cal. 157, 163, 51 Pac. 48; Title Ins. & Trust Co. v. California, etc., Co., 159 Cal. 484, 114 Pac. 838. It is unnecessary, however, to base the decision on the appeals from the second order, because the order vacating the decree must be reversed, upon the grounds stated in this opinion.

[1] The plaintiff and respondent, as the assignee of the original mortgagee, sued in the ordinary form to foreclose a mortgage made on April 19, 1913, to secure the payment of a debt evidenced by a note of even date with the mortgage, for $1,400, payable one year after date, with interest at 7 per cent. compounded every three months. The assignment of the note and mortgage to the plaintiff was in August, 1914, after the maturity of the note. The mortgage, which was recorded three days after its execution, accurately described by metes and bounds a lot in the city of Oakland, designated for convenience as lot 1. The plaintiff sued Eva E. Peppin, and J. B. Peppin, Jr., her husband, the original mortgagors, together with Jennie F. Stone and E. B. & A. L. Stone Company, a corporation, and certain fictitiously named defendants, who it was alleged claimed an interest in the mortgaged property, subject to the lien of the mortgage. The suit was commenced November 1, 1917, and, after service and return of the summons, on January 8, 1918, the plaintiff showed the default of the named defendants had been entered, dismissed the action as to the fictitiously named defendants, and proved his mortgage and debt, including interest, attorneys' fees, and costs, of $1,631.88. The court thereupon made a decree in accordance with the allegations and prayer of the complaint, and the mortgage, a copy of which was appended to the complaint as an exhibit, and ordered a sale of the mortgaged property by a commissioner named in the decree, which contained a provision for the docketing of a deficiency judgment. The court therefore had jurisdiction of the subject-matter and the parties, and the judgment followed the complaint, the allegations of which were admitted by the defaults. The judgment was entered January 11, 1918, and was executed on February

12, 1918, by the sale of lot 1, as described in both the mortgage and the decree. No deficiency judgment was entered, or at least the record fails to disclose anything from which the contrary might be inferred. In the absence of any showing in the record upon the subject, the presumption is that the proceeds from the sale of the mortgaged property satisfied the judgment. Code Civ. Proc. § 1963, subds. 5, 20, and 28.

[2] Subject to the power of a court of equity to set aside the judgment in a separate suit for fraud or mistake, or within the period limited by the section, for the trial court to vacate the judgment on motion under section 473 of the Code of Civil Procedure, the satisfaction of the judgment rendered it conclusive. "By section 1049 of the Code of Civil Procedure, the cause had then ceased to be pending in the court, and the court was without any jurisdiction to render any further judgment therein. * * * The safety and tranquillity of parties require that their interest should not be constantly suspended, and their repose liable to be disturbed at any moment by the discretion of the court. * * *" Brackett v. Banegas, 99 Cal. 623, 627, 34 Pac. 344, 345; Carpentier v. Hart, 5 Cal. 406. In Brackett v. Banegas, the facts were substantially the same as those recited above, except that the application was made after the time limited by section 473. That the reasoning of the court concerning the considerations moving the Legislature to limit the time of the application is directly applicable to considerations which should control any court upon an ex parte motion made within the time limit is apparent from the following quotation:

> "By the judgment as originally entered herein, the obligation of the mortgagor to the plaintiff had become fixed at a certain amount, bearing interest at the rate of 7 per cent. per annum. If, however, the court could at any time thereafter vacate this judgment after it had been satisfied, without any notice to the mortgagor, and re-establish the original obligation against him, bearing interest at the rate of 18 per cent. per annum" (or, in the present case compounded quarterly), "its judgment would not have been a 'final determination of the rights of the parties,' and the parties to the action could never feel secure in any action of the court. For the reason that the law does not sanction such injustice, it has been wisely determined by the Legislature that the court shall have no power upon mere motion to vacate its judgment after the lapse of six months from its entry." Brackett v. Banegas, 99 Cal. 627, 34 Pac. 345.

[3] While the court within the six months upon mere motion may vacate the judgment, the injustice of setting aside a judgment beneficial to the judgment debtor without notice is not sanctioned by the Code. Section 473 limits the time beyond which a motion cannot be entertained, even though notice be given and a showing of equitable considerations is made. It does not dispense either with the showing required or the necessity of notice to adverse parties. The court and the plaintiff were as effectually bound by the satisfied judgment as were the defendants. It determined in favor of the defendants the amount of the mortgage debt and eliminated in their favor the onerous provision for quarterly compounding of interest. It further determined that lot 1 was subject to the lien, and therefore that no other lot was affected by either the mortgage or the judgment. Code Civ. Proc. § 1908; Hutchings v. Ebeler, 46 Cal. 557; Spaulding v. Howard, 121 Cal. 194, 53 Pac. 563. The rule of res judicata rests on the two maxims that "a man should not be twice vexed for the same cause," and that "it is for the public good that there be an end of litigation." Where the judgment is sought to be set aside, the question is not whether the judgment was right or wrong, but whether it was a valid and final judgment. Lamb v. Wahlenmaier, 144 Cal. 95, 77 Pac. 765, 103 Am. St. Rep. 66.

It was sought by the amended complaint to substitute for the mortgaged lot another lot, designated as lot 2, owned by the E. B. & A. L. Stone Company, and to effect this purpose the former adjudication was set aside ex parte. Where, under a provision of the Practice Act, the court made an order directing the adverse party to a judgment to appear at a time fixed to show cause why it should not be vacated, the Supreme Court, solely for the reason that it did not affirmatively appear that a copy of the order was served on him or that he had notice of the time when the motion would be heard, reversed the order vacating the judgment. Vallejo v. Green, 16 Cal. 160; Reilly v. Ruddock, 41 Cal. 312. In determining the effect of section 473, the application of the rule of Vallejo v. Green to that section is recognized. "Section 473 provides, in effect, that the relief therein specified may not be given until after notice to the adverse party, but it does not provide that no application for relief can be made to the court until after such notice has been given." Brownell v. Superior Court, 157 Cal. 709, 109 Pac. 94. The only cases, where an order vacating an ex parte application has been sustained, accentuate the rule that vested rights may not be taken without notice and an opportunity of hearing. They are cases where the court vacated former improvident ex parte orders by which such rights were disturbed. Whitney v. Superior Court, 147 Cal. 536, 82 Pac. 37; Robson v. Superior Court, 171 Cal. 588, 154 Pac. 8. In such cases the second order was sustained, not as an ex parte adjudication of vested rights, but because no rights were vested by the first order made without the court having gained jurisdiction of the parties affected. "The objection that the lower court has improperly vacated its final order is one that goes to the jurisdiction of the court." Lang v. Superior Court, 71 Cal. 491, 12 Pac. 306, 416; Carpenter v. Superior Court, 75 Cal. 596, 19 Pac. 174; Holtum v. Greif, 144 Cal. 521, 78 Pac. 11. The judgment was valid on its face, and, unless it was set aside in reliance upon section 473, the court was without power to vacate it. Jacks v. Baldez, 97 Cal. 91, 31 Pac. 899. It is no answer to say that the parties may litigate their substantial rights under the mortgage after their substantial rights under the judgment have been taken from them without notice. "The validity of every judgment depends on the jurisdiction of the court before it was rendered, not upon what may occur subsequently." Pennoyer v. Neff, 95 U. S. 728, 24 L. Ed. 565.

The decision might rest on the jurisdictional ground of lack of notice; but, so anxious are appellate courts to sustain the actions of trial courts, it is considered proper briefly to state other reasons why the order vacating the judgment must be reversed. While section 473 is to be liberally construed, and much is left to the discretion of the lower court in regard to the granting of relief under it, when it appears that the lower court has been led into error and substantial rights of parties have been taken from them without notice and upon an insufficient showing, the appellate court cannot evade its clear duty to cause parties to be restored to their original positions in regard to the judgment. The discretion "is not a mental discretion to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case, this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates." Bailey v. Taaffe, 29 Cal. 424; Miller v. Carr, 116 Cal. 378, 48 Pac. 324, 58 Am. St. Rep. 180.

[4, 5] Whether a valid judgment is attacked in a separate suit or by motion, the considerations which should move the court are substantially the same, because the same remedy is sought, and, if given, awarded for the same reasons. Estudillo v. Security Loan, etc., Co., 149 Cal. 565, 87 Pac. 19. The order vacating the decree in terms stated that good cause therefor appeared "by the annexed affidavit." The affidavit annexed to the order was by the attorney for the plaintiff. It did not state why it was not made by the plaintiff, nor that the attorney was familiar with the facts and he believed or had advised his client that he had either a meritorious cause of action or grounds for setting aside the decree and the sale made under it. The only averment concerning mistake was that after the commissioner's sale "it came to the knowledge of the plaintiff that by mutual mistake of all the parties to this action said mortgage did not cover and describe the property intended to be covered and described therein, and by reason thereof it is necessary that said mortgage be revised and reformed so as to express the true intent of the parties hereto before the same be foreclosed."

There was no statement to explain why the mistake was not discovered before the plaintiff commenced the suit in which he proved the mortgage of the lot described in it, and sold under the decree, none to show that the judgment was not fully satisfied from the proceeds of the sale of the lot which was mortgaged, and none concerning what other property was sought to be subjected to the lien of the five year old mortgage, nor what new parties and intervening rights might be affected. Where the judgment is regular on its face, an affidavit of merits is indispensable as a basis of the motion. Nevada Bank v. Dresbach, 63 Cal. 324; Bailey v. Taaffe, 29 Cal. 422; Parkside Realty Co. v. MacDonald, 167 Cal. 342, 139 Pac. 805. It is argued that, despite the recital by which the court bound its action to the wholly insufficient affidavit of the attorney, it had before it the proposed amended complaint, and that it supplied the defects in the attorney's affidavit. While every reasonable inference should be drawn to support the action of the trial court, when the record shows the order was made upon specific evidence, the appellate court cannot indulge in presumptions to falsify the record. As early as 1874, the Supreme Court said that rule had been repeated so often that it had become trite. Abbey Homestead Ass'n v. Willard, 48 Cal. 619.

Even though it could be assumed the court acted on the allegations contained in the proposed amended complaint with the averments of the attorney's affidavit, the order vacating the judgment could not be sustained. In the amended complaint it was alleged, in substance, that in 1913 the original mortgagors owned adjoining lots 1 and 2; that they agreed with McDonald, the original mortgagee, that, if he would lend them $1,400 to be secured by a mortgage of lot 2, they would build on that lot a house according to plans then before the parties, to cost not less than the $1,400 to be loaned; that by a mutual mistake lot 1 was described in the mortgage instead of lot 2; that the $1,400 was loaned and the house built on lot 2 with the $1,400; that a month after the making of the mortgage the mortgagors by grant deed conveyed both lots to Jennie F. Stone and E. B. & A. L. Stone Company; that on September 1, 1917, E. B. & A. L. Stone Company by grant deed conveyed the mortgaged lot 1 to Jennie F. Stone, and on October 1, 1917, the Stone company contracted to sell the unmortgaged lot 2, with the house, to John Sloss and Margaret Sloss for $3,500, of which $175 had been paid; that Mr. and Mrs. Sloss had entered into possession of the house, and, inferentially at least, were living there when the suit to foreclose the mortgage on lot 1 was commenced, and continuously thereafter, as appears from the attorney's affidavit and the order vacating the decree, until the plaintiff upon his first visit to them, after the commissioner's sale, learned that the mortgage did not cover their home. It further appears from the amended complaint that the plaintiff bought the mortgage after the maturity of the note secured by it. It is alleged that both the Stone deeds were without consideration, and the bald statement is made, as to each of the changes of ownership of the mortgage and the property, that the parties engaged in the particular transaction knew of the original agreement that the mortgage should cover the lot it did not cover, and that at the time of each transaction the parties to it believed the mortgage described the property on which the house was built. There was no suggestion of fraudulent concealment, and no fact was stated to explain why the information so readily gained after the foreclosure sale was not discovered before the suit was commenced or within the period of nearly three months which elapsed between the commencement of the suit and the date of the decree. The mortgage, its assignment, and each of the deeds, were recorded, and the most careless observer would have been able to distinguish the difference between 187½ feet and 225 feet, the distance from the corner of the block respectively to the nearest line of the mortgaged and the unmortgaged property. No fact is stated which in any way explains why the successive owners of the lots and the mortgage dealt as they did for a period of five years with matters of public record without any of them discovering that none of them had taken the trouble to find out with what he was dealing. If the owners of the lots were negligent in this regard, the owner of the mortgage was not thereby excused from ascertaining what an ordinarily prudent man buying the mortgage might have learned at the time of the purchase, and what he ought to have learned before commencing suit. "The reasons, and the causes, and the excuses for the inadvertence, are matters which concern the court, and these are not stated. Inadvertence in the abstract is no plea upon which to set aside a default. The court must be made acquainted with the reasons for the inadvertence, and, if satisfactory, will act upon them and relieve from burdens caused by them; but, if the inadvertence is wholly inexcusable, as if it arises from gross negligence, the court will not look upon it kindly, and will have none of it." Shearman v. Jorgensen, 106 Cal. 485, 39 Pac. 864. There is no showing that the judgment debt was not fully satisfied by the sale of lot 1. If it was sold to a stranger, the affidavit should have shown how much was paid and what became of the money. If it was bought in by the plaintiff for the debt of a trifle over $1,600, did he not get all he was entitled to have? The lot with the $1,400 house is under contract of sale for $3,500. In the absence of any statement to the contrary, it would seem that the adjoining lot without the $1,400 house is worth $2,100, or at least as much as the debt. Equity will not overturn a judgment valid on its face unless it is an unjust judgment. It must appear that a like result would not follow in the new litigation. Harnish v. Bramer, 71 Cal. 155–159, 11 Pac. 888. If the plaintiff has a cause of action for relief from the judgment, that right may be established in a new suit, where the other parties to the judgment may resist the reformation of the mortgage not only, but, after the court has jurisdiction of them, they may defend against the setting aside of the judgment under which they claim vested and beneficial rights.

The order vacating the judgment is reversed.

We concur: LANGDON, P. J.; HAVEN, J.

(180 Cal. 762)

PEMBERTON v. ARNY. (L. A. 4923.)

(Supreme Court of California. July 30, 1919.)

1. MUNICIPAL CORPORATIONS 🔑706(5)—COLLISION IN STREET—EVIDENCE—NEGLIGENT OPERATION OF AUTOMOBILE.

In an action for injuries to a pedestrian struck by defendant's automobile, evidence *held* sufficient to sustain the court's finding that the defendant was negligent in giving no warning, failing to watch for pedestrians and turning onto the left-hand side of the street.

2. APPEAL AND ERROR 🔑1052(7)—HARMLESS ERROR—ADMISSION OF EVIDENCE—CURE BY FINDING.

If a municipal ordinance requiring vehicles turning a corner to right to turn as near the curb as possible was superseded by the Motor Vehicle Act, requiring them only to keep to the right of the center of the street, error in admitting the ordinance was harmless, where the court found that defendant made the turns onto the left-hand side of the street.

3. WITNESSES 🔑281—CROSS-EXAMINATION—ASSUMPTION OF FACTS.

In cross-examining defendant's wife, where there was evidence that defendant in turning a corner to the right with his automobile turned onto the left side of the street, though such evidence was contradicted by defendant and other witnesses, a question, assuming that he made such turn, was not objectionable as assuming a state of facts not in evidence.

4. APPEAL AND ERROR 🔑1048(5)—HARMLESS ERROR—OBJECTION TO QUESTION.

Where the court had a question, objected to as assuming defendant turned onto the left side of the street, re-read, and then stated that witness might answer whether there was anything interfering with defendant's turning, an answer that there was nothing was an answer to the court's question, and error cannot be predicated on the original question; it being unanswered.

5. APPEAL AND ERROR 🔑1048(3)—HARMLESS ERROR—ADMISSION OF EVIDENCE—ANSWER TO IMPROPER QUESTIONS.

Error in permitting a witness to answer a question which assumed facts was not prejudicial, where other witnesses had testified without contradiction to the same effect, and appellant made no claim to the contrary.

Department 1.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Perle C. Pemberton against Edward Arny. Judgment for plaintiff, and defendant appeals. Affirmed.

Roland G. Swaffield, Phil. M. Swaffield, and Chris Wilson, all of Long Beach, for appellant.

Ingle Carpenter and Chas. W. Fourl, both of Los Angeles, for respondent.

LAWLOR, J. Action was brought by the plaintiff against the defendant to recover damages for injuries sustained by his wife, Amy Pemberton, through the alleged negligence of the defendant in the operation of his automobile. The cause was tried before the court sitting without a jury. The court found for the plaintiff in the sum of $2,000, with costs amounting to $59.45, and judgment was entered accordingly. The appeal is from the judgment on the grounds of the insufficiency of the evidence and errors in law occurring at the trial.

[1] Mrs. Pemberton was struck and run over by appellant's automobile. The accident occurred on January 22, 1915, between 7 and 7:30 p. m. at the intersection of Third street and Atlantic avenue, in the city of Long Beach. Third street, which runs east and west, is crossed at right angles by Atlantic avenue, a street 60 feet wide from curb to curb. Third street, along which a double street car track runs, is paved and is 50 feet wide from curb to curb. Atlantic avenue is not paved, but the pavement of Third street extends north into this street 2 feet beyond the north line of the sidewalk if extended across Atlantic avenue. This pavement comes up flush with the sidewalk and curb on both sides of Atlantic avenue, so that there is no drop from the sidewalk to the pavement at this crossing.

On the evening of the accident Mrs. Pemberton, with her 12 year old son Lorwin, left their home with the intention of attending the revival services which were being held in the tabernacle, a temporary structure, situated on the northeast corner of Atlantic avenue and Third street. They had alighted from a street car at American avenue and Third street, three blocks west of Atlantic avenue, and were proceeding east on the sidewalk along the north side of Third street, and had reached a point on the crosswalk on Atlantic avenue when Mrs. Pemberton was struck by defendant's machine, which had come down Third street in a westerly direction and was making the turn into Atlantic avenue, going north.

As to the nature and extent of the injuries sustained there was no conflict in the evidence. It was established by the testimony of the plaintiff and Mrs. Pemberton, as well as by that of the physicians who treated her, that she had sustained bruises about the head and chest and arms; that three ribs had been broken on the left side, and that at least one of these had punctured the lung on that side. It was further established that two major operations had been necessary as the result of the accident; that one of these operations was for the purpose of removing the spleen, which had been ruptured; the removal of which the doctor who performed the operation testified was absolutely necessary in order to save the patient's life. The other operation was for the purpose of removing certain abscesses from the lung. It was also established that a rupture had developed as a result of the first operation, which could be cured only by a further operation. It was the opinion of the physicians who testified as to Mrs. Pemberton's condition that her health would never be normal again.

As to how the accident actually happened the evidence is in sharp conflict. Mrs. Pemberton testified that as she approached Atlantic avenue her son Lorwin was on her right, that is, on the side next to the street; that when they reached the west side of Atlantic avenue they stopped on the curb and looked both ways before proceeding to cross, that is to say, she looked north along Atlantic avenue and south along Atlantic avenue and east along Third street; that in doing so she saw defendant's automobile approaching as it came down Third street, going west; that it was moving moderately fast near the center of the street; that at the time she stepped from the west curb of Atlantic avenue onto the crosswalk the defendant's machine was about 50 feet east of the sidewalk line of the east side of Atlantic avenue; that from the time she stepped into Atlantic avenue she paid no further attention to the machine, because it did not appear to be in her way; that she had proceeded about 10 or 15 feet, less than halfway across the street, when she was struck in the back and side by the defendant's automobile; that she heard no horn sounded or any other warning given; that she did not know that the defendant's machine had made the turn until it struck her; and that she did not remember whether or not the lights on the machine were lighted. This statement was corroborated by her son Lorwin, who testified that he had watched the automobile out of the corner of his eye from the time that he and his mother started on the crosswalk until he thought it had passed them; that he did not see any evidence of an intention on the part of the defendant to turn up Atlantic avenue; that the first he knew that the machine had turned was when it loomed up on his right, not more than 2 feet away; that he jumped forward and yelled as the machine touched his right leg. He escaped injury.

Mr. and Mrs. C. H. Haag, witnesses called for the plaintiff, testified that they also were on their way to attend the revival services at the tabernacle at the time the accident occurred; that they were proceeding along the crosswalk on Atlantic avenue, just ahead of Mrs. Pemberton and her son; that they saw the defendant's automobile coming down Third street; that all of the lights were lighted, and that the machine appeared to be moving at about 10 or 15 miles an hour; that they both watched to see whether or not it was going to make the turn into Atlantic avenue; that at the time the machine reached the sidewalk line on the east side of Atlantic avenue, the point where an automobile would ordinarily begin to make the turn, it showed no signs of slackening speed, nor gave other evidence of turning; that they watched particularly, because when the machine had reached that point they were about 12 or 15 feet from the east curb of Atlantic avenue, and would have been directly in the machine's way if it had made the turn. Both of these witnesses testified that they did not see the automobile make the turn; that the first they knew that it had turned into Atlantic avenue was when they heard Lorwin Pemberton scream. At this they both turned and saw the machine just as it was coming to a stop. It was then headed in a northwesterly direction, and was on the west side of the center line of Atlantic avenue, on the crosswalk. Mr. Haag testified that he rushed back and was among the first to reach the injured woman. She was under the machine, and he found, when he attempted to pull her out, that she was held fast by the right rear wheel, which was resting either on her body or on her clothes; that in order to release her it was necessary to push the machine back about a foot. Both Mr. and Mrs. Haag testified that they heard no horn sounded or other alarm given.

Witness Willie E. Hale, called by the plaintiff, testified that he arrived on the scene with an ambulance shortly after the accident happened; that he drove the ambulance south down Atlantic avenue and stopped on the east side of where Mrs. Pemberton was being supported in a sitting position on the ground. His ambulance was west of the center line of Atlantic avenue. William M. Galbraith, also called on behalf of the plaintiff, testified that he reached the scene shortly after the accident occurred; that he found the plaintiff sitting on the ground a little west of the center of the street; and that the automobile was standing almost exactly in the center of the street. E. B. Hill, called on behalf of the plaintiff, testified that he, too, was on his way to the tabernacle; that he was proceeding along the crosswalk just ahead of Mr. and Mrs. Haag; that he observed the defendant's machine as it came down Third street, and that he did not see any indications of it making the turn into Atlantic avenue; that he watched the automobile until it passed the point where a vehicle would usually begin to turn, that is to say, the sidewalk line of the east side of Atlantic avenue; that he had reached the east curb when he heard Lorwin Pemberton scream; that he turned and saw that the machine had turned, and that Mrs. Pemberton had been run down on the crosswalk. He rushed to the automobile and assisted Mr. Haag in removing Mrs. Pemberton from underneath the machine. According to this witness the automobile was entirely on the east side of the center line of Atlantic avenue, but he testified that the west or left-hand side of the machine was right on the center line. None of these witnesses saw the machine make the turn. All of them, however, except the last two, as we have shown, gave the position of the machine when it was brought to a stop as being on the left-hand side of the center of the street.

It is the contention of the appellant that he made the turn from Third street into Atlantic avenue, as near the right-hand curb as was possible, and that the injury to Mrs. Pemberton was the result of her own negligence in hurrying across Atlantic avenue without looking for approaching automobiles. The appellant was driving the machine himself, sitting alone on the front seat. In the rear seat were his wife and his two daughters. In his own behalf the appellant testified that as he came down Third street he was on the right-hand side of the north car track; that he was traveling about 10 miles an hour; that he had all the lights burning on the machine; that when he reached the east line of Atlantic avenue he sounded his horn and began to make a gradual turn to the right; that he passed within 6 or 8 feet of the northeast corner, but that in order to avoid striking an automobile which was parked on Atlantic avenue at right angles to the curb from 15 to 20 feet north of the corner, he bore a little to the left; that there was a street car passing going east, just before he reached the east line of Atlantic avenue; that Atlantic avenue was very dark at the time; and that there were no lights except those on his machine and some of the machines that were parked, and a small incandescent light at the door of the tabernacle; that he did not see Mrs. Pemberton until she was within about a foot or a foot and a half of the right front fender; that just before he saw her he had been blinded for an instant by a light from some source which flashed across his wind shield; that as soon as he saw Mrs. Pemberton he cramped his front wheels hard to the left, threw out his clutch, jammed on the foot brake, and at the same time set the emergency, bringing his machine to a stop within its own length, and on the right-hand side of Atlantic avenue. Appellant's testimony was corroborated throughout by that of his wife and his two daughters.

Witnesses Mrs. Minnie Haskins, Rev. A. R. Moore, W. E. Brown, and J. C. Hoffman, called on behalf of appellant, all testified that they arrived on the scene after the accident had happened, and that they found the machine standing on the east side of the center line of Atlantic avenue, or, in other words, on the right-hand side of the street. C. H. Stevenson, also called for the appellant, testified, however, that the machine was standing at about the center of the street.

The court found that the defendant Edward Arny, "at the time and place hereinabove referred to, suddenly and without warning or signal of any kind turned his automobile to the right and to the north into Atlantic avenue, and violently struck Amy Pemberton with his said automobile, and knocked her to the pavement and ran over her and dragged her beneath same; that the defendant in turning to the right from said Third street north into Atlantic avenue caused his automobile to be turned so suddenly in front of Amy Pemberton that the said Amy Pemberton did not have time to get out of the way of defendant's automobile before the collision occurred; * * * that the defendant * * * carelessly and negligently drove and operated his automobile upon said crossing in a careless manner without due or any regard to the safety and convenience of pedestrians and the said Amy Pemberton, in that he neglected and failed to keep a sharp, diligent, and careful watch or any lookout or watch whatsoever for pedestrians, and by reason of said negligence defendant's automobile struck Amy Pemberton and threw her to the ground and injured her as herein more fully set forth; that the defendant negligently and carelessly gave no reasonable, or any warning, by horn or otherwise, to said Amy Pemberton that defendant was turning from Third street north into Atlantic avenue, and intended to cross said sidewalk or crossing, which was being used by the said Amy Pemberton, in order to allow the said Amy Pemberton to escape from in front of, and get out of the way of defendant's automobile; that by reason of the carelessness and negligence of the defendant as hereinabove alleged the said Amy Pemberton while upon said crossing referred to was struck by defendant's automobile as aforesaid, was knocked down and dragged, thrown to the pavement," and suffered the injuries as hereinbefore set out; "and that she will be an invalid for the remainder of her life and unable to perform her usual duties." "As a conclusion of law from the foregoing facts, the court finds and decides: That the defendant Edward Arny was guilty of negligence in running and colliding with and running over the said Amy Pemberton, the wife of the plaintiff herein, and that said negligence was the proximate cause of the said injuries; that the said Amy Pemberton was not guilty of any contributory negligence whatsoever."

We have thus reviewed the testimony at length in order to show that there is sufficient evidence to support the findings of the court resolving the conflict on the side of the plaintiff.

[2] Appellant contends that the court erred in admitting in evidence over the appellant's objection section 8 of Ordinance 598, known as the "Traffic Ordinance" of the city of Long Beach, which section reads as follows:

"Sec. 8. The driver of any vehicle in turning to the right from one street into another shall turn the corner as near the right-hand curb as possible."

It is urged that the section was irrelevant, immaterial, and not pertinent to any issue in the case, and had been superseded by the Motor Vehicle Act of the state of California (Stats. 1913, p. 639), which provides that the driver of any vehicle in turning to the right from one street into another shall keep to the right of the center thereof. On this point the court found:

> "That at the time of said injury to the said Amy Pemberton * * * there was in full force and effect in the city of Long Beach, state of California, an ordinance No. 598 (N. S.), which provided that 'the driver of any vehicle in turning to the right from one street into another shall turn the corner as near the right-hand curb as possible;' * * * that the defendant in turning to the right and north into Atlantic avenue from said Third street in the city of Long Beach did not keep as near the right-hand curb as possible; that at the time of the accident herein complained of there was nothing to prevent the defendant in turning to the right from said Third street north into Atlantic avenue, from turning close to the curb at the northeast of said Third street and Atlantic avenue as required by the ordinance hereinabove referred to; that the defendant in turning to the right from said Third street north into Atlantic avenue in said city of Long Beach, did not keep to the right of the center of the street intersection of said Third street and Atlantic avenue; that the negligence of the defendant was the sole and proximate cause of the injuries."

In view of this finding it is not necessary to consider whether the admission of the section 8 above referred to was superseded by the Motor Vehicle Act. It is to be noted that the court not only found that at the time of the accident the defendant was violating the said city ordinance, but, also, that he was violating the Motor Vehicle Act itself, in that "he did not keep to the right of the center of the street intersection of said Third street and Atlantic avenue." For this reason, the admission of the ordinance, even if erroneous, would not be prejudicial.

[3] It is further urged by the appellant that the court erred in admitting into evidence the following testimony on cross-examination of Mrs. Kittie Arny, wife of defendant, and a witness called in his behalf:

> "Q. So, then, there was nothing, so far as you could see, on the east side of Atlantic avenue, which would at all have interfered with your turning closer to the curb than the turn which brought you at or near the center of the street?
>
> "Mr. Swaffield: We object to that on the ground that it assumes a state of facts not in evidence. It assumes that the turn they made would have brought them to the center. She testified there was a swing apparently to the west at the time of this accident; she has not testified that the turn brought them to the center; irrelevant, incompetent, and immaterial.
>
> "The Court: Read the question. (Question read.)
>
> "The Court: She may answer if anything was there that interfered with your turning.
>
> "A. There was nothing there that I saw; we turned as close as we could."

The objection that the question assumed a state of facts not in evidence is without merit. As we have heretofore pointed out, there was evidence before the court tending to show that the turn which the defendant made did bring his automobile to the center of the street intersection and beyond that line. And this is not affected by the fact that there was evidence to the contrary.

[4, 5] Moreover, the question to which counsel objected as assuming facts not in evidence was not answered. After having the question read the court said: "She may answer if anything was there that interfered with your turning." The answer was directly responsive to the question of the court. In any event, the answer could not be held to be prejudicial for the reason that other witnesses had testified to the same effect, and there was no testimony to the contrary. Nor was any claim made by appellant that there was any obstruction at the northeast corner of the street.

Judgment affirmed.

We concur: SHAW, J.; OLNEY, J.

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41 Cal. App. 358

FISCHER v. LUKENS et al. (Civ. 2583.)

(District Court of Appeal, First District, Division 2, California. June 3, 1919.)

1. EVIDENCE 🔑83(6)—PRESUMPTIONS — OFFICIAL ACTION.

Where the record contains no evidence to the contrary, it must be presumed that the clerk of the Supreme Court promptly transmitted a remittitur after its issuance, that it was duly received, that the clerk of the trial court duly received it, and thereafter that he did promptly attach the certificate to the judgment roll and enter a minute of the judgment of the Supreme Court on a docket, against the original entry, under Code Civ. Proc. § 958, and section 1963, subds. 15, 20, and 24; the statute not calling for a separate filing mark on the remittitur.

2. APPEAL AND ERROR 🔑1217—REMITTITUR —TRANSFER OF JURISDICTION.

The jurisdiction of the Supreme Court ceases when a remittitur is issued, and instantly the jurisdiction of the superior court attaches.

3. EVIDENCE 🔑383(7) — DEEDS — RECITALS.

A recitation in a copy of deed by a corporation, as recorded, that the grantor "has hereunto set its name and caused its common seal to be affixed by its president, thereunto duly authorized by resolution of its board of directors," is not evidence that the president who signed the deed did in fact affix the seal of the corporation; it being the duty of the recorder, under Pol. Code, § 4137, to note on the copy made by him the certificates and proofs appearing on the face of the instrument.

4. EVIDENCE ⚿370(5) — CORPORATE DEEDS —NECESSITY FOR SEAL.

Unless a deed of a corporation bears the corporate seal, it is inadmissible in evidence, without a showing of the authority of the officers executing the same to execute it.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Xavier Fischer against E. G. Lukens and the Pacific Investments, Incorporated, and others. Judgment for plaintiff, and the last-named defendant appeals. Affirmed.

See, also, 178 Pac. 302.

Pillsbury, Madison & Sutro, of San Francisco, for appellant.

Stanley Moore, of San Francisco, and Reed, Nusbaumer & Bingaman, of Oakland, for respondent.

LANGDON, P. J. This is an action to quiet title. The plaintiff had judgment in the trial court. Pacific Investments, Incorporated (a corporation), one of the defendants, has appealed and has brought up all the evidence in a bill of exceptions. The evidence of the parties consists of written instruments. No witnesses were called by either party. Both parties claim to deraign title from Western Fuse & Explosives Company. On December 22, 1904, the plaintiff obtained a judgment against the Western Fuse & Explosives Company, and later took out execution and caused the property involved in this action to be sold at execution sale. The plaintiff purchased at the sale, and if his purchase vested in him a legal title the judgment of the trial court should be affirmed.

[1, 2] Appellant's first objection is that the execution sale was invalid, on the ground that at the time the clerk of the trial court issued the writ the jurisdiction of the trial court had been divested by virtue of an appeal duly perfected. This point was discussed and determined adversely to the contentions of the defendant and appellant in the opinion of division 1 of this court upon the former hearing of this matter (178 Pac. 302). We agree with the conclusion reached in that opinion. As stated therein, the facts regarding the appeal in the action against the Western Fuse & Explosives Company, and pertinent to this appeal, are few, and they are all admitted. The first appeal was taken regularly and the execution was duly stayed. Later that appeal was disposed of and a remittitur was sent down. The remittitur was dated May 9, 1910. It was filed September 13, 1916, nunc pro tunc, May 11, 1910, pursuant to an order of the trial court made on that date. The record is silent as to when, if at all, the clerk of the trial court did "attach the certificate to the judgment roll, and enter a minute of the judgment of the Supreme Court on the docket against the original entry." The writ of execution was taken out August 1, 1913, and the sale was had September 8, 1913. As the record contains no evidence to the contrary, we must presume that the clerk of the Supreme Court promptly transmitted the remittitur after its issuance; that it was duly received; that the clerk of the trial court duly received it; and thereafter that he did promptly "attach the certificate to the judgment roll, and enter a minute of the judgment of the Supreme Court on the docket, against the original entry." Code Civ. Proc. § 958; section 1963, subds. 15, 20 and 24. These matters fill all the calls of the statute. It will be noted that the statute does not call for a separate filing mark on the remittitur. Code Civ. Proc. § 958. When the provisions of the last-mentioned section have been complied with, it is clear that jurisdiction revests in the trial court. Granger v. Sheriff, 140 Cal. 190, 73 Pac. 816. There is not, however, any express statement on that subject in our statutes. But there is settled authority to the effect that all jurisdiction of the appellate court is divested on the instant the remittitur goes down. Herrlich v. McDonald, 83 Cal. 505, 23 Pac. 710; Adams v. Dorhmann, 63 Cal. 417; Granger v. Sheriff, supra. But it needs no citation of authority to the effect that jurisdiction of a pending case rests in some court. In this case the jurisdicion of the Supreme Court and the jurisdiction of the superior court only are involved. It being settled by the above authorities that the jurisdiction of the Supreme Court ceased when the remittitur issued, it seems clear that instantly the jurisdiction of the superior court attached. It follows that the attack on the title of the respondent is without merit.

This leaves for our consideration only the one question of whether or not the trial court erred in refusing to admit in evidence the record of a deed from the Western Fuse & Explosives Company to E. G. Lukens, through which deed appellant claimed to deraign title to the property in question. The objections urged against the admission of the record of the deed are that from said record it does not appear that a corporate seal was attached to the deed; that there was no proof by the defendant of delivery of the deed to the grantee; and, further, that the deed was void because it purported to have been executed on behalf of the corporation by E. G. Lukens, as president thereof, to himself personally; and that the consideration recited in the deed being a mere nominal consideration, and said defendant having failed to show that an adequate consideration was paid by said Lukens to said corporation, the deed was prima facie void.

The original deed having been lost, appellant offered in evidence the record of this deed in the office of the county recorder of Alameda county. Under our conclusion, it will only be necessary for us to discuss the first objection made to the deed, which obviates the consideration of the contention of appellant that the remaining objections made by plaintiff and respondent were not raised in time.

[3, 4] The defendant, in attempting to introduce the record of this deed from the corporation to Lukens, introduced no proof of the authority of the officer executing the instrument to execute the same, but relied upon the presumption raised by a seal of the corporation to furnish the prima facie proof necessary to its admission in evidence. The record of the deed contained no statement or other evidence by the recorder that a corporate seal was affixed to the original deed, but the deed itself, as recorded, recited that the grantor "has hereunto set its name and caused its common seal to be affixed by its president, thereunto duly authorized by resolution of its board of directors." We think this recital is not evidence of the existence of the fact which it recites. Gashwiler v. Willis, 33 Cal. 11, 17, 91 Am. Dec. 607.

Section 4137, Political Code, declares:

> "When any instrument, * * * is deposited * * * for record, the recorder must indorse upon the same the time when it was received * * * and must record the same without delay, together with the acknowledgments, proofs, certificates, written upon or annexed to the same. * * *"

It was the duty of the recorder, therefore to note on the copy made by him the certificates and proofs appearing on the face of the instrument. If there had been a seal upon the original deed, the record of which was sought to be introduced by the defendant, it would have been the duty of the recorder to have made some appropriate record of that fact. We will presume that official duty has been regularly done, and, in the absence of a seal upon the copy, we must presume that the original deed bore no seal. If the original deed had been produced without the corporate seal, it would have been inadmissible, without a showing of the authority of the officers executing the same to execute it. Barney v. Pforr, 117 Cal. 56, 48 Pac. 987; Miners' Ditch Co. v. Zellerbach, 37 Cal. 545, at pages 596, 597, and 598, 99 Am. Dec. 300. Appellant is in no better position by reason of having offered the record instead of the original. The defendant made no showing whatever of due and regular execution by the officers of the corporation, and we think the deed was properly excluded.

The case of Smith v. Dall, 13 Cal. 510, relied upon by appellant, merely presented the question of whether the defendant, who claimed under a deed subsequent to the one under which plaintiff deraigned title, had notice of the first conveyance, which had been imperfectly recorded. This case was decided in 1859, before the distinction between sealed and unsealed instruments had been abolished in this state, and at that time it was necessary for a deed to be under seal. It was held in that case, however, that so far as the record of the deed was concerned, a recital in the notarial certificate that the deed contained a seal was sufficient to give the notice contemplated by the statute to a subsequent purchaser. There was no question involved in that case of the validity of the deed to pass title. In fact, it is stated by the court that the deed was actually under seal and had been duly acknowledged, and the court stated that the question was: "Does the fact that the recorder failed to make some mark upon his books to indicate that there was a seal to the conveyance vitiate the record?"

In the present case, the record was not offered to prove notice, but as an actual step in the chain of title claimed by the defendant.

The judgment is affirmed.

We concur: BRITTAIN, J.; HAVEN, J.

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41 Cal. App. 251

WING v. WESTERN PAC. R. CO.
(Civ. 2777.)

(District Court of Appeal, First District, Division 2, California. May 23, 1919. Rehearing Denied by Supreme Court July 21, 1919.)

1. Railroads 🔑385—Persons on Track—Contributory Negligence.

The contributory negligence of one injured while crossing a track along which he is walking is to be determined without reference to any negligence of the railroad.

2. Railroads 🔑400(12)—Injuries on Track—Questions for Jury—Contributory Negligence.

A pedestrian on a street occupied by an unfinished spur track, who started to cross the track without looking for cars, the gravel on each side commanding his attention, *held* not guilty of contributory negligence as a matter of law.

3. Negligence 🔑136(9) — Contributory Negligence—Question for Jury.

Contributory negligence is a question of fact for the jury, and not one of law for court, when reasonable minds may draw different conclusions from the facts.

Appeal from Superior Court, Alameda County; William S. Wells, Judge.

Action by Jacob Wing against the Western Pacific Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed.

M. H. Wascerwitz and G. C. Ringolsky, both of San Francisco, for appellant.

Snook & Church, of San Francisco (Guy V. Shoup, of San Francisco, of counsel), for respondent.

HAVEN, J. Plaintiff appeals from a judgment of nonsuit rendered against him in an action to recover damages for personal injuries. In granting defendant's motion for a nonsuit, the learned judge of the trial court stated the reasons therefor in the following language:

> "The motion for a nonsuit has been made in this case, on the ground of contributory negligence of the plaintiff, and this motion, in the court's judgment, must be granted. There is no question in my mind that the plaintiff was grossly negligent in his actions that night. His testimony shows that he came down from the synagogue, went straight down Harrison street, leaving two streets in which he had a clear right of way; that he crossed these railroad tracks and went into a place of danger; that he saw, as he turned into Third street, this car standing on the track in front of his house, nearly 600 feet away; that he walked then 75 to 100 feet, and then crossed the spur track; and that he either did not look or he walked directly into the car that was coming, looking directly at it, and there can be no recovery in a case of that kind. The court finds, as a question of law, that there was contributory negligence, and the motion for nonsuit will be granted."

Appellant contends that the question of his contributory negligence should have been left to the jury. Between 6 and 6:30 o'clock in the evening of October 7, 1917, plaintiff, who was then 71 years of age, was walking towards his home in the city of Oakland. He proceeded upon Harrison street to its intersection with Third street, where he crossed the two main tracks of the railroad owned and operated by the defendant, and, after turning easterly towards Alice street, partially crossed a spur track, then in course of construction, when he was struck by a car operated by the defendant and seriously injured. The spur track left the main track at Alice street, curved southwesterly towards the sidewalk on the south side of Third street, and finally straightened out and ran upon the sidewalk in front of a building, the easterly end of which was 75 or 100 feet east of Harrison street. The ties and rails of the spur track had been laid during the two or three weeks prior to the time of the accident, but the track was not ballasted, the gravel for that purpose lying in piles alongside of the track. The car which struck the plaintiff was loaded with ties, and was being backed from the main track to the spur track by an engine attached to the end of the car away from plaintiff. Plaintiff resided upon the south side of Third street, between Alice and Jackson streets. He testified that it had been his custom for many years, when going to and from his home to his place of business, to proceed along Harrison street to the south side of Third street and then turn down Third street; that he had been crossing the two main line tracks since they were laid, 9 years previous to the accident; that on the evening of the accident, he turned east towards Alice street after crossing the main tracks and, because of the uncompleted condition of the spur track, walked in the space between it and the main tracks until he reached the point where the spur track left the sidewalk at the easterly end of the building above referred to, at which point he attempted to cross the spur track to the sidewalk; that, when crossing the main tracks at Third and Harrison streets, he saw a train standing on one of them between Alice and Jackson streets, about opposite his home: that he did not see the engine; that although there was sufficient light to see the train, at a distance of less than two blocks, it was too dark to tell what kind of a train it was. Plaintiff was thoroughly familiar with the location. He knew that the spur track was unfinished, and that no cars had been running upon it when he crossed it two or three days prior to the accident. A photograph of the scene of the accident was introduced in evidence and is contained in the record. From an inspection of this exhibit it is apparent that it was necessary for plaintiff to walk over the gravel which had been piled along the track for the purpose of ballasting before stepping upon the track, and that his attention would necessarily be centered upon his footsteps. Plaintiff had just reached the second rail of this unfinished track when a gondola car, loaded with ties, was backed upon the spur track and struck him. He testified that his sight and hearing were very good, but that he neither heard any noise nor saw any lights or men with lighted lanterns. The evidence also showed that there were no lighted lanterns along the track where the gravel was piled; that there was a light on the front of the engine, which was pointed away from plaintiff, but that plaintiff saw no light on the car. Plaintiff was the only witness who testified to the facts of the accident. His description of the accident was as follows:

> "I was crossing one half the new track, the other half I see nothing. I start in to cross. There was no light, and afterwards come the car, and the car gave me a push, and I fell down and broke my leg, and after I take hold the leg with my left hand it cut my hand off, be-

cause I am left-handed. I don't hear nothing, and I see nothing. Q. Did you look to see anything? A. Of course, I look around when I got to cross that track. I look around to see anything is in my way, and I don't see nothing. Q. Did you see a train? A. I didn't see no train. I see the train in the middle track, and I was over this track. Q. Where did you see the train? A. On the main track, in the middle of the street, and this I passed."

In reply to a question whether he saw a car on the main track between Alice and Harrison streets, he said:

> "I tell you I didn't take no notice to look back. I look only in front. I don't see nothing because I don't look around because I was to the track past."

Questioned as to which main track the train which he saw was on he said:

> "That I can't tell you. I take care of myself, not for the track, because I see I pass through the two tracks. I didn't take no more notice."

He testified in answer to a question regarding where he had crossed the tracks on an occasion two or three days previous to the accident:

> "I crossed anywheres. I always taken care by the main tracks; I crossed on the main tracks, and this track wasn't working, no cars going there or nothing at all. It was laying nothing but the rails."

[1, 2] If plaintiff had been injured by a train or car running on either of the main tracks of the defendant's railroad, we should have no hesitancy in agreeing with the views of the learned judge of the trial court as expressed in his order granting the motion for a nonsuit. The condition of the spur track, as disclosed by the evidence above referred to, presents a very different question. A railroad track is in itself a sign of danger. Persons crossing it are charged with the duty to look and listen, because they are presumed to know that the track exists as a means for the passage of trains which may inflict injuries. The failure to take the required precautions before crossing a track which is being used for such purposes is "the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do," and is therefore negligence as a matter of law. It is manifest, however, that a reasonable man, guided by the considerations above referred to, would not feel called upon to exercise as great a degree of watchfulness for danger from passing trains in crossing a track, which he knew was in the process of construction and upon which no trains had been operated except for construction purposes, as when crossing a completed track in full operation. The gravel piled beside the track was a sign of the danger of falling into the unfilled excavation, rather than a sign of the possibility of approaching trains. If plaintiff had concentrated his attention upon the train which he had observed in the next block, and thus stumbled over the gravel pile into the ditch, it might well have been claimed that he had been guilty of negligence in so doing.

The contributory negligence of plaintiff is to be determined without reference to any negligence of the defendant. Hutson v. Southern Cal. Ry. Co., 150 Cal. 701, 703, 89 Pac. 1093. While, therefore, the negligent maintenance of the spur track or negligent operation of the train which caused plaintiff's injuries cannot be relied upon as absolving plaintiff from the duty of exercising the usual precautions required of a reasonable man under the circumstances, all the facts disclosed by plaintiff's evidence are material in determining the nature of the danger to which it is claimed plaintiff negligently exposed himself. Antonian v. Southern Pacific Co., 9 Cal. App. 718, 728, 100 Pac. 877. These facts were: The existence of an uncompleted track; knowledge by plaintiff of the fact that such track was in process of construction; want of knowledge on his part of any use of such track for transportation purposes; the existence of the gravel pile, which necessarily diverted and commanded his attention; exercise of care in crossing the main tracks upon which he had been accustomed to note the passage of trains; relaxation of such care after he had passed such tracks; and injury inflicted by a construction car being backed upon the spur track, upon which plaintiff saw no lights or employé of the defendant on what became the front of the train by reason of its method of operation.

The reasonable construction of plaintiff's entire testimony is that, while he looked for danger when crossing the main tracks and saw the car standing on the main tracks about 600 feet from the crossing, he, nevertheless, considered all danger was passed when the main tracks had been crossed, and took no more notice. "I take care of myself, not for the track, because I see I pass through the two tracks. I didn't take no more notice." In other words, he neither regarded the spur track in its then condition as a sign of danger, nor took the precautions which the law would have required of him if it had been such. Did his failure to do so constitute contributory negligence as a matter of law, or was that a question of fact to be determined by the jury? In our opinion, it was the latter.

[3] Plaintiff's contributory negligence is ordinarily a question of fact for the jury, to be decided by it from the circumstances of each particular case. It is very rare that the court is enabled to say, as a matter of law, that negligence has been shown; and only when reasonable minds might not draw

different conclusions from the facts presented. Seller v. Market-Street Ry. Co., 139 Cal. 268, 271, 72 Pac. 1006. In the case of Zibbell v. Southern Pac. Co., 160 Cal. 237, 240, 116 Pac. 513, 515, the facts of which were somewhat similar to those of the instant case, the Supreme Court said that—

> Contributory negligence "is a question of law only when the evidence is of such a character that it will support no other legitimate inference than that in the one case the plaintiff was guilty of contributory negligence. * * * But even in such cases, while the question is said, and properly said, to be one of law, it is never a question of pure law. The real decision of the question by the court is a decision of fact. When the evidence is such that the court is impelled to say that it is not in conflict on the facts, and that from those facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury, then, and only then, does the law step in and forbid plaintiff a recovery. * * * Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury."

In this case the condition of the spur track, with its contiguous gravel piles, plaintiff's knowledge thereof, and the fact that the car which struck him was being backed upon the track without lights or warning, are elements which might cause reasonable minds to differ as to plaintiff's negligence. In Shearman & Redfield on Negligence, § 476, it is said that the failure to look and listen becomes negligence as a matter of law only "where there are no excusing circumstances, as where * * * he is misled by appearances or conditions that would have deceived a person of ordinary prudence." The same authors, in section 471, refer to the peculiarly dangerous character of trains running backwards, and state:

> "The rationale of the rule requiring special precautions in backing trains over crossings or other places where persons are likely to be is in the increased danger to which they are subjected."

In the cases of Klotz v. Winona St. P. R. Co., 68 Minn. 341, 71 N. W. 257, and White v. Southern Pacific Co., 122 Cal. 305, 54 Pac. 956, the injuries were inflicted by trains running backwards and the question of the contributory negligence of the persons injured was held to be one for the jury. In so determining, the court in each instance referred to the running of the train backwards as a circumstance tending to rebut the charge of plaintiff's negligence. In the latter case plaintiff was injured by a freight train backing into him. He looked and listened, but neither saw nor heard the train. The court said:

> "The ringing of a bell, or the blowing of a whistle, upon a train that is traveling backward, is calculated to deceive a traveler upon the highway. The distance of the alarm from the real point of danger well serves the purpose of lulling the traveler into a false sense of security. * * * His view toward the south was obstructed, but, if a train with an engine at its head had been coming from that direction, he would have seen at least the smokestack of the engine. * * * Upon these facts the case was one eminently proper to go to the jury. As a matter of law, we cannot say this evidence discloses contributory negligence upon the part of the person injured."

In the Minnesota case above cited the concurrence of one of the justices is placed upon grounds which are peculiarly apposite to the facts disclosed by this record. It is there said:

> "I concur on the ground that it is not, as a question of law, negligence to fail to look or listen before attempting to cross such a spur track, leading to a private industry, and used only two or three times a day by a switching train which runs slowly, such track being used only for the purpose of making connections with such private industry; that it was a question of fact for the jury whether or not plaintiff's intestate was guilty of negligence in failing to look and listen before attempting to cross this spur track."

The conclusion here reached finds further support in the case of Southern Pacific Co. v. Harada, 109 Fed. 379, 381, 48 C. C. A. 423.

The judgment is reversed.

We concur: LANGDON, P. J.; BRITTAIN, J.

41 Cal. App. 449

McCRAY v. WOTKYNS et ux. (Civ. 2882.)

(District Court of Appeal, Second District, Division 2, California. June 7, 1919.)

1. MECHANICS' LIENS ⟹61—NECESSITY OF CONTRACT—STATUTE.

Under Code Civ. Proc. § 1191, providing that any person who at the "request" of the owner of any lot grades or improves the same has a lien thereon, a person who has graded a lot without the proposal to do so having been unconditionally accepted by the owner, so that no binding contract was ever made, cannot have a lien upon such lot for the work performed.

2. MECHANICS' LIENS ⟹75(4)—NECESSITY OF CONTRACT —ACQUIESCENCE IN THE WORK PERFORMED—ESTOPPEL.

Under Code Civ. Proc. § 1191, providing that any person who at the request of the owner of any lot grades or otherwise improves the same has a lien thereon, one who grades such a lot without a contract therefor *held*, under the evidence, to have no right to a lien on the theory that the owner knew of the performance of the work and assented thereto; notice to the owner's husband not being notice to the owner.

3. HUSBAND AND WIFE ⚿150—PERFORMANCE OF LABOR—PERSONAL LIABILITY—ESTOPPEL OR RATIFICATION.

Where plaintiff graded a lot belonging to defendant and her husband without formal request or contract, and defendant had no knowledge of the work until after its completion, defendant was not personally liable to plaintiff in the absence of estoppel or ratification.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Suit by A. L. McCray against Walter B. Wotkyns and Kate B. Wotkyns, his wife. From a judgment for plaintiff, defendants appeal. Reversed.

Elliot Gibbs, of Pasadena, for appellants.
J. Ira Courtney and A. E. Hamilton, both of Los Angeles, for respondent.

FINLAYSON, P. J. Plaintiff seeks to enforce a mechanic's lien on a lot in Los Angeles belonging to defendant Kate B. Wotkyns, for work done in grading and leveling the lot. The defendant Kate is the wife of her codefendant Walter, and the land is her separate property. From a judgment decreeing that plaintiff has a lien on the lot, directing its sale by the sheriff, and adjudging that plaintiff have a deficiency judgment against both defendants if the lot shall not sell for enough to satisfy plaintiff's claim, defendants appeal.

The appeal was taken under the alternative method. Notwithstanding that where the appeal is so taken the statute requires the parties to print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court (section 953c, Code Civ. Proc.), and the typewritten transcript of the evidence in the case covers some 80 pages, there is not printed in any of the briefs, or in any supplement thereto, more than the merest modicum of the evidence. However, from a consideration of such of the evidence as is printed, we think the judgment must be reversed, for the reason that it appears therefrom that neither defendant ever made any contract with plaintiff to grade the lot, and that Kate B. Wotkyns, the owner of the lot, had no knowledge, actual or constructive, that plaintiff had done any work thereon until some time after the lot had been graded.

[1] From the meager evidence printed in appellants' brief, which is not controverted by any printed in respondent's brief, it appears that before he did any work plaintiff proposed to defendants that he would grade and level the lot for $1,000. This proposal was not accepted. Instead, as plaintiff himself testified, defendants told him, in effect, that they would allow him to do the work provided they could borrow the necessary money, and asked him to telephone them the next day, telling him that they would then let him know if they could get the money. The next day plaintiff did telephone defendants, but was informed that they were still negotiating for the loan. There is no evidence that the loan ever was effected. From this it is obvious that plaintiff's proposal was not unconditionally accepted, or squarely assented to, and that therefore there never was a binding contract between plaintiff and defendants, or either of them.

Section 1191 of the Code of Civil Procedure provides that—

> "Any person who, at the request of the owner of any lot * * * grades * * * or otherwise improves the same, * * * has a lien upon said lot."

As there was no unqualified acceptance of plaintiff's proposal, it cannot be said that he graded or improved the lot at the "request" of the owner or of either of the defendants.

[2] Nor is there any evidence that at any time during the progress of the work the owner of the lot, Kate B. Wotkyns, had any knowledge, actual or constructive, that her lot was being graded, so as to entitle plaintiff to a lien, under section 1192, by reason of the owner's failure to post a notice disclaiming liability. Upon this aspect of the case, substantially the only evidence presented for our consideration in the briefs of either party is that which respondent himself has printed in his brief. From this it appears that neither defendant visited the lot while the work was being done, but that shortly before plaintiff completed the work, and while there still remained some slight amount to be done in order to finish the grading and leveling he telephoned to the husband, Walter B. Wotkyns, and asked him if there was any little thing he wanted done to finish the job the way he wanted it. While this may have given notice to the husband that work was then being done upon his wife's lot, it was not notice to the wife—the owner of the lot. There is no evidence that the husband was the wife's agent to receive such, or any, notice; and she, it seems, testified that she did not know that any work had been done upon the lot until after the grading was completed.

[3] Since neither defendant "requested" plaintiff to do the work, and the owner of the lot had no knowledge of the work until after its completion, plaintiff was not entitled to a lien. Nor is either defendant personally liable. First, because, there being no unqualified acceptance of plaintiff's offer to grade the lot for $1,000, neither defendant contracted for the work; secondly, because there is no showing that either defendant has become

personally liable by reason of estoppel or ratification, or otherwise.

Judgment reversed.

We concur: SLOANE, J.; THOMAS, J.

41 Cal. App. 413

MUZIO et al. v. ERICKSON et al.
(Civ. 2904.)

(District Court of Appeal, Second District, Division 2, California. June 7, 1919.)

1. Easements 🔑42—Right to Use Building — Grant of Proprietary Interest in Land.

Where a mere right to use a part of a building is granted, no proprietary interest in the land is conveyed.

2. Easements 🔑26(4) — Destruction of Servient Tenement—Easements in Building.

An easement is an interest in real estate and survives the destruction of a part of the servient tenement when there is anything remaining upon which it may operate, but a right in the nature of "an easement in a building" is extinguished by the destruction of the building or the part thereof upon which the easement is imposed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Easement.]

3. Easements 🔑26(4), 42 — Stairways — Interest in Realty.

Where an owner of land conveyed part thereof by a deed which provided that "there should be perpetually kept open a stairway to be kept as the same now is and to be used in common by the parties thereto," the deed did not create an easement in the land, nor any right other than the right of access by the stairway, which did not survive the destruction of the stairway by fire.

4. Easements 🔑1—Manner of Creation.

Every easement, being an interest in land, can be created only by grant either express or implied from necessity; estoppel or long enjoyment amounting to prescription presupposing a grant.

5. Deeds 🔑100 — Ambiguous Instruments—Construction.

If the language of an instrument be uncertain and ambiguous, it is to be taken by its four corners and read in the light of the circumstances surrounding its execution and the situation of the parties.

6. Easements 🔑42 — Creation — Construction.

If an ambiguous instrument be one which it is claimed creates an easement, its language is to be interpreted according to the apparent purpose of protection or advantage to the several estates concerned.

7. Costs 🔑32(2)—Effect of Judgment for Part of Relief Demanded.

Where the petition in a suit to quiet title to an easement did not present as separate and distinct issue, the title to the dominant estate and the title to the easement in the servient estate, an adjudication that plaintiffs were the owners of the dominant estate did not entitle them to costs as a matter of right under Code Civ. Proc. § 1022, but defendants were entitled to costs under section 1024; the only material issue being as to the existence of the easement.

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by David Muzio and others against Meta J. Erickson, executrix of the will of Charles Erickson, deceased, and others, to quiet title to an easement. From a judgment for defendants, plaintiffs appeal. Affirmed.

Wm. Shipsey, of San Luis Obispo, for appellants.

F. G. Athearn and Haven & Athearn, all of San Francisco, and Albert Nelson, of San Luis Obispo, for respondents.

FINLAYSON, P. J. This is an appeal by plaintiffs from a judgment in favor of defendants in an action to quiet title to an alleged easement. Plaintiffs claim that the servient tenement is a parcel of land now owned by the estate of Charles Erickson, deceased, and which adjoins plaintiffs' land.

The essential facts, as shown by the findings, which are not attacked, are as follows: Nathan and Isaac Goldtree were the owners of a parcel of land in block 14 of the city of San Luis Obispo fronting on Monterey street. On August 21, 1882, the Goldtrees, by grant deed, conveyed to one Oaks the westerly part of this tract, retaining the easterly part. For convenience, the part so conveyed to Oaks will be designated as the "Oaks lot," and the part retained by the Goldtrees as the "Goldtree lot." By mesne conveyance, plaintiffs have become, and are, the owners of the Oaks lot, and Charles Erickson, since deceased, became the owner of the Goldtree lot. Defendant Meta Erickson is the executrix of the last will of Charles Erickson, deceased. The other defendants are lessees of the Goldtree lot. At the time of the conveyance to Oaks, there was a two-story frame building on the Oaks lot. This building fronted on Monterey street, and was built up to the property line between the two lots. At that time there was also a two-story frame building on the Goldtree lot. This building also fronted on Monterey street. On the Goldtree lot, and between these two buildings, was a little alley—a space about five or seven feet wide. Occupying a portion of the width of the alley, and entirely on the Goldtree lot, was a stairway, 4 or 5 feet wide, built against the wall of the Oaks building. This stairway began at a platform, a step or two high, about 5 feet back from the front of the building. It ran back some 20 or 25 feet to more steps, which extended on back towards the rear of the buildings some 12 feet farther, and arose to another platform about 8 feet high, whence steps led to the right and left, respectively, into the second story of each building.

In the deed from the Goldtrees to Oaks was the following clause:

> "Also, there shall be perpetually kept open, *as a perpetual easement to the above-described land*, a stairway leading from Monterey street, at the southern corner of the above-described lot, over the lands of the party of the first part; said stairway to be kept as the same now is; *that is to say, the right given herein shall embrace no more land than is now used for the stairway now there;* said stairway to be used in common by the parties hereto." (The italics are ours.)

All the parties hereto claim under the Goldtrees as their common source of title. Appellants' claim rests upon the contention that the above-quoted provision of the deed from the Goldtrees to Oaks vested in Oaks, and in themselves as the successors of Oaks, a perpetual easement in the soil of the Goldtree lot. Respondents contend that the right or interest created by this provision of the Oaks deed was not an easement, which is an interest in land, but was an interest in the stairway, a right to the use of the stairway, a right which, for want of a better designation, may be called an easement in the stairway on the Goldtree lot. The true construction of this clause in the deed is the crux of the case, both buildings, including the stairway, having been entirely destroyed by fire years before the action was commenced—the Oaks building in or about 1900, and the Goldtree building on February 13, 1903.

In 1909, which was some years after fire had destroyed both of the former buildings, defendant Northrup and one Gallagher, tenants of Erickson, erected on the Goldtree lot a double, one-story, corrugated iron building, fronting on Monterey street. Though this building was not built right up to the dividing line between the two lots, it was, at its front end, but 14 inches from the division line, and, as it extended back from Monterey street, it receded farther from the line between the two lots, so that, at a distance of about 100 feet back from its front, this new building on the Goldtree lot was about 5 feet 4 inches easterly of the line between the two lots. In 1912 appellants, having in that year acquired the Oaks lot, built thereon a two-story brick building that covered their entire lot from its front to a depth of about 100 feet. While they were constructing this building, appellants demanded of respondents that they be permitted to erect on the Goldtree lot, in the space formerly occupied by the alley between the two lots, a new stairway, reaching from Monterey street to the second story of their new brick building. Upon respondents' refusal to comply with their request, appellants brought this action.

[1, 2] It is the established doctrine that where a mere right to use a part of a building is granted, no proprietary interest in the land is conveyed. Upon this principle it has been held that a grant of the right to use the stairway of a building gives no interest in the soil which will survive the destruction of the building, and the right ceases whenever the building is destroyed without the fault of the owner of the servient tenement, and the owner of the right to use the stairway will not acquire any right in any new building which may be erected in the place of the one destroyed. An easement, in the true sense of the word, is an interest in real estate, and survives the destruction of a part of the servient tenement when there is anything remaining upon which the easement may operate. But a right in the nature of "an easement in a building," as it is sometimes called, is extinguished by the destruction of the building, or the part thereof upon which the easement is imposed, so that there is nothing upon which it can operate. Cohen v. Kutner Co., 177 Cal. 592, 171 Pac. 424, L. R. A. 1918D, p. 410; Brechet v. Johnson Hardware Co., 139 Minn. 436, 166 N. W. 1070, L. R. A. 1918D, p. 691; Shirley v. Crabb, 138 Ind. 200, 37 N. E. 130, 46 Am. St. Rep. 376; 14 Cyc. 1194.

Appellants insist that by the language of the deed from the Goldtrees to Oaks an easement in the soil was created, and not merely a right to use the stairway, and that, therefore, the easement was not lost by the destruction of the buildings and stairway. We think, however, that Oaks was given no easement in the land of the Goldtree lot—the land now occupied by respondents—nor any right other than the right of access to the second floor of the building on the Oaks lot by the use of the stairway—a right that would naturally terminate by the destruction of the buildings and stairway.

[3, 4] In the above-quoted excerpt from the deed to Oaks, we have italicized the words upon which appellants mainly rely to sustain their claim that there was thereby created an easement in the soil of the Goldtree lot. Without these italicized words—words which appellants claim indicate an intention to create an easement in the soil—the deed to Oaks unquestionably would be insufficient to create an easement in the land.

The language of the deed with the italicized words omitted is:

> "There shall be perpetually kept open * * * a stairway leading from Monterey street, at the southern corner of the above-described lot, over the lands of the party of the first part; said stairway to be kept as the same now is; * * * said stairway to be used in common by the parties hereto."

This language is wholly insufficient to create an easement in the soil of the Goldtree lot. It is not the language of a grant. Every easement being an interest in land, can be created only by grant, either express or implied from necessity, estoppel, or long enjoyment amounting to prescription presupposing a grant. McDaniel v. Cummings, 83 Cal. 515, 518, 23 Pac. 795, 8 L. R. A. 575; Pinheiro v. Bettencourt, 17 Cal. App. 111, 119, 118 Pac. 941; 14 Cyc. 1159; 9 R. C. L. 745. The language of the deed, without the italicized words, is no more than a covenant to keep open a stairway for convenient access to the second story of the building on the Oaks lot. The italicized words—the words upon which appellants principally rely—while they may render some aid to the construction for which appellants contend, serve only to make the intention of the parties uncertain. For they are not such explicit words of grant as to indicate an unmistakable intention to grant an interest in land.

[5] The rule is that if the language of an instrument be uncertain and ambiguous, it is to be taken by its four corners and read in the light of the circumstances surrounding its execution and the situation of the parties.

[6] If the instrument be one which, it is claimed, creates an easement, the language is to be interpreted according to the apparent purpose of protection or advantage to the several estates concerned. If we consider the situation of the parties, their surroundings, and their apparent purpose to afford any tenant of the second story of the building on the Oaks lot the advantage of the use of the stairway upon the Goldtree lot, we think it clear that the parties did not intend to convey any interest beyond that which was necessary to the use and maintenance of the stairway during the existence of the two buildings. No provision in the deed obligated the grantors, the Goldtrees, or their successors to build a new stairway in case of the loss of the old one. The deed does provide that there "shall be *perpetually kept open * * ** a stairway"; but it is hardly permissible to construe this language as an agreement to rebuild in case of the destruction of the stairway. Brechet v. Johnson Hardware Co., supra. The words "easement" and "perpetually " do not add any particular strength to appellants' position. The words "easement" and "license" are used indiscriminately even by the courts; and in interpreting documents of this kind courts look to the intent of the parties, as gathered from the circumstances confronting them, rather than to the mere choice of words. Cohen v. Kutner Co., supra. The word "perpetually," like the word "forever," does not assist appellants' contention. Cohen v. Kutner Co., supra. By whatever name we call the right granted by the instrument in question, it is clear that it did not grant Oaks or his successors an easement in the land, but that the intent of the parties was that the easement over the stairway, or the right thereto, by whatever name we call it, should be enjoyed only while the buildings and the stairway existed in their then form.

[7] The judgment provides that plaintiffs recover no costs, and that defendants have judgment for their costs, taxed at $40. The point is made by appellants that, inasmuch as they were adjudged to be the owners in fee of the Oaks lot, they were entitled to costs as a matter of right, under the authority of Sierra Union, etc., Co. v. Wolff, 144 Cal. 430, 77 Pac. 1038, and Gibson v. Hammang, 145 Cal. 454, 78 Pac. 953, wherein it is held that, under section 1022 of the Code of Civil Procedure, a plaintiff is entitled to his costs in an action to quiet title if he have judgment in his favor for only a part of the property, and the answer has put in issue the title to the whole property. We do not think that these cases are applicable. Appellants' complaint, which was not verified, did not present, as separate and distinct issues, the title to the Oaks lot *and* the title to the alleged easement in the Goldtree lot. The allegations of the complaint are:

> "Plaintiffs * * * acquired from said Oaks the said Oaks lot *with* its appurtenances. including the aforesaid easement;" also that "Charles Erickson acquired from said Goldtrees the said Goldtree lot, *but subject to said easement*;" also that "defendants, and each of them, claim some right, title or interest in or to said Oaks lot *with* its appurtenances, including said easement over said Goldtree lot, * * * but said claim * * * is without right."

The cases relied upon by appellants would have been applicable if respondents, in their answer had denied that appellants had title to *any part* of the estate of which they alleged themselves to be owners. Instead, respondents' answer was a general denial, coupled with the affirmative defense that plaintiffs are estopped for the reason that they made no objection to the construction of the new building "upon the land over which plaintiffs now claim to have an easement," i. e., the Goldtree lot. The complaint being unverified, defendants were entitled to make a general denial. The denial, though general, was no more than a denial that plaintiffs are the owners of the Oaks lot *with* the easement, and a denial that defendants claim any interest in or to the Oaks lot *with* the easement. Each of these denials accords with the actual facts of the case.

Construing the answer as a whole, we think that the only material issue was as to the existence of the alleged easement, and as to this the judgment was in favor of respondents, who, therefore, under section 1024 of the Code of Civil Procedure, were entitled to their costs. A like conclusion was reached in Weller v. Brown, 25 Cal. App. 216, 221, 222, 143 Pac. 251, under a somewhat similar situation.

Judgment affirmed.

We concur: SLOANE, J.; THOMAS, J.

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41 Cal. App. 643

VERDIER v. TITLE GUARANTY & SURETY CO. (Civ. 2912.)

(District Court of Appeal, Second District, Division 2. California. June 17, 1919.)

PRINCIPAL AND SURETY ⚷155—COMPLAINT—SUFFICIENCY.

An owner's complaint against a building contractor's surety *held* fatally defective for failure to allege that plaintiff owner had performed her part of the contract with the building contractor.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Mrs. M. Verdier against the Title Guaranty & Surety Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

W. W. Kaye, of Bakersfield, for appellant.
E. L. Foster and Chas A. Barnhart, both of Bakersfield, for respondent.

THOMAS, J. This is an action brought by plaintiff against defendant surety company upon an indemnity bond given by the latter to the former to secure the performance by the Aiken Reinforced Concrete Company of a contract for the construction of a three-story brick building. The bond was for $6,746.50. The case was tried by the court without a jury. Judgment went for plaintiff in the sum of $3,200.

The amended complaint is in two counts, in the first of which appears what purports to be a copy of the indemnifying bond and a copy of the contract between the plaintiff and said Aiken Reinforced Concrete Company, set out in extenso, and the second realleging these same alleged facts which were set forth and referred to in paragraphs 1 and 2 of the first cause of action. Without quoting said instruments or any portion of the complaint, suffice it to say that the plaintiff prays for judgment against defendant for the sum of $6,700, and for her costs.

There was a demurrer to the complaint as amended. This demurrer was both general and special.

Appellant specifies 14 errors at law occurring during the trial, and 15 specifications of insufficiency of the evidence to support the findings of the court. In view of the fact that we are of the opinion that the first specification of error—the court's overruling the said demurrer—referred to in the transcript and appellant's opening brief is well taken, we do not consider that for the present any other point urged needs to be discussed.

Nowhere in the amended complaint is it alleged, nor does the record contain any evidence, that the plaintiff herein performed any, much less all, of the covenants or conditions required to be performed by her under her contract with the contractor, the Aiken Reinforced Concrete Company. Notwithstanding this fact, the court, in finding 7, found:

> "That the plaintiff performed all the conditions and terms and agreements on her part to be performed with the Aiken Reinforced Concrete Company under said contract, provided to be by her kept and performed."

The point is not urged by appellant, but we fail to find any evidence in the record to justify the finding, even had the pleadings been such as to permit the reception of the same. We think that this failure to so allege is fatal to the present appeal.

The contract by its terms required the plaintiff to pay to said contractor the full sum of $27,000 in six installments, as follows: The sum of $4,050 "when the foundations is in ready for the first floor joists"; the second installment of $4,050 "when the walls are up one story, and the second-story joists are in place"; the third installment of $4,050 "when the roof is on"; the fourth installment of $4,050 "when the plastering is completed"; the fifth installment of $4,038.50 "when the building is completed and accepted"; and the sixth, and final, payment of $6,761.50 "thirty-five days after the acceptance of the building." Nowhere in the amended complaint is there an allegation that plaintiff has paid any of these installments to the said contractor as provided for in said contract, or otherwise or at all; and for aught that appears in the said amended complaint, the failure on the part of plaintiff to comply with any or all of said provisions may have been the reason for the failure and neglect of the contractor to complete the contract or agreement referred to, if, indeed, any such failure or neglect occurred. The demurer should have been sustained.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

We consider the citation of authorities unnecessary to support our conclusion.

The judgment is reversed, and the lower court ordered to reverse its ruling overruling, and to sustain defendant's demurrer to the amended complaint herein, granting plaintiff leave to amend.

We concur: FINLAYSON, P. J.; SLOANE, J.

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41 Cal. App. 571

BADGER et al. v. CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 2778.)

(District Court of Appeal, First District, Division 1, California. June 13, 1919. Rehearing Denied July 11, 1919; Denied by Supreme Court Aug. 11, 1919.)

1. Street Railroads 🔑117(5)—Injury to Pedestrians—Questions for Jury.

In an action for the death of pedestrian struck by a street car, whether the motorman was negligent *held* for the jury.

2. Street Railroads 🔑117(22)—Injury to Pedestrian—Contributory Negligence.

In an action for the death of a pedestrian struck by a street car, whether the pedestrian was guilty of contributory negligence in starting to cross in front of a car, which was all but stopped, *held* for the jury.

3. Street Railroads 🔑85(1) — Pedestrians—Use of Streets.

Ordinarily street cars which run upon rigid rails have a better right to the space the rails occupy, to which pedestrians must give way.

4. Street Railroads 🔑103(2)—Rights of Pedestrians—Last Clear Chance Doctrine.

The rule that street cars, which run upon rigid rails, have the better right to the space the rails occupy, to which pedestrians must give way, has no application where the doctrine of last clear chance is invoked.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Frederic G. Badger and others, by their guardian, etc., against the City and County of San Francisco and Michael J. Ryan. Judgment for plaintiffs, and defendants appeal. Affirmed.

George Lull, City Atty., and R. T. Ainsworth and Chas. S. Peery, Asst. City Attys., all of San Francisco, for appellants.

Franklin T. Poore, of San Francisco, for respondents.

RICHARDS, J. This is an appeal from a judgment in plaintiffs' favor in an action for damages for the death of George H. Badger, the husband of plaintiff Anna B. Badger, through the alleged negligence of the corporation defendant's employés in the operation of its municipal railway, and is taken by said corporation.

The appellant contends that its motion for nonsuit should have been granted; and, this having been denied, that the verdict of the jury and judgment of the court should have been in its favor by reason of the absence of any evidence showing negligence on the part of its employés, and also by reason of the contributory negligence of the decedent.

On the threshold of an examination into the merit of these contentions the language of Mr. Justice Shaw in the case of Scott v. San Bernardino Valley, etc., Co., 152 Cal. 606, 93 Pac. 677, may be aptly referred to as indicating the scope of inquiry of this court upon appeal in like cases:

> "A street car operated by defendant collided with a buggy in which the plaintiffs were driving, whereby the plaintiff, Jennie R. Scott, was thrown out and injured. It is contended that the plaintiff, George H. Scott, was negligent in driving upon and across the track in front of the car, and that this negligence contributed to the injury.
>
> "In considering this proposition, it is necessary always to bear in mind that the jury has found to the contrary. In this case it not only returned a general verdict to that effect, but, in answer to a specific question, it declared that George H. Scott did not negligently drive upon the track. If there was any substantial evidence in support of this fact the verdict must stand, although the preponderance of the evidence may be against it. The question whether or not upon a given occasion the conduct of a person is negligent is always comparative and relative. The conduct must be compared to that of an assumed person of ordinary prudence, and must be considered with relation to all the circumstances attending the occasion which might reasonably be taken into consideration by a person of ordinary prudence in determining what his conduct should be. The circumstances to be considered are those which the evidence shows may reasonably be supposed to have been known to such person and to have influenced his mind and actions at the time. These are not, necessarily, the circumstances which afterwards, in the light of the event, it can be seen should have been known to him and should have influenced his conduct. Nor is his wisdom in determining what to do to be judged by the event. We must, as nearly as possible, put ourselves in his place, he being compelled to act without foreknowledge and with only ordinary prudence and wisdom to guide him. In some particular cases of frequent occurrence it has been established by a long course of judicial decision that certain precautions are presumptively necessary to constitute due care, and that, if one of these precautions is omitted, negligence will be presumed as matter of law. For example, one who, in traveling a public road, crosses the track of an ordinary steam railroad, must before going upon the track look and listen for an approaching train, and must generally stop for that purpose. If it does not appear that he did these things he will be considered guilty of negligence unless he shows

some extraordinary and unusual conditions which render it unnecessary. But, in general, negligence is a question of fact for the jury, and the law has fixed no exact standard of care other than the general one that it must be such as a reasonably prudent man would exercise in the particular circumstances. Hence in ordinary cases it is peculiarly a question for the jury or court trying the cause to decide as a matter of fact whether or not the person was culpably negligent. Judged by these rules, we think the verdict in this case is supported by sufficient evidence."

With the foregoing instructive views as our guide we will address ourselves to the evidence in the case.

On the morning of the 15th day of October, 1915, George H. Badger, a man of 59 years of age residing with his family on Johnson avenue, near its junction with Geary street, in the city of San Francisco, left his said home about half past 6 o'clock on his way to his work, which was that of a porter for a downtown furniture store. He came along the west side of Johnson avenue to its junction with Geary street, and there left the curb with the intention apparently of crossing Geary street to Commonwealth avenue, which has its junction with the north side of Geary street nearly opposite Johnson avenue. Mr. Badger was rather hard of hearing, and also did not see well at a distance, although he wore glasses and could see fairly well near at hand. As he stepped from the curb and proceeded to cross Geary street he was seen by the motorman operating the car by which he was later struck as said car was proceeding westward on Geary street, and while it was somewhat more than 150 feet away from the place where the deceased was when he was thus seen. The motorman states that the deceased while thus walking slowly across Geary street was facing partially toward the direction from which his car was coming and was looking straight ahead. The decedent walked to or upon the southerly rails of the defendant's double track and there hesitated or stopped, according to the testimony of the witness, Martin Lambert. In the meantime the car had proceeded westward upon the northerly track to a point 15 or 20 feet from the place where the decedent was, slowing down as it approached the junction of these streets and sounding the gong occasionally. As the car reached this point it had slowed down almost to a standstill. At this moment the decedent, who had stopped or was hesitating at or upon the defendant's southerly line of tracks, started to cross over when the car also started to go ahead. The motorman, seeing that the decedent had started to cross ahead of his car, rang the bell vigorously and then undertook to stop the car, but was unable to do so, and the decedent was struck and thrown upon the fender of the car, receiving injuries from which he died shortly thereafter. The testimony of the witness, Martin Lambert, who was a passenger upon the car and who was standing near the motorman and in full view of the scene, was as follows:

> "A man stepped off of Johnson avenue walking slow * * * walking very slow, and stopped on the other side, on this side of the railroad tracks, kind of hesitating whether he would go or not; it looked that way. He slowed down the car, and as he started the man started to walk, and the fender went down and the man was on the fender."

And again he says:

> "He almost had the car to a standstill when he started it off again, this man started from the other side of the railroad track. We were on the right-hand track going to the beach, and this man come to a dead standstill on the other side of the track, because he crossed the other side of the track as this man started the car and he fell on the fender."

And again, speaking of the car, he testifies:

> "We had checked the car almost to a standstill and started off again, and as we started off again the accident happened."

It is true that this witness, in a written but unsworn statement given to the defendant's employés a day or two after the accident, gave it as his conclusion that the motorman was not at fault, and that the decedent was entirely to blame, but with this conclusion the jury apparently did not agree. Nor, it may be said, did the trial court, since it denied the defendant's motion for a new trial. The testimony of the motorman does not very materially disagree with that of the witness Lambert, and these two were practically the only living eyewitnesses to the casualty.

[1, 2] Upon this state of the evidence we are asked to conclude upon appeal that the defendant, through its employés, was not negligent, and that the decedent was guilty of contributory negligence as a matter of law. We are unable to arrive at either of these conclusions, since, in our opinion, to reach either or both of them would be to invade the province of the jury which sat upon the case, saw and heard the witnesses, and had submitted to its discretion and judgment the close question whether the decedent, seeing the defendant's car slow down to practically a standstill at or near a street crossing, was justified in concluding that it had done so in order to permit pedestrians to pass over, and hence was not negligent in attempting so to do; while, on the other hand, the motorman, having thus brought his car to practically a standstill within a few feet of a pedestrian apparently about to cross over, should have stayed its progress until the pedestrian had a fair opportunity to pass, and whether he was or was not negligent in going ahead under such circumstances at a rate of speed which made it impossible to stop his car when he discovered the pedestrian had put himself in

a place of danger. The jury resolved these matters against the appellant, and with their conclusion in the premises we cannot feel that it is our province to interfere.

[3, 4] In reaching this conclusion we are not unaware of the rules laid down in Bailey v. Market Street, etc., Co., 110 Cal. 320, 42 Pac. 914, and the cases which follow its decision relative to the rights and duties of railways and pedestrians in respect to the use of the public streets. We agree with the general doctrine announced in those cases, that ordinarily street cars which run upon rigid rails have the better right to the space the rails occupy to which pedestrians must give way; but we do not find that either the law or the facts of these cases fit the case at bar, where the question is one of fact as between the pedestrian and the motorman, which of these two was negligent in advancing at the particular moment just before the collision took place. Of this we think the jury was the sole judge, and with its conclusion we will not interfere. In respect also to the doctrine of "last clear chance" we see no room for its application to the instant case under the facts as above set forth.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

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41 Cal. App. 428

PENCE v. DENNIE. (Civ. 2895.)

(District Court of Appeal, Second District, Division 2, California. June 7, 1919. Rehearing Denied by Supreme Court Aug. 4, 1919.)

1. DAMAGES ⚿123—BUILDING CONTRACT—BREACH—MEASURE OF DAMAGES.

Where a building contractor violated the contract in furnishing defective stone work and in replacing it with brick without the written consent of the owner, the measure of damages was the cost of replacing the work with the material called for by the contract.

2. ESTOPPEL ⚿90(2)—BUILDING CONTRACT—CHANGE WITHOUT OWNER'S CONSENT.

Where a building contract provided that no change should be made without the owner's consent in writing, the owner was not estopped from relying on such contract, where he did not know of changes until the work was completed, notwithstanding that he then made no particular protest.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by James H. Pence against Fred L. Dennie, with counterclaim by defendant. Judgment for defendant for costs, and plaintiff appeals. Affirmed.

C. E. Joslin, of Los Angeles, for appellant.

Percy Hight, of Long Beach, for respondent.

SLOANE, J. The plaintiff, a contractor and builder, brought this action to recover from the defendant an alleged balance of $1,066.84 on a building contract totaling $46,750, together with $1,282.16 for extras alleged to have been furnished at the request of defendant, and $400 claimed as a bonus under the contract, making a total for which judgment was demanded of $2,759.

The defendant, by answer and counterclaim, admitted the original contract price of $46,750, but alleges payment of all but $90.35, denies liability for $400 bonus, or any part thereof, and claims damages against plaintiff of $450 for delay in completing contract, $1,523 for items of material and labor not furnished as called for by the contract, and $1,685.15 for defective work and materials, and asks judgment on his counterclaim for $3,427.69.

On the trial of the case the court found that the original contract price due the plaintiff was $46,750 and that he was entitled to extras in the sum of $205, and no more, and disallowed his claim of $400 as a bonus. The court further found that the defendant has paid on the contract $45,969.36, thus leaving a credit due the plaintiff of $985.64. As against this credit to the plaintiff the court found for defendant on his answer and counterclaim, $450 damages for delay in completing the contract, $25 insurance due from plaintiff, $1,349.70 for labor and material omitted in the contract work, and $1,553.68 damages for defective work and materials; but in its conclusions of law the court omits the item of $450, thus leaving a balance due defendant of $1,942.74, after offsetting plaintiff's claim. The judgment, however, was that neither plaintiff nor defendant recover on the respective claims, but that defendant have judgment for costs in the sum of $39.40.

The result of the trial was that the court found, after crediting defendant's payments and allowing the $205 extras, a balance due plaintiff amounting to about $1,000, and found that the defendant was entitled to approximately $3,000 by way of offset. It is apparent, therefore, that there must on this appeal be found an enlargement of plaintiff's credits or reduction of defendant's offsets, or both, aggregating the sum of $2,000, before it will appear that the plaintiff is prejudiced by this judgment.

The plaintiff has appealed from the judgment in favor of defendant and from an order of the court denying plaintiff's motion for a new trial. As the proceedings have been taken since the amendment abolishing appeal on denial of motion for new trial, the matter comes up on the appeal from judgment alone, and is presented under the alternative method on the typewritten transcript of the record in the trial court.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

The only matter to be considered is the sufficiency of the evidence to support the findings of the court as to the various items of claim and counterclaim. It has been no slight task to sift out the testimony, which is more voluminous than illuminating in many of the details, in order to ascertain if in each particular there is some substantial weight of evidence supporting the conclusions reached by the court as to the facts.

The basis of the action purports to be a written contract for the construction of the building in question, with plans and specifications referred to as being annexed to the contract and filed therewith in the office of the county recorder. No plans and specifications were so attached or filed in the recorder's office, but plans and specifications were produced and admitted in evidence which it was shown were accepted and acted on by the parties to the contract throughout the construction of the building. The contract itself is a matter of some uncertainty and much dispute between the parties as to some of its items. But we are satisfied that the court was justified in its findings as to the contract as actually agreed upon and executed.

The original agreement was that the building was to be constructed in accordance with plans and specifications to be prepared, for a total sum of $46,750. Work was begun, and certain excavation work and foundation completed, at a valuation of $2,000. This was either before the contract was executed, or there was a second contract made of date July 17, 1913, after the foundation work was completed. This contract recites an agreed price of $44,750, and makes no provision for the foundation work, which had already been done and paid for; the aggregate making up the $46,750. It also fixes the time in which the work was to be completed as 92 working days, as against 120 and 105 days shown by other copies of contracts relied upon by plaintiff. There is no substantial dispute as to what the terms of the contract actually were, however, excepting as to the time in which the work was to be completed, and as to which party should pay the insurance during the construction work. In these particulars the plaintiff claims the contract was changed after its execution, in the copy produced by defendant, reducing materially the period in which the building was to be finished, and obligating the contractor to pay the insurance (which amounted to only $25). The defendant testified that these alterations were agreed to and made before the contract in question was executed, and the court accepted in evidence, as the true contract, the one claimed to be correct by the defendant. As the circumstances tend to corroborate the defendant's explanation of the changes, the court was justified in its ruling.

It is this difference in the period of completion of the work that determines the question as to whether plaintiff was entitled to a bonus for completing the work ahead of time or was liable in damages for the failure to complete the work as stipulated, and it was, we think, justifiably determined in favor of defendant, thereby eliminating plaintiff's $400 claim for a bonus.

The next item of plaintiff's claim also arises on a construction of the provisions of the contract and specifications, and the law applicable thereto. The court found that the plaintiff had actually furnished in the construction of the building, as alleged in his complaint, extras of the value of $1,282.16, but that the same were unauthorized under the terms of the contract. The specifications adopted as part of the contract contain the following provisions:

> "No extras shall be allowed without written order from the architect. * * * Should any changes, additions, or omissions in the work provided for in this contract be ordered, the contractor shall not be authorized to comply with such order without previously obtaining written authority therefor from the owner, and the contract shall not be deemed altered thereby, either as to time when the work shall be completed, contract price, or work to be done, excepting as expressly stated in such authority."

There is no pretense that either the architect or the owner ordered or authorized any of these extras in writing, or authorized them expressly in any way, excepting as to the item of $205, which the defendant admitted to having orally ordered, and which he consented to allow on plaintiff's claim, and which has been allowed by the court. It is claimed, however, that a superintendent representing the defendant on the work had knowledge of most or all of these extras, and consented orally and by acquiescence to their incorporation in the building; but it is not shown that this superintendent had any authority in the premises, other than to see that the contract was carried out. Plaintiff's main contention, however, is that the defendant was aware of most of the extra work and material being furnished, and permitted it to be put into the building without objection, and that he is estopped by his conduct from taking advantage of the requirements of the contract for authorization in writing.

The defendant denies knowledge that the extras were being furnished, as to some of the items, denies that he knew they were extras in some instances, and in regard to some of the items we are inclined to the conclusion that he was aware at the time that the plaintiff was putting in extra work and material, and made no objection thereto; but conceding, as to the last-mentioned work and material, that defendant's counsel is correct in his application of the law of waiver and estoppel, it would only apply to a small proportion of the amount claimed.

With reference to the larger items of $365 for glass mirrors in the wall beds, $103 for mirrors in the dressing rooms, and $77 for extra plastering, there is nothing to show that plaintiff's attention was called to the fact, or that he was aware that these did not go in under the contract. The beds and dressers of which the mirrors formed a part were called for by the contract without specification as to their finish, and it does not follow, as a matter of law, that if the contractor furnished them with mirrors the owner was bound to know that he was not doing it as part of his contract. With regard to other charges for extras, the plaintiff either denies that they were extras or that he knew anything about them.

If there were no provision in the contract requiring an express order in writing, it would still be an open question, under the testimony, as to whether much of this extra charge could be maintained, under the conflicting evidence. But it should be borne in mind, under the conditions of this contract, that the very purpose of such provisions for written authority to make changes is to avoid just such controversies as have arisen here; and in the absence of very clear and convincing evidence of waiver or estoppel, the terms of the contract should control.

The principal item of damages allowed defendant on his counterclaim is the sum of $1,000 for the substitution of brick construction on the front of the building, where the contract called for artificial stone. When the stone work was put in, or partly so, it was found defective. The defendant was absent in the East, and the contractor, after consulting with defendant's architect and superintendent, and in order to save the delay incident to obtaining new stone material, and perhaps in uncertainty of its then coming up to the requirements, substituted brick; the details therefor having been supplied by the architect. There was no written consent by the owner to this change, and no consent or authorization by him of any kind. When he returned home the change had been made. He does not seem at the time of his return to have made any special objection to the substitution. The contractor saved nothing, apparently, by the change from stone to brick. The original estimate for this part of the work was $422. There is testimony in the record that to now make the change and complete the job as called for by the contract would cost $1,000 or more.

[1, 2] There was a violation of the contract in furnishing defective stone work and in replacing it with brick without the written consent, or the consent at all, of the owner. The owner was entitled to have this stone front, and we are not prepared to say that the court was not, under the evidence, justified in allowing him damages. The measure of damages was the cost of replacing the work with the material called for by the contract; but in view of the fact that the value of the completed building was probably not greatly reduced by the substitution of brick for the artificial stone, it seems that this measure of damages, though a lawful one, places a harsh penalty on the contractor, especially in view of the fact that the owner's architect and superintendent both acquiesced in the change. However, neither of them are shown to have had authority to authorize such change in the general character of the structure, and, in any event, the authority was not obtained from the owner nor evidenced as specified in the contract. We do not think defendant is estopped from relying upon the terms of his contract that no changes should be made without his consent in writing. Had he known of the change when it was in process, and stood by without objection, the doctrine contended for by appellant might apply. But he did not know of it until it was done, and the fact that he then made no particular protest was in no way prejudicial to the appellant.

It is not necessary to review the findings of the court as to each of the specified items of damage for uncompleted work or for defective work and materials. There was conflict in the testimony as to practically every item. While we are not satisfied that every allowance made to defendant by the court is supported by the evidence, we are satisfied that there was evidence to support a sufficient offset to more than balance the amount to which the plaintiff was entitled.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

(41 Cal. App. 411)

ROBERTS v. ALLEN. (Civ. 2915.)

(District Court of Appeal, Second District, Division 2, California. June 7, 1919.)

1. Quieting Title ⟹10(2)—Trusts ⟹86—Establishment—Burden of Proof.

In action to declare a trust and quiet title, plaintiff must establish her position, if at all, upon the strength of her own case rather than the weakness of the defense.

2. Appeal and Error ⟹524—Record—Exhibits.

Where exhibits introduced by appellant were not copied into the record nor attached to the pleadings or transcript, the appellate court may refuse to consider the briefs.

3. Appeal and Error ⟹907(5) — Presumptions—Record.

Where exhibits introduced by appellant were not incorporated into the record nor attached to the pleadings or transcript, nothing is presented for review, because, in absence of legal evidence to the contrary, it must be presumed that court below reached proper conclusion.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Sarah A. Roberts against A. G. Allen, as administrator of the Estate of James A. Roberts, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

William A. Spill, of Pasadena, for appellant.

Hugh E. Macbeth, of Los Angeles, and C. J. Willett and A. G. Allen, both of Pasadena, for respondent.

THOMAS, J. This is an action to declare a trust and quiet title. Plaintiff claims that by her own labors, before she married defendant's intestate, she had saved and accumulated money which she invested in Arkansas real estate, all of which, under the laws of that state, was her sole and separate property; that after her marriage and both before and after her coming to this state, she had rented said property, the rentals, after coming to this state, being sent to her husband, defendant's intestate, who, because of the illiteracy of plaintiff—she being unable to read or write—conducted all of her business; and that these rents were accordingly collected, "cashed and banked" by him. According to the allegations of the complaint, these moneys were "banked in his own name, but all for the use and benefit of the plaintiff, who at all times was the real the true owner of said rentals." It is then alleged "that about two years after plaintiff and defendant's intestate came to California to live, as aforesaid, to wit, in the year 1903, defendant's intestate used part of the money accumulated from the rentals received from plaintiff's property in Arkansas for purchasing "property described in the city of Pasadena," and, "unbeknown to the plaintiff, and contrary to the belief and desires of plaintiff, caused the title to said property to be issued in his own name, and that he, the said James A. Roberts, continued to hold said property as aforesaid up to the time of his decease," and that the defendant administrator claims said property on behalf of the estate of said deceased. Plaintiff further alleges that because of her illiteracy she knew nothing of the fact that her husband had taken title "to the aforesaid real property in Pasadena, purchased as aforesaid, in his own name, but verily believed that the said title had been made in her name."

[1] In view of these facts, and the condition of the record here, we think it unnecessary to refer to the answer of defendant or to the findings of the court. So far as the evidence on behalf of defendant is concerned, almost, if not quite all, was in an attempt to establish the heirship of W. H. Roberts—an intervener herein—a matter not in issue here, hence immaterial. The plaintiff, however, must establish her position, if at all, upon the strength of her own case rather than the weakness of the defense.

Plaintiff has not traced any specific sum of money from her separate estate into the property in question. She has not pointed out to us any testimony which shows that she is entitled to have title quieted in her or a trust declared in her favor. Lest, however, this possible oversight on the part of plaintiff's counsel might cause an injustice to be done to plaintiff, we have, notwithstanding the rule which renders such labor on our part unnecessary, read the entire record, with the result stated.

[2, 3] From the record it appears that four exhibits were introduced on behalf of plaintiff. The evidence of this fact appears as follows: Plaintiff's Exhibit No. 1, blank sheet, showing bank account of deceased; No. 2, three documents attached, a deed, a contract, and a check; No. 3, a bunch of letters; and No. 4, a deed. We assume from the record before us that these, whatever they were, were actually before the trial court; but we are not given the opportunity of considering them at all. They were not read into the record. The record is silent, even as to whether they were considered read. They have not been copied into the record in any way. They, or copies thereof, are not attached to the pleadings or to the transcript. Because of these facts, we might have invoked the rule enunciated in Welk v. Sorenson (Sup.) 178 Pac. 498, and refuse to consider the briefs; but, as already stated, we have not done so.

We are, however, wholly helpless in the matter to do anything except to affirm the judgment of the trial court, because, in the

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

absence of legal evidence to the contrary, we must presume that that court acted regularly and in the lawful exercise of its jurisdiction.

Judgment affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

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41 Cal. App. 458

GRIFFITH v. REDDICK et al. (Civ. 2133.)

(District Court of Appeal, Second District, Division 2, California. June 7, 1919.)

1. Bailment 🔑18(3) — Automobile — Lien and Possession of Repairer.

Where the owner of an automobile in possession of a machinist who had repaired it obtained possession by taking it from his shop without his knowledge or consent, and returned it when demanded, and later induced a driver of the machinist by trick or device, to take it into another garage, which took possession of and attempted to hold it, the machinist did not lose his constructive possession or his lien.

2. Replevin 🔑93—Findings—Alternative Relief.

When one claims a right of possession of personal property in claim and delivery by virtue of a lien, the measure of his recovery in the event his possession cannot be restored is the amount of his lien, and it is therefore necessary for court to find that amount which is not necessarily what he claims is due him, but only what is actually due.

3. Replevin 🔑103(4) — Alternative Judgment.

Where defendant claimed the right of possession of personal property in claim and delivery by virtue of a lien, the fact that the court did not make a finding as to what was due by virtue of the lien did not affect the part of his judgment giving to defendant the right to a redelivery of the property, Code Civ. Proc. §§ 627, 666, entitling the prevailing party in proceedings under claim and delivery to an alternative judgment for the value of the property in case a return can be made, being solely for the benefit of the prevailing party, the plaintiff not having the privilege of payment, if redelivery of the property is possible.

Appeal from Superior Court, Los Angeles County; Stanley A. Smith and Grant Jackson, Judges.

Action by Robert E. Griffith against J. J. Reddick and others. Judgment for defendants, and plaintiff appeals. Affirmed in part and reversed in part.

Perry F. Backus, of Los Angeles, for appellant.

Earl Newmire and L. M. Fall, both of Los Angeles, for respondents.

SLOANE, J. Plaintiff has appealed from a judgment in favor of defendants for the return of possession of an automobile truck, or for the sum of $1,334.31, the amount of lien claimed by defendants against the same in case a redelivery of the property cannot be had.

Alleged insufficiency of the evidence to sustain the findings, and insufficiency of the findings to sustain the judgment, are the grounds of appeal.

Very little consideration is required in disposing of the sufficiency of the evidence and findings in support of defendant's right to a redelivery of the property. It clearly appears that defendant Reddick, an automobile machinist, was in possession of the truck by virtue of a lien for extensive repairs made thereon in his shop. Plaintiff claims that this lien was lost by a voluntary relinquishment to him of the possession of the truck. The plaintiff did obtain possession of it on one occasion, by taking it from the shop without the knowledge or consent of defendant Reddick, at a time when no other person was present than a workman, who was at times casually in the employ of said defendant, but who does not appear to have been working for him at this time, or to have had authority to permit the machine to be taken from the shop. Defendant Reddick immediately demanded and secured its return to his place of business and possession, and the plaintiff, in effect, disclaimed any intention to interfere with said defendant's lien. Later the defendant Reddick permitted the truck to be used in plaintiff's business for a few days with one of his (Reddick's) employés in charge as driver, who returned it to said defendant's place of business every night. If it was during this period at any time in the control of plaintiff in person, it was with the understanding that it was in no way a surrender of the lien. While the machine was being driven for plaintiff by defendant Reddick's employé, plaintiff, by what may be properly termed a "trick or device," induced the driver to take the truck into what was known as the Normal Garage, where he had left orders with the people in charge that they were not to allow the said driver to remove it. When he attempted to do so he was prevented. Thereupon he notified his employer, who, with several of his workmen, repaired at once to the Normal Garage and took more or less forcible possession of the truck and drove it away. Plaintiff thereafter brought this action, and obtained, through a writ of replevin, possession of the truck.

[1] By none of the transactions narrated, leading up to this suit, did defendant Reddick lose his lien, or even his constructive possession. The detention of the truck in the Normal Garage was unwarranted, and did not confer possession of any kind upon plaintiff, and if the removal of it by said defendant was forcible, it was not as against

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

any possession on the part of plaintiff, but that of the Normal Garage.

The findings of the court that defendant Reddick was in possession of this truck under a valid lien and was entitled to its possession when it was taken in the claim and delivery proceedings, and the judgment of the court that he recover possession thereof from the plaintiff, were all properly made and given.

The only allegation of error which is open to discussion is with regard to the findings and judgment granting the alternative relief that in a case a redelivery of the property cannot be had, defendants recover from plaintiff the sum of $1,334.31, the amount of the lien claimed against said personal property.

The plaintiff disputed the amount of defendant Reddick's claim of lien, and on the trial he was not permitted to introduce his evidence in that relation. Moreover, the findings of the court are irreconcilably inconsistent in this regard. In finding 5 the court declares "that all of the admissions, denials, and allegations contained in defendants' second defense are true, except that, while the court finds that defendant Reddick claims a lien to the extent of $1,334.31 on said personal property herein mentioned, and plaintiff admits there is some undetermined amount due him for repairs thereto, the court does not find as to the amount due Reddick." In finding 6 it is declared "that all of the admissions, denials, and allegations contained in paragraphs 1, 2, and 3 of defendants' second defense are true, and sustained by the evidence." Paragraph 3 of the second defense, referred to in this finding, states that the defendant Reddick had performed and rendered services in and about said truck, and furnished materials for its reconstruction, "to the amount of $1,560.31, no part of which has been paid, except the sum of $226, leaving a balance wholly due, owing, and unpaid from said plaintiff to said defendant J. J. Reddick of $1,334.31." Either the first quoted finding, being specific in its terms, must control the more general one relating to the truth of the allegation of the answer, or the two findings must stand in irreconcilable conflict.

[2] As we undersand the procedure laid down by the Supreme Court in Wilkerson v. Thorp, 128 Cal. 221, 60 Pac. 679, and other decisions to the same effect, when one claims the right of possession of personal property in claim and delivery by virtue of a lien, the measure of his recovery, in the event his possession cannot be restored, is the amount of his lien, and it must therefore be necessary for the court to find that amount. The amount of his lien is not necessarily what he claims is due him, but what is actually due and owing. For the reasons stated, the alternative part of this judgment cannot be sustained.

[3] We see no reason, however, why this should affect the part of the judgment giving to defendant the right to a redelivery of the property. The Code provision (Code Civ. Proc. §§ 627, 667) entitling the prevailing party in proceedings under claim and delivery to an alternative judgment for the value of the property in case a return cannot be had, is solely for the benefit of the prevailing party. It does not, where the judgment is for a redelivery to the defendant, or for the value if a return of the property cannot be had, give to the plaintiff the privilege of either redelivery or payment of the value, at his option. He has to return the property if it is within his power to do so, and it is no concern of his if the defendant fails to obtain his alternative relief. It is even held, in cases where it is made to appear on the trial that a redelivery cannot be had, that the converse of this proposition is true, and that judgment can be taken for the value without a judgment for the return of the property. Claudius v. Aguirre, 89 Cal. 501, 26 Pac. 1077; Etchepare v. Aguirre, 91 Cal. 288, 27 Pac. 668, 929, 25 Am. St. Rep. 180; Burke v. Koch, 75 Cal. 356, 17 Pac. 228; Brown v. Johnson, 45 Cal. 76; Erreca v. Meyer, 142 Cal. 308, 75 Pac. 826; Faulkner v. First National Bank, 130 Cal. 258, 62 Pac. 463; Bradley v. McDonald, 169 Pac. 427; Waldman v. Broder, 10 Cal. 378; Kneebone v. Kneebone, 83 Cal. 645, 23 Pac. 1031.

In the case of Waldman v. Broder, supra, the court says:

> "The jury having found a general verdict for the defendant in this action of replevin, the property, which had, under the previous proceedings, been taken from the defendants, was properly directed by the court to be returned to the defendants. * * * Nor is there anything in the failure to give an alternative judgment for the value of the property. This omission might be complained of by the defendants if they had shown the value; but it is no ground of complaint on the part of the plaintiff."

In Kneebone v. Kneebone, supra, there was a judgment of dismissal of plaintiff's action in claim and delivery and for a return to defendant of the property taken thereunder. It was claimed on appeal "that the court erred in adjudging that 'plaintiff return the property described in plaintiff's complaint to the defendant.' It is said the judgment should have been for a return of the property (describing it), or the value thereof in case a return could not be had; in other words, in the alternative form, as prescribed by section 667, Code of Civil Procedure." The court then says:

> "It was a matter of no concern to the plaintiff whether the judgment was in the alternative form or not, as he had no option as to whether he should pay or return the property."

It has been held in general terms, and without discussion, in two or three California decisions that the provisions of the Code as to an alternative judgment must be followed (Berson v. Nunan, 63 Cal. 550; Brichman v. Ross, 67 Cal. 601, 8 Pac. 316), but these cases have been questioned, or distinguished from the facts here under consideration, by later decisions (Claudius v. Aguirre, supra), and we are satisfied do not change the doctrine as laid down in the other decisions herein cited.

If the defendant has not had or cannot obtain a redelivery of the property, he should be entitled to a new trial as to the amount of his lien.

The judgment is affirmed as to all matters excepting the alternative that plaintiff recover the sum of $1,334.31, the amount of the lien claimed against said personal property in case a redelivery of same cannot be had. That part of the judgment is reversed, and a new trial directed as to the amount of defendant's claim of lien, unless a new trial on that issue be waived by the defendants.

We concur: FINLAYSON, P. J.; THOMAS, J.

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41 Cal. App. 345

PEOPLE ex rel. BRADFORD, Dist. Atty., v. LAINE et al. (Civ. 1952.)

(District Court of Appeal, Third District, California. June 2, 1919. Rehearing Denied by Supreme Court July 31, 1919.)

1. Action 🔑38(4) — Single Cause of Action — Redlight Abatement Act—Complaint.

A complaint to enjoin a nuisance under the Redlight Abatement Act, charging that "said premises were and now are used for purposes of lewdness, assignation, and prostitution" states only one cause of action; the gravamen of the complaint being the nuisance.

2. Nuisance 🔑84 — Redlight Abatement Act—Complaint—Sufficiency.

A complaint in a proceeding under the Redlight Abatement Act to enjoin a nuisance was sufficient where it alleged, "Said premises were and now are used for purposes of lewdness, assignation, and prostitution," although it contained no description of specific acts of which the lewdness consisted or the manner in which those general acts were committed and practiced.

3. Nuisance 🔑84—Injunction—Lewdness —Evidence.

In a proceeding by the state under the Redlight Abatement Act to enjoin a dance hall as a nuisance, evidence that intoxicating liquor was sold in the dance hall and was used by females as well as male frequenters was admissible to show the character of the place and that lewdness was practiced therein.

4. Evidence 🔑61—Presumption — Lewdness and Immorality—Intoxicating Liquors.

Where women shamelessly indulge in intoxicating liquors in a public place with any and all men who may chance to visit such a place, it is reasonably probable that they and their male companions in the bacchanalian revelry would indulge in conduct involving immorality.

5. Nuisance 🔑84—Injunction—Lewdness —Evidence.

Evidence of the sale and use of liquor in a public dance hall is not conclusive proof of lewdness or other immoral conduct.

6. Appeal and Error 🔑1052(8)—Harmless Error—Evidence of Independent Crime.

In a proceeding by the state under the Redlight Abatement Act to enjoin a building as a nuisance, it was not prejudicial error to permit introduction of evidence tending to show that the occupant of the premises was selling intoxicating liquor without a local license, where there was such an abundance of convincing evidence showing that acts of lewdness were committed that it would be unreasonable to hold that the court was in the slightest degree influenced thereby.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Proceedings by the People of the State of California, on the relation of Hugh B. Bradford, district attorney of the County of Sacramento, against the property of Laura E. Laine, occupied by Charles F. Gibney. From a judgment in favor of plaintiff, the owner and occupant appeal. Affirmed.

See, also, 177 Cal. 742, 171 Pac. 941.

J. W. S. Butler, B. F. Van Dyke, and White, Miller, Needham & Harber, all of Sacramento, for appellants.

Hugh B. Bradford, Dist. Atty., of Sacramento, for respondent.

HART, J. The district attorney of Sacramento county filed in the superior court a complaint praying that the property at No. 223 L Street, in the city of Sacramento, be enjoined as a nuisance, by virtue of the provisions of the so-called "Redlight Abatement Act." Stats. 1913, p. 20. The premises, which are owned by the defendant Laura E. Laine, are occupied by defendant Charles F. Gibney as a dance hall where approximately 35 girls are employed. Judgment was entered in favor of plaintiff and directing that the building and premises be kept closed for one year, etc. The appeal is by defendants from said judgment.

It was charged in the amended complaint that—

> "Said premises were and now are used for purposes of lewdness, assignation, and prostitution, and upon said premises acts of lewdness, assignation, and prostitution were held and did occur, and said premises were and now are a nuisance under the laws of the state of California."

Defendants filed a demurrer to the amended complaint, in which, among other grounds, they specified that—

"In said amended complaint three causes of action are set forth, and no one of them is so stated as to be sufficient to constitute a cause of action, and said causes of action are mingled together, and not separately stated, to wit:" One charging lewdness, the second charging assignation, and the third charging prostitution.

The demurrer was overruled, and appellants urge that this action of the court was erroneous.

It is also contended by appellants that the demurrer to the amended complaint should have been sustained on the ground that the facts constituting the alleged acts of lewdness are not set out in the complaint.

[1] The complaint is not amenable to the objection that it states different and distinct causes of action. Mr. Bradford, the district attorney, representing the respondent here, in his brief well answers the contention of the appellants upon that point as follows:

> "The statute under which the action was brought is one for the abatement of nuisances; the thing aimed at is a nuisance. The cause of action here is the abatement of a nuisance alleged to be in existence on the premises of appellants. The action was not brought to abate acts of lewdness, and acts of assignation, and acts of prostitution, but was brought to abate a nuisance which was caused by the commission on said premises of acts of lewdness, assignation, and prostitution. The fact that the court found that the nuisance was caused by acts of lewdness only does not render the pleading faulty; it simply shows that more was alleged than could be proven."

In other words, there is but one cause of action stated in the complaint, to wit, a public nuisance, committed, as the complaint alleges, by the habitual practicing upon and in the premises described of acts of lewdness, assignation, and prostitution. These terms have a definite, commonly understood meaning, and are employed in the statute as they are so understood, and the statement in the complaint that the nuisance complained of consisted of the habitual practicing of either or all of those acts as they are generally designated or referred to in the statute is sufficient to set forth, in an intelligible, unambiguous, and readily understood manner, a cause of action under the statute.

That it is proper to charge that all said acts have been habitually practiced in the building complained of we have no doubt. Thus, if it happens that the evidence is sufficient to show that only one of the three general acts is practiced therein, and thus the premises have been maintained as a nuisance, then a judgment condemning the property as such and enjoining its further use for that purpose may follow, rendering unnecessary the trouble, expense, and inconvenience of a new proceeding, as might be the case if it were requisite that the complaint should be confined in its charge to one of the three several acts of which the nuisance denounced by the abatement act may consist. The defendant or the party owning the building or maintaining the nuisance can suffer no disadvantage or cannot in the slightest measure be misled where the complaint charges that the nuisance has been maintained by the habitual commission in the building or on the premises of the three general acts designated by the statute as constituting such a nuisance. He can experience no possible difficulty in as readily and fully meeting and defending against the complaint where the three general acts are charged and but one is susceptible of establishment by the proofs as though one of the acts only were relied upon in the complaint to show the existence of the nuisance. Indeed, lewdness, assignation, and prostitution are acts so similar in nature that there can be but little difference in the general character of the evidence necessary to prove their existence.

In criminal cases, even, it has repeatedly been held as to a certain class of cases that, where a specific crime is by the statute made to consist of all or one of a series of enumerated acts, the complaint or indictment may, without doing violence to good pleading or without misleading the accused, charge that the defendant committed the crime by doing all such acts. For instance, in People v. Harrold, 84 Cal. 567, 24 Pac. 106, where the accused was charged with the crime of forgery and the indictment charged that he did "make, alter, forge, and counterfeit a certain bill of sale," etc., it was held that the indictment was not faulty because it charged that the crime was committed by the doing of the several acts any one or all of which will constitute forgery. The court in that case said:

> "Where a statute enumerates a series of acts, either of which separately, or all together, may constitute the offense, all of such acts may be charged in a single count, for the reason that, notwithstanding each act may by itself constitute the offense, all of them together do no more, and likewise constitute but one and the same offense."

See, also, People v. Frank, 28 Cal. 513; Ex parte McCarthy, 72 Cal. 384, 14 Pac. 96; People v. Faust, 113 Cal. 172, 45 Pac. 261; People v. Epperson, 176 Pac. 702.

There is no conceivable reason why this rule should be held any the less applicable to a case arising under the abatement act, which is not a criminal proceeding, notwithstanding that a judgment in the nature of a penalty may be entered therein. But, as above stated, the gravamen of the complaint here is the nuisance. That is the ultimate fact to be established, and it is proper to allege and prove it by showing any or all the acts constituting it.

[2] The objection that the allegation that "lewdness, assignation, and prostitution" were practiced in the building, in the absence of a description of specific acts of which the lewdness, assignation, or prostitution consisted or of the manner in which those general acts were committed and practiced, involves mere conclusions of the pleader and of law, is answered by the foregoing considerations, and further by the following cases: House v. Meyer, 100 Cal. 592, 35 Pac. 308; Talbot v. Ginocchio, 18 Cal. App. 391, 123 Pac. 223; Ellis v. Central Traction Co., 174 Pac. 407; Doolittle v. McConnell (Sup.) 174 Pac. 305. Nothing further, therefore, need be said upon that subject herein.

The next and last assignment of error involves the action of the court in permitting the fact to appear in the record that intoxicating liquors were sold on the premises in question without a local license. This testimony resulted from the statement of the witness Grant that he purchased a bottle of liquor in the building on the occasion of his visit thereto, there being a bar maintained therein, and the denial of one of the defendants, Gibney, who conducted the place, that he ever sold or dispensed such liquors on the premises. The said defendant, in the first instance, said that there was a government (meaning federal government) license in the room where it was claimed liquor was sold. The district attorney then asked Gibney, "If you do not sell liquor, why do you have a government license?" to which the defendant replied that he was under the impression that he had seen a government license on the wall in a frame, but that he was not positive that it was such a license. The court thereupon asked the defendant if he had a city liquor license, to which he replied, "I do not know as regards to that."

[3-6] The objection to that testimony was that it involved the introduction into the case of evidence tending to show that a public crime had been committed by defendant Gibney, and that such evidence had no tendency to prove that the premises as maintained were a nuisance under the abatement act; that therefore the testimony was not only irrelevant to the issue before the court, but prejudicial in its effect upon the rights of the defendants.

It was proper to show that intoxicating liquors were dispensed or sold to frequenters of the dance hall, and that the females there present not only drank such liquors, but solicited the male visitors to purchase the same for them. In view of the fact that the testimony disclosed that both men and women frequented the place, and although, in many instances, strangers to each other indiscriminately intermingled with each other and indulged in free and easy or familiar and unbecoming conduct toward each other, evidence of the sale of intoxicating liquors in the dance hall and the use thereof by female as well as male frequenters of the place tended, in some measure, to show the character of the place and that lewdness was practiced therein. Enough is commonly known of the character of women to justify the statement that, where they have so far divested themselves of that personal pride and modesty which constitute one of the ruling characteristics of true womanhood that they will shamelessly indulge in intoxicating liquors in a public place with any and all men who may chance to visit such a place, it is reasonably probable that, under such circumstances, they and their male companions in the bacchanalian revelry would indulge in conduct involving gross acts of lewdness and immorality. Of course, evidence of the sale and use of liquor in such a place is by no means conclusive in proof of lewdness or other immoral conduct, but it is some proof, the probative force and effect of which is for the determination of the trial court and to be considered by it in connection with evidence of other relevant facts and circumstances. But it was wholly unnecessary to bring out the fact, or attempt to do so, that Gibney sold liquors at the dance hall without a municipal license authorizing him to do so. The record, though, carefully examined, does not show that Gibney positively stated that he did not have such a license. He merely said that he could not answer as to that. Assuming, though, as well we may assume, that the fact that he could not say whether he had taken out a local license or not would justify the inference that he had no such license, since it would stand to reason that, if he had such a license, he would have known of it, still we cannot say that the bringing out of that fact resulted in a miscarriage of justice. There is an abundance of evidence in the record showing that acts of lewdness were committed in the place by both male and female frequenters thereof. Indeed, the evidence is so convincing in that particular that it would be most unreasonable to hold that the court below was in the slightest degree influenced in its decision by the mere fact, if it was a fact, that the defendant Gibney sold intoxicating liquors in the building in question here without legal authority to do so.

We may add that we have carefully read the very able briefs of counsel for the appellants and examined the cases and other authorities cited and relied upon as in support of the several points urged for a reversal and that none of the cases cited is, in our opinion, strictly in point here. In them the rules of correct pleading are discussed and ably expounded, but in none is there any expression which we conceive to be at cross-purposes with the views herein expressed and the conclusion following therefrom. The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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41 Cal. App. 452

FARRAR v. FARRAR. (Civ. 2144.)

(District Court of Appeal, Second District, Division 2, California. June 7. 1919.)

1. HUSBAND AND WIFE 🔑133(1)—EVIDENCE—SEPARATE PROPERTY.

In a divorce suit, evidence *held* sufficient to show that real property awarded defendant as her separate property was, in fact, such.

2. DIVORCE 🔑222—ALLOWANCE OF ATTORNEY'S FEES—TIME OF ALLOWANCE.

While ordinarily an allowance of attorney's fees in a divorce suit must be made in contemplation of services to be rendered, pending the action, where the determination of the amount of the allowance was, by express stipulation, deferred to the close of the trial, the trial court had jurisdiction to make an order allowing such fees contemporaneously with the judgment.

3. DIVORCE 🔑228—ALLOWANCE OF ATTORNEY'S FEES—ALLOWANCE IN JUDGMENT AND NOT BY SPECIAL ORDER.

Where it was stipulated in a divorce suit that the determination of the amount of attorney's fees might be deferred to the close of the trial, an allowance by the trial court of such fees in the judgment rather than by a separate order was not prejudicial to the losing party.

4. DIVORCE 🔑235—ALIMONY—AMOUNT—DISCRETION OF COURT.

The amount to be allowed the wife in a divorce suit as permanent alimony, upon the rendition of a decree on her cross-bill, is a matter within the reasonable discretion of the trial court under the circumstances of each case.

5. DIVORCE 🔑240(5)—ALIMONY—AMOUNT—EXCESSIVENESS.

Allowance of $35 a month alimony *held* not excessive or oppressive to a man who received $75 a month, in addition to his board and lodging, notwithstanding that the wife held real estate as her separate property; such property producing no income.

6. TRIAL 🔑29(2)—PROVINCE OF JUDGE—OMISSIONS OR DEFECTS.

It is court's duty to see that as nearly as possible the issues shall be disposed of on their merits, and he may call attention to omissions in the evidence or defects in the pleadings which may result in a mistrial.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Suit by Arthur L. Farrar against Matilda L. Farrar for divorce, with cross-bill. Judgment for defendant on the cross-bill, and from part of the judgment plaintiff appeals. Affirmed.

Thompson & Creighton, of Los Angeles, for appellant.

Frank C. Collier, of Los Angeles, and Collier, Shelton & Schlegel, for respondent.

SLOANE, J. Plaintiff brought his action in this case for a divorce on the ground of extreme cruelty. The defendant, by her cross-complaint, alleged desertion and adultery. The judgment was for defendant on the ground of desertion. The appeal is taken by plaintiff and cross-defendant from the part of the judgment disposing of the property rights, and awarding to defendant alimony and attorneys' fees.

The findings, so far as material to this appeal, are, in substance, as follows: That plaintiff and defendant accumulated as community property the following property, and none other, to wit: The household furniture; the wearing apparel and personal effects of plaintiff and defendant; one automobile; and a mining interest of some kind or character in the state of Colorado. That the following is separate property of the defendant: Easterly 41 feet of westerly 48 feet of lot 28 in block B of West Los Angeles; lot 102 of Exposition Park Square, of Los Angeles; $350 in cash in possession of defendant. That defendant has no income, but that she has about $350 in money on deposit. That plaintiff is at present employed at a grocery store in Barstow, Cal., at a monthly salary of $75, in addition to his board and room. That $35 per month is a reasonable amount for permanent alimony. That $200 is reasonable attorneys' fee to be awarded defendant.

The judgment, as to the property rights, was in accordance with these findings, and divided the community property by giving to defendant the household furniture and her personal effects and wearing apparel, and to the plaintiff the automobile, the Colorado mining interest, and his personal effects and wearing apparel; the court adjudging this to be an equal division in value of the community property. The defendant also had judgment for permanent alimony at $35 per month, and $200 attorneys' fees.

[1] The main contention of appellant is that the evidence does not support the finding that the real property is the separate property of defendant. Most of appellant's argument, however, is taken up with a discussion of the relative weight and credibility of the conflicting testimony on this point. That was a matter for the trial court. It may be conceded that defendant's account of the resources from which she obtained title to this property is not very clear or convincing. She claims to have had $3,000 of which her husband was not aware at the time of

their marriage, and as to the disposition of which, during the years previous to these real estate investments, she is very vague and noncommittal in her explanations. On the other hand, the only way appellant attempts to explain the purchase of these lots as community property, and which explanation is denied by respondent, is on the theory that a large proportion of the consideration paid for them was money saved by the respondent from an allowance of $50 per month, with perhaps $100 a year additional, which he paid to her for a period of several years. Incidentally it is conceded that she kept up all of the household expenses, and clothed herself out of this allowance. The consideration paid for the two properties was $2,650 for the first described lot, on which the parties resided, and $1,500 for the other lot, aggregating $4,150. It is agreed that Mrs. Farrar had at least $600 at her marriage, and from about $700 to $1,000 subsequently inherited from her parents, and she admits that she paid about $500 of the consideration of the last described lot from savings from her allowance; but this would still leave an additional sum of from $2,000 to $2,300 to be accounted for, and we are inclined to believe that respondent's claim that she had $3,000, instead of merely $600, at the time of her marriage is a more credible explanation of the purchase money than the surmise of appellant that she saved a total of some $2,500, or over $25 a month for eight years, from an allowance of $50 per month, after paying all the current expenses of the household therefrom. In addition to this, we have the presumption of separate ownership, from the fact that this property has at all times stood of record in Mrs. Farrar's name.

The defendant testified that the home place, which is all of the real estate that plaintiff in his complaint claimed as community property, "was purchased with money that was absolutely my own money. It was money that I had before I married Mr. Farrar. I had my own funds, and it was with these funds that I purchased this property." Plaintiff's complaint avers that aside from this lot, which is therein alleged to be community property, "there is no other community property, excepting household goods and wearing apparel." As to the sum approximating $500 which respondent admits went into the other lot from savings accumulated from her husband's allowance to her and the cash in her possession, the court was not without evidence to justify treating these amounts as a gift from her husband. As has already been pointed out, title to this lot was taken and held in respondent's name, and the complaint concedes that it did not belong to the community. We cannot see that the court erred in its findings regarding this property. The personal property and effects found to be community property seem to have been equally divided in point of reasonable value.

Appellant complains that there is no express finding of the trial court as to the community interest in the $200 building and loan stock, and shares of the par value of $200 in the Guaranty Building & Investment Company, of which evidence was introduced. These items, however, are covered both by the admission of plaintiff in his complaint that, aside from the alleged community interest in the home place and in the household goods and wearing apparel, there was no community property, and the general finding of the court that the property enumerated as such in said finding, and none other, constituted the community accumulations of the parties. That the items above referred to were not enumerated in the judgment as separate property of appellant is in no way to plaintiff's detriment.

Relating to the Guaranty Building & Investment shares, counsel for appellant states in his brief that—

> "There was no testimony given in regard to the matter, except the testimony of Mrs. Farrar herself, * * * which reads as follows:
>
> "Q. (by Mr. Thompson): How much of the Guaranty stock have you? A. I have 200 shares at $1 per share."

Counsel further states that "it is not shown anywhere in the testimony that this stock is not worth its face value." This is certainly a very misleading summary of the record. The typewritten transcript contains nearly three pages of testimony of Mrs. Farrar tending to show that this company was long since bankrupt and out of business, that she had not kept up her assessments on the stock, and that she had received notice some three years previously that her shares would be sold for delinquencies, and had abandoned the whole matter as valueless. There was no attempt on the part of plaintiff to show that they had any value.

[2, 3] The allowance of $200 as attorneys' fees is reasonable in amount. Ordinarily, as appellant contends, such an allowance must be made in contemplation of services to be rendered pending the action; but in this case the matter of fixing the amount which defendant should receive for services of her attorneys was, by express stipulation between the parties, deferred to the close of the trial; and there can be no question, under such circumstances, of the court's jurisdiction to make the order contemporaneously with the judgment. Sheppard v. Sheppard, 15 Cal. App. 614, 115 Pac. 751. That the allowance was made in the judgment rather than by a separate order can in no wise prejudice appellant. The order by itself would have the effect of, and could be enforced as, a judgment.

[4, 5] The amount to be given, if anything, as permanent alimony is a matter within the reasonable discretion of the court, under the circumstances of each case. We do not see that $35 a month is excessive or oppressive to a man who is receiving $75 per month, in addition to his board and lodging. The respondent, it is true, has the real estate as her separate property, but it affords her only a place to live, as no income is derived from it at present, and she has no other income. Plaintiff testified that he had for years contributed not less than $50 a month to his wife's support, although she then, as now, had the possession and use of this real property. Is there any reason why he should do less because he has willfully deserted her? Appellant's counsel refers to this requirement for alimony as "a mortgage on Mr. Farrar's existence for the rest of his natural life." It is the enforcement of an obligation which the appellant took upon himself when he married this woman, and from which he cannot be permitted to free himself by deserting her willfully and without legal cause. A man past middle age can usually rehabilitate himself in life in case of a break in the marriage relations. A woman of that age seldom can; and the courts may very properly safeguard her financial future where, by the fault of her husband, the marriage is dissolved.

[6] The spirit and language in the closing brief of counsel for appellant, in its reflections upon the fairness of the trial judge in the disposition of this case, is offensive and uncalled for, and would have merited an order striking the brief from the files, had the matter been earlier called to the attention of this court. Moreover, there is nothing in the record of this case to give substance to the criticism. It is time it was understood that a trial judge does not sit as a mere referee in a contest of wits between counsel in the case, but that it is not only within his province, but is his duty, to see that as nearly as possible the issues shall be disposed of on their merits; and it is not out of place for him to call attention to omissions in the evidence or defects in the pleadings which are likely to result in a mistrial.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

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HIRSCHBERG v. SOUTHERN PAC. CO.

(L. A. 4264.)

(Supreme Court of California. July 31, 1919.)

1. Witnesses 🔑219(4)—Privileged Communications to Physicians—Waiver.

The privilege of a patient, under Code Civ. Proc. § 1881, of preventing physicians from testifying as to communications made by patient, is personal to the patient and may be waived by him.

2. Witnesses 🔑219(5)—Privileged Communications to Physicians — Waiver of Privilege.

Plaintiff in a personal injury action, by testifying fully and allowing a physician to testify fully as to her condition after an alleged assault, did not waive her right, given by Code Civ. Proc. § 1881, to object to the introduction in evidence of information acquired by another physician while acting as her physician several years prior to the injury complained of.

In Bank.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Fannie Hirschberg against the Southern Pacific Company. From a judgment for plaintiff and order denying its motion for new trial, the defendant appeals. Affirmed.

Henry T. Gage, W. I. Foley, W. I. Gilbert, and C. F. Cable, all of Los Angeles, for appellant.

Peyton H. Moore and E. B. Drake, both of Los Angeles, for respondent.

LAWLOR, J. This is an appeal from a judgment of the superior court of the county of Los Angeles in an action for damages for personal injuries, in which the plaintiff was awarded the sum of $3,500, with costs amounting to $524.95. The complaint alleges that the injuries were sustained by the plaintiff at the hands of an employé of the defendant company. The case was tried by jury, and judgment was given by the court for the amount of the verdict. A motion for a new trial was thereafter interposed and denied. The record contains a statement on motion for a new trial settled and allowed by the court.

It appears that the plaintiff has resided in Los Angeles since July 27, 1910. On August 5, 1910, the plaintiff, accompanied by her son, went to the station of the defendant company in Los Angeles for the purpose of securing certain baggage belonging to her and her family. The baggage agent presented a statement of excess charges for payment before releasing the baggage. Plaintiff's son questioned the correctness of a certain item of 25 cents, and an altercation ensued, during which, plaintiff alleged, the baggage agent assaulted her by seizing her right arm and throwing her violently and forcibly against the stone floor, causing her jewelry to be driven into the flesh of her chest, "bruising and lacerating the same and breaking the bones thereof." It is further alleged that she was "severely and permanently injured in the lower abdominal region, and especially plaintiff's uterus was misplaced, torn, crushed, and bruised, and her female functions were interfered with, and she has been caused to be sick, sore, and lame therefrom ever since"; and, further, that her left knee and right arm were severely sprained, her back wrenched, her face and head bruised, "and that her body became sick, sore, and disordered."

The only question presented for consideration on this appeal is whether the trial court erred in excluding the deposition of Dr. Emery Marvel of Atlantic City, N. J., which was offered by the defendant.

From the record it appears that the deposition was objected to by the plaintiff on the ground that the examination called for information acquired by Dr. Marvel while attending the plaintiff as a physician, within the meaning of subdivision 4, § 1881, Code of Civil Procedure, and that the ruling of the court was based upon that conceded fact. It also appears that, while the deposition was taken upon the stipulation of the parties, it was taken "subject to all objections and exceptions, as if the said witness were personally present on the stand, but without objection to the time or place of taking the same. It being expressly agreed that plaintiff by this stipulation does not in any way waive the right to object to the introduction in evidence of all or any part of the testimony of Dr. Marvel on the ground that the same is privileged."

The appellant contends that the deposition of Dr. Marvel was admissible upon two grounds:

> "First. Mrs. Hirschberg, by her own testimony and by disclosures made with her consent by her physician, waived any right which she may have had to the exclusion of the testimony of the physician.
>
> "Second. She testified that Dr. Emery Marvel was not her physician, and that he had never treated her for any disease except that of lumbago. If he was not her physician, then certainly she could not object to his testifying in the case. In other words, if she claimed the privilege of excluding the communications between Dr. Marvel and herself from the consideration of the jury she could only do so upon the theory that he was her physician. She could not deny that the relationship existed, and in the same breath claim his testimony could not be offered because it was a privileged communication."

The plaintiff testified on direct examination that as a result of the injury she sustained a displacement of her uterus, and that "before the trouble I was a healthy woman." On cross-examination she was asked if in the years 1902, 1904, and 1907, at Atlantic City, New Jersey, she was not treated by Dr. Marvel for a displacement of her uterus. Her answer was flatly in the negative; she stated, however, that he had once treated her for lumbago.

On direct examination, Dr. Adolph Tyrola, plaintiff's personal physician, who treated her for the first time after the injury and was called in her behalf, described in minute detail the condition of the organs of the pelvic region, including a displacement of the uterus. He testified on cross-examination that—

> "She did not tell me that the entire displacement resulted from the fall. * * * My opinion in this case is that the displacement began several years ago, long prior to my first examination."

In view of the delicate nature of much of the testimony touching the physical condition of the plaintiff, and the fact that the only question reserved for appeal is that of privilege, we do not think it necessary to make a more extended reference to such testimony.

[1] Section 1881 of the Code of Civil Procedure, as it was written at the time this action arose, reads as follows:

> "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore a person cannot be examined as a witness in the following cases: * * * 4. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient. * * *"

The purpose of the privilege "is to facilitate and make safe full and confidential disclosures by patient to physician of all facts, circumstances, and symptoms, untrammeled by apprehension of their subsequent enforced disclosure and publication on the witness stand, to the end that the physician may form a correct opinion, and be enabled safely and efficaciously to treat his patient." In re Bruendl's Will, 102 Wis. 45, 78 N. W. 169. The privilege is personal to the patient and may be waived by him. Lissak v. Crocker Estate Co., 119 Cal. 442, 51 Pac. 688. What constitutes a waiver is stated in 40 Cyc. 2399, as follows:

> "The privilege is waived whenever the person entitled to the protection of the statute voluntarily makes public matters of which a disclosure without his consent is forbidden, and so where the client or patient voluntarily introduces evidence of communications between himself and his physician the privilege is waived, and the attorney or physician may testify in respect thereto."

It has been held that if a patient offers the testimony of one of several physicians attending the case at the same time, or who were present at a consultation, the privilege has been waived, so that the testimony of all of them will be received. Morris v. Railroad, 148 N. Y. 88, 42 N. E. 410, 51 Am. St. Rep. 675; O'Brien v. Western Implement Mfg. Co., 141 Mo. App. 331, 125 S. W. 804, and cases there cited. And likewise where different physicians have treated the patient at different times for the same injury and the patient calls one of the physicians to testify, it has been held that this constitutes a waiver as to all the physicians. Lawson v. Morning Journal, 32 App. Div. 71, 52 N. Y. Supp. 484; Lampel v. Goldstein, 167 N. Y. Supp. 576; State v. Long, 257 Mo. 199, 165 S. W. 748; Priebe v. Crandall (Mo. App.) 187 S. W. 605. However, there is authority to the contrary. Dotton v. Albion, 57 Mich. 575, 24 N. W. 786; Baxter v. Cedar Rapids, 103 Iowa, 599, 72 N. W. 790; Mellor v. R. Co. (Mo.) 14 S. W. 758; Hope v. Railroad Co., 110 N. Y. 643, 17 N. E. 873; Mays v. New Amsterdam C. Co., 40 App. D. C. 249, 46 L. R. A. (N. S.) 1108; Slater v. Sorge, 166 Mich. 173, 131 N. W. 565.

But it is to be noted that in the foregoing cases it was sought to admit the testimony of physicians who attended the patients after the injury complained of, and who, according to the testimony of the patients themselves on direct examination, had been consulted or had given treatment for the same injury. Such is not the case here. The testimony of Dr. Marvel purported to cover information acquired by him while attending the plaintiff as her physician several years before. And in the presentation of the case for the plaintiff the treatment by Dr. Marvel was in no way referred to, but, as already stated, the fact was introduced at the trial on the cross-examination of the plaintiff. Dr. Marvel did not examine or treat the plaintiff after the assault. This question, so far as we are able to find, has never been passed upon in this state. However, the case of Missouri & N. A. R. Co. v. Daniels, 98 Ark. 352, 136 S. W. 651, decided in 1911 by the Supreme Court of Arkansas, is so clearly analogous in its facts and presents so concisely the exact point of law here involved that we will quote from it at some length.

The action was brought to recover damages for personal injuries alleged to have been sustained by the plaintiff through the negligence of a conductor of the defendant railroad company. It was alleged that the plaintiff had been thrown from the steps of a passenger coach to the floor of the station platform, and that as a result of the fall she had suffered a prolapsus of the uterus and that the injury was so severe that an operation was necessary. To prove the seriousness of her condition after the accident, she called Dr. Fowler, her attending physician, as a witness. We quote from the opinion:

> "* * * During the progress of the trial the defendant introduced two physicians who had attended on the plaintiff about two years prior to the time of the alleged injury, and offered to prove by them that she had sustained a displacement of the womb at that time, and had suffered from that trouble long prior to the date of the alleged injury. The plaintiff objected to the admission of this testimony, and her objection was sustained by the court. It is conceded by the defendant that the information which the testimony of these witnesses would have disclosed was acquired by them while attending the plaintiff as physicians; but it contends that the evidence was admissible because the plaintiff had waived her right to object to the introduction of any testimony relative to her condition by reason of having herself introduced the testimony of Dr. Fowler, above referred to.
>
> "It is provided by section 3098, Kirby's Digest, that 'no person authorized to practice physic or surgery, and no trained nurse, shall be compelled to disclose any information which he may have acquired from his patient while attending him in a professional character, and which information was necessary to enable him to describe as a physician or to act for him as a surgeon or a trained nurse.' * * * By virtue of the statute the patient is alone given the right to remove the ban of secrecy. The patient may be willing to waive the objection of incompetency as to a particular physician in whom

he reposes confidence, and yet be unwilling to waive this objection as to another, who treated him at a different time for the trouble complained of. The statute affords him this privilege, when the testimony of the offered witness does not relate to the same occasion as that from which the patient has removed the seal of secrecy. [Citing cases.]

"Counsel for the defendant upon cross-examination of plaintiff asked her if the physicians whom defendant desired to introduce as witnesses as to her condition prior to the alleged injury had treated her in 1907 for displacement of the womb. This she denied, and it is now urged by the defendant that it was entitled to have the benefit of these physicians' testimony in order to contradict the plaintiff. But, if the defendant's position in this respect should be upheld, then the above statute in regard to privileged communications would be easily evaded. In any cause where the opposing party desired to obtain the testimony of an attending physician, it could be secured in like manner, although against the objection of the patient. The plain provisions of the statute forbidding such testimony by a physician cannot thus be abrogated. Holloway v. Kansas City, 184 Mo. 19, 82 S. W. 89; Burgess v. Sims Drug Co., 114 Iowa, 275, 86 N. W. 307, 54 L. R. A. 364, 89 Am. St. Rep. 359. We are therefore of the opinion that the plaintiff, by the introduction of the testimony of Dr. Fowler relative to his treatment of her as a physician after the injury, did not waive her privilege to object to the testimony of other physicians who had treated her prior to that time, alhough for the same alleged trouble."

See, also, Butler v. Manhattan Ry. Co., 3 Misc. Rep. 453, 23 N. Y. Supp. 163; Marx v. Manhattan Ry. Co., 56 Hun, 575, 10 N. Y. Supp. 159; Treanor v. Manhattan Ry. Co., 16 N. Y. Supp. 536; Webb v. Metropolitan St. Ry. Co., 89 Mo. App. 604; Woods v. Incorporated Town of Lisbon, 150 Iowa, 433, 130 N. W. 372.

The case of Holloway v. Kansas City, 184 Mo. 19, 82 S. W. 89, decided by the Supreme Court of Missouri, states with equal force and lucidity the law applicable to this question. Action was brought there for the recovery of damages for personal injuries alleged to have been caused to the plaintiff by falling through a hole in a defective sidewalk. A point similar to the one last discussed was there raised on appeal. In the course of its opinion the court said:

"The plaintiff testified upon her examination in chief that her general health was good, and upon cross-examination she was asked if Dr. Mathias had treated her, and what for. She replied that he had treated her for headaches; nothing else. Defendant thereafter introduced Dr. Mathias to show what he had treated her for. Now, defendant contends that, because plaintiff answered its questions to the effect that Dr. Mathias treated her for nothing else than headaches, she waived the protection of the statute, and that the defendant had the right to the evidence of Dr. Mathias for the purpose of contradicting her. If defendant's position in this respect be the law, then the statute in regard to privileged communications is a failure in the purpose for which it was intended, for a party to a suit could evade it at any time where an attendant physician is introduced as an expert witness by asking him upon cross-examination, if he had treated the party in whose behalf he testifies, if he treated such party for anything else than what may be stated by such party, and, if so, by this means contradict him. The statutes of Iowa and New York with respect to privileged communications are in all essentials like the Missouri statute, and in the former state in the case of Burgess v. Sims Drug Co., 114 Iowa, 275, 86 N. W. 307, 54 L. R. A. 364, 89 Am. St. Rep. 359, the facts were similar to the facts in the case at bar. In that case defendant asked plaintiff on cross-examination if a certain physician, viz. Dr. Amos, had treated him, and what the doctor had treated him for. Plaintiff answered the questions, without objection, and then defendant offered Dr. Amos as a witness, claiming that plaintiff had waived his right under the statute by answering the questions propounded him by the defendant. The court held that plaintiff had not thereby waived his privilege under the statute, and that Dr. Amos was not competent to testify in regard to plaintiff's ailments, or his treatment of him. The court says: 'If counsel saw fit, on cross-examination, to inquire into this matter, he must be bound by the answer, and cannot afterwards claim that the witness, by answering without objection, voluntarily waived the privilege.' The same rule is announced by the Supreme Court of New York in Fox v. Union Turnpike Co., supra [59 App. Div. 363, 69 N. Y. Supp. 553]. There was no error in the ruling of the court upon this question."

[2] In our opinion the rule applicable to this case is correctly stated in the foregoing authorities. We have found no authority that supports the contention of appellant that because the plaintiff and her physician testified fully as to her condition after the assault the ban of privilege was thereby waived as to information acquired by Dr. Marvel while acting as her physician several years prior to the injury complained of.

We will next consider the further contention of appellant that the plaintiff testified that Dr. Marvel was not her physician, and that he never treated her for any disease except lumbago. Preliminarily it is proper to point out that the appellant is not accurate in stating the effect of the testimony of the plaintiff. She did not testify that Dr. Marvel was never her physician. The record plainly shows to the contrary. The purport of her cross-examination was whether in the years 1902, 1904, and 1907 Dr. Marvel did not treat her for female trouble. The questions were so framed that an affirmative answer would carry the declaration either that he had or had not been her physician for the specified purpose. She invariably answered that he had never so treated her, but that he had been called in to treat her for an attack of lumbago. This was equivalent to a direct declaration that he never had been her physician for the treatment of female trouble, but that he had been her physician for the treatment of lumbago. It was not disputed at the trial that Dr. Marvel had been the plaintiff's physician; the sole dispute was whether he had treated her for female trouble or for lumbago. Moreover, the fact of the relationship of physician and patient was admitted by counsel for the defendant at the trial, and it was upon this admission that the court based its ruling excluding the deposition, as is shown by the record:

> "Mr. Gilbert (counsel for the defendant): Let the record show that the entire deposition of Dr. Marvel was offered.
>
> "The Court: That is on the understanding that what he would testify to was information gained while attending her as a physician?
>
> "Mr. Gilbert: Yes.
>
> "The Court: With that understanding the objection will be sustained."

The argument of appellant, therefore, that plaintiff having denied that Dr. Marvel had been her physician could not object to his testifying in the case, is without force.

In view of this stipulation, and because we do not find that the point has been made in the briefs, it is not necessary to consider the question whether the privilege may be allowed as to information claimed by the defendant to have been acquired by Dr. Marvel in the treatment of the plaintiff for female trouble in the face of her testimony that he attended her for the treatment of lumbago only.

It is unquestionably true that the testimony of Dr. Marvel, if competent, would have been material and relevant to the inquiry whether the pelvic condition of the plaintiff as testified to by herself, Dr. Tyrola, and the other physicians at the trial, was in any degree due to the assault. No authority has been brought to our attention by counsel, and we have not been able to find any, which would support the admission of the deposition under the circumstances presented by the record.

And although the tendency of the decisions in recent years has been toward a less liberal application of the ban of privilege, and that the privilege in this state in cases of damages for personal injuries has been abrogated snice this cause of action arose (Stats. 1917, p. 954), yet to hold that the deposition was admissible would be to deny to the plaintiff a substantial right. The ruling was proper.

For the reasons stated the judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; MELVIN, J.; OLNEY, J.

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180 Cal. 785

MUSGRAVE v. RENKIN et al. (L. A. 5244.)

(Supreme Court of California. Aug. 6, 1919.)

1. Mortgages ⚷309(3) — Release — Delivery.

Release of a mortgage, not delivered by the mortgagee in his lifetime, did not take effect.

2. Mortgages ⚷224 — Assignment — Validity.

A mortgagee's assignment of the mortgage to a trustee in consideration of the beneficiary's agreement to care for, nurse, and support the mortgagee during the remainder of his life, which agreement the beneficiary performed, was not a gift, and was not executory, but was a present transfer of title.

3. Trusts ⚷11(1) — Purpose — Support of Assignor.

Assignment of mortgage to a trustee in consideration of the beneficiary's agreement to continue to care for, nurse, and support assignor during the remainder of his life, created a valid trust.

Department 1.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by Hattie W. Musgrave, as executrix of the last will and testament of James Henry Caldwell, deceased, against Ida B. Renkin and E. W. Renkin and others. From judgment for defendants, plaintiff appeals. Affirmed.

Isidor B. Dockweiler, of Los Angeles, James C. Williams, of Kansas City, Mo., W. D. Finch and Dockweiler & Mott, all of Los Angeles, for appellant.

Lucius K. Chase, Walter L. Mann, and George F. Renkin, all of Los Angeles, for respondents.

SHAW, J. At the time of the transactions complained of the decedent, Caldwell, held a mortgage and note, executed to him by the defendants, for the sum of $4,450. The plaintiff's complaint purports to state a cause of action to set aside a release of this mortgage and an assignment of the same mortgage, in trust for certain purposes, made by the decedent in his lifetime, on the ground that they were obtained by fraud and undue influence, and on the further ground that the transaction was an attempt to make a gift, and that it was not completed during the lifetime of the donor. The court below found that the aforesaid contracts were not obtained by fraud, that they were executed without undue influence, and with full knowledge by the donor of their terms and effect, and that at the time his mind was clear and he was fully capable of transacting business. There was evidence sufficient to support these findings. Hence they are conclusive on appeal.

[1] The release was not delivered by the

deceased in his lifetime. Hence it did not take effect and need not be further considered.

[2, 3] The assignment of the mortgage was made in March, 1915, and was accompanied by a declaration of trust by the assignor and an acceptance thereof duly executed by the assignee. The effect thereof was to transfer the complete title to the mortgage and note to the trustee, and he thereafter held the same subject to the terms of the trust. The trust declaration provided that in case Caldwell, the decedent, left the home of the Renkins during his lifetime, the trustee should reassign the mortgage and note to Caldwell. That condition did not happen. Under the remaining conditions of the trust, if Caldwell remained in the home of Mrs. Renkin and was cared for by her up to the time of his death, the mortgage was then to be assigned by the trustee to Ida B. Renkin. That condition happened, and the mortgage was transferred in accordance with the declaration. The consideration for the transaction was the previous care of the decedent by Mrs. Renkin and her agreement to continue to care for, nurse, and support him during the remainder of his life. He was old and so afflicted that he required constant care and attention. The agreement of Mrs. Renkin was fully performed. The assignment to the trustee was not a gift, it was not executory, but was a present transfer of the title. Burkett v. Doty, 176 Cal. 89, 167 Pac. 518. The trust was in all respects lawful and valid. The result is that the findings and judgment of the court below in favor of the defendant must be sustained.

The judgment is affirmed.

We concur: LAWLER, J., OLNEY, J.

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181 Cal. 11

In re GOULD'S ESTATE. (S. F. 9058.)

(Supreme Court of California. Aug. 8, 1919. Rehearing Denied Sept. 4, 1919.)

1. Executors and Administrators ⟹188 — Allowances to Widow — Separation and Divorce.

A widow is entitled, under Code Civ. Proc. § 1464, to a reasonable allowance for support, although she has not lived in a family relation with her husband for some years prior to his decease, and has been granted an interlocutory decree of divorce.

2. Judgment ⟹524—Construction.

Words in a judgment or decree should not be construed independently, but should be considered in relation to the context in which they are found and in the light of the circumstances under which they were used.

3. Executors and Administrators ⟹188 Allowance to Widow—Effect of Award of Property on Divorce.

An interlocutory decree of divorce, requiring the husband to transfer to the wife certain property and allotting all other property of the community to the husband "free and clear of all claim of the wife," *held* not to defeat her statutory claim to a family allowance on his death.

Department 2.

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

In the matter of the estate of Frank H. Gould, deceased. From an order allowing Nettie Gould, the widow of deceased, a sum as a family allowance, E. B. Gould, as special administrator, appeals. Affirmed.

Frank Freeman, of Willow, and Walter E. Drobisch, of San Francisco, for appellant.

Joseph A. Brown, Elmer E. Robinson, Fabian D. Brown, and Robinson & Brown, all of San Francisco, for respondent.

LENNON, J. This is an appeal by E. B. Gould, a special administrator of the estate of Frank H. Gould, deceased, from an order allowing respondent, Nettie Gould, the widow of the deceased, the sum of $75 a month as a family allowance.

On January 19, 1918, the superior court of the city and county of San Francisco granted to Nettie Gould an interlocutory decree of divorce from Frank H. Gould, upon a cross-complaint filed by her in an action instituted by the said Frank H. Gould. This decree required the plaintiff, Frank H. Gould, to transfer to the respondent herein certain property, real and personal; it being at the same time ordered that—

> "All other property of said community, real, personal, or mixed, and of every description, is hereby assigned and allotted to the plaintiff, Frank H. Gould, free and clear of all claim of the defendant [Nettie Gould]."

Frank H. Gould died on January 26, 1918. On March 1, 1918, Nettie Gould made her application to the superior court of the city and county of San Francisco for a family allowance. The application was resisted on the ground that Nettie Gould had not been for many years in fact a member of the family of Frank H. Gould, and moreover, that Frank H. Gould died possessed of no property save that which had formerly been the property of the community and which had been awarded to him free and clear of all claim of Nettie Gould, including, so it is contended, her claim for a family allowance. On March 12, 1918, the court made the order appealed from allowing Nettie Gould a family allowance beginning with February 1, 1918, and continuing until further orders of the court.

[1] When a person dies leaving a widow, under section 1464 of the Code of Civil Procedure, such widow is entitled to a reasonable provision for her support to be allowed by the superior court or a judge thereof. This provision is not conditioned upon her having lived in a family relation with her husband at the time of his death. It follows, therefore, that the right of Nettie Gould to a family allowance must be determined independently of the circumstance that she had not lived with Frank H. Gould for some years prior to his decease. Farris v. Battle, 80 Ga. 187, 7 S. E. 263, approved in Smith v. Smith, 112 Ga. 351, 37 S. E. 407; King v. Executor of King, 64 Mo. App. 301.

At the time of the death of the decedent, Nettie Gould was his wife. She is now entitled to such rights as the law confers upon her, under the circumstances, as his widow, including the right to a family allowance, unless the property of the community awarded to the decedent was allotted to him free and clear of all claim by her, including the claim to a family allowance. Estate of Dargie, 162 Cal. 53, 121 Pac. 320.

In the Estate of Whitney, 171 Cal. 750, 154 Pac. 855, Mr. Justice Sloss, speaking on behalf of this court, said:

> "The widow's claim to a family allowance is strongly favored in our law. * * * A will may, of course, be so drawn as to put the widow to her election between taking the benefits given her by the testator and claiming her right of family allowance. So, too, the wife may, by agreement, surrender the privilege of applying for an allowance. Whether the right to demand an allowance is inconsistent with the will, or has been surrendered, is a question of interpretation of the will or the contract. In the case of a contract, we think the right should not be held to have been surrendered by an agreement between the spouses 'except by clear and explicit language.'"

In reason, the same principle should apply in construing the decree of a court dividing the property of the community between the spouses; the additional precaution being taken to avoid construing the decree so as to make it apply to rights which the proceeding was not intended to adjudicate.

[2, 3] In the Estate of Whitney, supra, the wife "waived all claims to her share of the community property and any and all other claims that she might have upon any of the estate disposed of by the said will." The will assumed to dispose of the entire estate of the husband. After careful consideration of the authorities in this state and other jurisdictions, the court decided that the wife had not waived her right to a family allowance. In view of the similarity of the language involved in that and in the instant case, this decision is entitled to great weight. An examination of the cases wherein it has been held that the wife had waived her statutory rights as widow reveals the fact that in each case the words used clearly imported an intention to surrender the very right afterwards claimed. In the Matter of Noah, 73 Cal. 583, 15 Pac. 287, 2 Am. St. Rep. 829, the wife agreed to relinquish "all her marital claims." In Wickersham v. Comerford, 96 Cal. 433, 31 Pac. 358, the wife relinquished all rights as wife in law or equity or by descent. In the Matter of Yoell, 164 Cal. 540, 129 Pac. 999, the language was even more explicit. It is true that the Estate of Lufkin, 131 Cal. 291, 63 Pac. 469, stands for the proposition that the word "claim" is sufficiently broad to include the statutory claim for a family allowance. But that case merely supports the conclusion that the words "free and clear of all claim of the defendant" contained in the decree here in question, would, standing alone, cover a claim for family allowance. We are bound, however, to construe these words not independently but in relation with the context in which they are found and in the light of the circumstances under which they were used. The preceding portions of the decree clearly and unmistakably indicate the subject-matter of the adjudication as the presently existing rights of the spouses in the property of the community. The first five clauses of the decree, which thus identify the rights to be determined, are followed by the general terms of the clause in question. "The general language of this clause must be held to relate to rights and interests of the same nature and description with those that have been already mentioned. The clause is in the nature of a 'sweeping clause,' and its use and object was to guard against accidental omissions; and the rule of construction in such cases is that the 'general words are restrained by the subject-matter.'" Mahaffy v. Mahaffy, 63 Iowa, 55, 18 N. W. 685. Construing, then, the general words "free and clear of all claim of the defendant" as restrained by the subject-matter, that is to say, the presently existing rights of the spouses in the property of the community, we are constrained to hold that they were not intended to and do not cover a claim for family allowance. It follows that the court did not err in granting the respondent's application for a family allowance.

The view which we have taken of the case makes it unnecessary for us to consider the question whether or not Frank H. Gould died possessed of any property save that which had formerly been the property of the community.

The order appealed from is affirmed.

We concur: WILBUR, J.; MELVIN, J.

181 Cal. 6

LEMLE v. BARRY et al. (Sac. 2676.)

(Supreme Court of California. Aug. 7, 1919.)

1. VENDOR AND PURCHASER 🔑144(2) — DEFECTS IN TITLE.

Where there has been no fraudulent misrepresentation as to the vendor's title, the fact that he has an imperfect title or no title at all at time of execution of a contract of sale does not invalidate the contract of sale; it being sufficient if vendor has good title at time he is called upon to perform.

2. VENDOR AND PURCHASER 🔑148 — DEFAULT—TENDER OF DEED.

Where, under a contract of sale of land, the making of the deed and the payment of a certain part of the purchase price were dependent and concurrent conditions, and time was of the essence of the contract, vendor could not put the vendee in default until he tendered his deed.

3. VENDOR AND PURCHASER 🔑86, 334(1) — CONTRACTS OF SALE—ABANDONMENT.

Under a contract of sale of land, wherein the payment of a certain part of the purchase price within a specified time and the delivery of the deed were dependent and concurrent conditions, the vendee after the expiration of the time within which he was to make such payment could consider the contract abandoned, where the vendor after such time and without tendering a deed gave notice of termination of the contract and forfeiture on the theory that the vendee was in default, and the vendee was entitled to a return of installments of the purchase price theretofore paid.

4. VENDOR AND PURCHASER 🔑336 — CONTRACT—ABANDONMENT BY VENDOR—DEMAND BY VENDEE FOR REIMBURSEMENT.

Where, under a contract of sale of land, payment of a certain part of the purchase price and delivery of the deed were dependent and concurrent conditions, and vendor, after termination of the time within which vendee should make such payment, gave notice of forfeiture of installments theretofore paid without tendering the deed, thus giving vendee the right to treat the contract as abandoned, a demand of the vendee for reimbursement as to installments theretofore paid, although long delayed, had the legal effect of an immediate demand, where the vendor requested delay, but made no effort to correct a defective title or tender a deed.

In Bank.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Julius Lemle against Mary M. Barry and others. Judgment for defendants, and plaintiff appeals. Reversed.

Theodore A. Bell, of San Francisco, for appellant.

Frank Freeman, of Willow, and Frank L. Hatch, of San Francisco, for respondents.

WILBUR, J. This action is brought by the vendee to recover from the vendor the initial payment of $5,000 made by the vendee at the time of the execution of the written contract for the sale of land. Plaintiff appeals from a judgment rendered upon sustaining a general demurrer. The contract, which is set out as an exhibit to the complaint, was entered into July 31, 1912, for the sale of the "Barry ranch," containing 9,400 acres of land, at the price of $15 per acre. The terms of payment were thus stated:

> "$5,000 to be paid on the execution of this agreement; one-half of the full purchase price to be paid on or before 60 days after the execution of this agreement; balance to be secured by note and mortgage payable on or before 3 years after date; said note and mortgage to be of approved form and with the usual covenants and conditions found in mortgages of real property. The same to bear interest at the rate of 6 per cent. per annum, payable annually," etc.

It also provided:

> "It is expressly understood between the parties hereto that the said party of the second part shall at the expiration of 60 days from and after the second payment herein stipulated and agreed to be paid, and provided further that said second party shall have made said first payment as herein agreed and otherwise conformed to said stipulation and agreement, be entitled to enter upon and take possession of said premises and farm the same in a manner pursued for like land; but said party of the second part hereby and herein agrees not to sell, convey, or otherwise incumber the whole or any portion of said land until said deed and mortgage has been executed according to the terms herein and heretofore contained."

The agreement also contained the usual provision that time is of the essence of the agreement, including the following provision, to wit:

> "And the said parties of the first part, on receiving such payments at the time and in the manner above mentioned, agree to execute and deliver to the party of the second part, his administrators or assigns, a good and sufficient deed to the property above described."

Apparently the parties contemplated that upon the making of the 60-day payment, the vendor would execute a deed and the vendee execute a note and mortgage for one-half of the balance of the purchase money. This construction of the contract seems to accord with the conduct of the parties, for, within 60 days from the date of the contract, the vendors furnished the vendee an abstract of title continued to August 12, 1912. On September 17, 1912, the vendee's attorney reported to the vendee his conclusion with reference to the abstract of title, and on or about said date the vendee communicated said report to the vendors with a written demand that the alleged defects therein be corrected. The attorney's report upon the abstract in question, which is set out in full in the complaint, is to the effect that it appeared therefrom that the vendors owned the title in fee to an undivided four-sevenths of most of the property known as the Barry ranch, and that three-sevenths belonged to Mary M. Barry (five-fourteenths) and to John H. Barry (one-fourteenth). Other objections to the title are not clear, in the absence of the abstract, which is referred to in the report. One objection is that the abstract shows that one and one-third acres of land had been deeded to the trustees of the Cottonwood school district. It is alleged in the complaint that the vendors never at any time have corrected or remedied the defects in their title, and that they never have presented a good and merchantable title to said premises, and have never been able to convey to the plaintiff a good and sufficient and merchantable title to said premises, and it is also alleged that the vendors have never performed or offered to perform any of the covenants contained in their agreement or tendered the plaintiff any deed or conveyance to said property. It is further alleged that on June 4, 1913, the vendors delivered to the vendee a notice, set out in the complaint in part, as follows:

> "You are hereby notified that you have forfeited any and all rights which you may hold in and to that certain agreement * * * dated the 31st day of July, 1912, * * * and said parties of the first part therein hereby declare such forfeiture by reason of your noncompliance with the terms and conditions of said agreement, and hereby terminate the same; * * * that subsequent to the service of such notice * * * the plaintiff demanded of the vendors the return to him of the $5,000; which he had paid them;" that the vendors requested of plaintiff time to consider his demand, and particularly to consider the objections which the plaintiff had made to their title to said premises, which request plaintiff granted, and from time to time, at the request of the vendors, extended the time for the vendors to consider plaintiff's demand and the ground of his objection to said title until November 13, 1914, when the vendors, for the first time, notified the plaintiff that they would not return to him the $5,000, or any part of the same.

It is further alleged:

> That the abstract of title was returned by the vendee to the vendors September 17, 1912, and that it was retained by them until July, 1914, "when they caused said abstract to be delivered to William Grant, at San Francisco, who was then and there acting as attorney for plaintiff in an attempt to satisfy Frank Freeman, Esq., who was then and there acting as attorney for the vendors in the premises, that the vendors' title to said land was defective, and that, unless the defects in said title were corrected, the vendors should return to the plaintiff the $5,000 paid to them as aforesaid, but thereafter, to wit, on or about September 1, 1914, said abstract was returned to the vendors, and has at all times since been retained by them, and not in the possession or under the control of this plaintiff; that plaintiff hereby elects to treat said contract as terminated by reason of the vendors' said breach thereof, and the plaintiff hereby offers, upon the return to him by the vendors of said sum of $5,000 with interest from June 4, 1913, at the rate of 7 per cent. per annum, to reconvey to the vendors, by a good and sufficient written conveyance, any and all interest which this plaintiff may have acquired in or to said premises by reason of the execution of said agreement, and to surrender said agreement to the vendors."

[1-4] The effect of a complete failure and of a defect of title of the vendor upon the relations of vendor and vendee has frequently been considered by the courts of this state. Where there has been no fraudulent misrepresentation as to the vendor's title, the fact that he has an imperfect title, or no title at all, at the time of the execution of the contract of sale, does not invalidate the contract of sale. Joyce v. Shafer, 97 Cal. 335, 32 Pac. 320; Backman v. Park, 157 Cal. 607, 610, 108 Pac. 686, 137 Am. St. Rep. 153; Krotzer v. Clark, 174 Pac. 657; Kerr v. Reed (App.) 179 Pac. 399. "In a case such as this it is permissible for one to contract to convey title to land which he does not own, and he is in default under such contract only when the vendee has performed his part of the contract and made demand for a title which the vendor is unable to furnish." Hanson v. Fox, 155 Cal. 106, 99 Pac. 489, 20 L. R. A. (N. S.) 338, 132 Am. St. Rep. 72, quoted with approval in Backman v. Park, supra, 157 Cal. 610, 108 Pac. 687, 137 Am. St. Rep. 153. It is sufficient, therefore, if the vendor has good title at the time he is called upon to perform. One-half of the purchase price (inclusive of the initial sum of $5,000) was to be paid 60 days after the execution of the contract. We may assume, as the parties seem to have done, and as we think the contract means, that the vendors were to make the contemplated deed upon such payment of one-half the price. The making of the deed and the payment of that part of the price were therefore dependent and concurrent conditions. In such case, even though time is of the essence of the contract, the vendor cannot put the vendee in default until he has tendered his deed. Boone v. Templeman, 158 Cal. 290, 297, 110 Pac. 947, 139 Am. St. Rep. 126, and cases cited; Sausalito, etc., Co. v. Sausalito Imp. Co., 166 Cal. 308, 136 Pac. 57. It follows that on June 4, 1913, the vendee was not in default for failure to make the payment due 60 days from the date of the contract, and that the attempt to declare a forfeiture on the theory that the vendee was in default was unavailing, and that the contract still remained in full force and effect. Boone v. Templeman, supra, 158 Cal. 298, 110 Pac. 947, 139 Am. St. Rep. 126. Under the circumstances the vendors' notice was, in effect, an unauthorized attempt to abandon

the contract. It is true that their action was predicated upon the erroneous claim that the vendee was in default for failing to make the 60-day payment. If the vendee, in fact, had been in default, a notice that the contract was terminated would have been proper, and the vendors would be no longer bound either to convey the land or refund the purchase money. Such notice would have been in strict accord with the contract. Glock v. Howard, 123 Cal. 1, 10, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Oursler v. Thatcher, 152 Cal. 739, 93 Pac. 1007; Skookum Oil Co. v. Thomas, 162 Cal. 539, 549, 23 Pac. 363; Cross v. Mayo, 167 Cal. 594, 140 Pac. 283; Myers v. Williams, 173 Cal. 301, 159 Pac. 982. As it was, the vendee immediately upon receiving the vendors' unwarranted notice had the right to treat the same as an abandonment of the contract, and to the return of the installment of the purchase price theretofore paid. Glock v. Howard, supra. The vendee, it is true, delayed his demand for reimbursement, and when made it remained under consideration for some months by the vendors, until November 13, 1914, when they finally refused to make such repayment and failed to go on with the contract. With reference to the long delay of the vendee in making such demand for reimbursement, it is sufficient to say that the vendors requested delay, and that, although the contract was in effect all this time, no effort was made by the vendors to correct the title, or to tender a deed, and they did not withdraw their declaration that the contract was terminated. Hence the legal effect of the demand of the vendee for the return of the purchase money paid was the same as though made at once.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; LAWLOR, J.; OLNEY, J.; MELVIN, J.

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181 Cal. 1

LEMLE v. BARRY et al. (Sac. 2751.)

(Supreme Court of California. Aug. 7, 1919.)

1. Vendor and Purchaser ⚷342 — Contracts of Sale—Abandonment by Vendor—Remedies of Vendee.

Where a vendor has failed to tender a deed under a contract of sale and to correct a defective title, the vendee may sue for damages for breach of the contract, or may sue to recover installments previously made, but cannot have both remedies, the former being based on the contract, and the latter on an abandonment of the contract.

2. Vendor and Purchaser ⚷170 — Contracts of Sale—Default—Necessity for Tender.

In order to put in default the vendor in a contract of sale of land, under which payment of a certain part of the purchase price and delivery of the deed were dependent and concurrent conditions, and in which time was of the essence of the contract, the vendee must tender the purchase money.

In Bank.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Julius Lemle against Mary M. Barry and others. Judgment for defendants, and plaintiff appeals. Reversed.

Theodore A. Bell, of San Francisco, for appellant.

Frank Freeman, of Willow, and Frank L. Hatch, of San Francisco, for respondents.

WILBUR, J. [1] This is an action between the same parties as in Sac. No. 2676, 183 Pac. 148, this day decided. By stipulation of the parties both cases were submitted at the same time and upon the same briefs. In a written stipulation filed by the parties it is stated that the questions involved in the two cases "are identical." In the petition for transfer to this court respondents state that this is the same case as Sac. No. 2676. The appellant, however, claims that in Sac. No. 2676 "he was entitled to recover from the respondents the payment made by him upon the execution of the agreement of July 3, 1912, and in his second action (Sac. No. 2751) to recover damages for breach of said contract," basing his contention upon the same principle of law in both instances. In the transcript on appeal in one case the second amended complaint alone is brought to this court, and in the other the amended complaint. The original complaint is not brought up in the record. It appears, however, from the dates in the two cases that, while both complaints are based in large part upon the same facts, the case now under consideration is a separate and distinct suit in which plaintiff seeks to recover $50,000 damages for the breach of the written contract, more particularly referred to in the opinion this day filed in Sac. No. 2676. The facts alleged in the two complaints are substantially identical, and, so far as necessary, are set out in the above-mentioned opinion, save that in this action for damages it is alleged not only that the plaintiff has fully performed each and every covenant contained in his said agreement by him to be performed, but that he has at all times been ready, willing, and able to pay to the vendors the one-half of the full purchase price of said premises, and to deliver the note and mortgage called for by the contract, and that he has been ready to perform each and every covenant and condition of said agreement by him to be performed in the event that the vendors had corrected, removed, or remedied the defects in their title and were able to convey to the plaintiff a fee-simple title. In lieu of the allegations contained in the action to recover the purchase money, to the effect that the plaintiff had demanded a return of the $5,000, it is alleged in this action that the defendants at all times since June 4, 1913, the date of the service of the notice that the contract was terminated, have failed and refused to correct the defect or to convey or to offer to plaintiff a good, sufficient or merchantable title to said land. As the parties have failed to make any distinction between the two actions or base any claim upon that distinction, it seems unnecessary for us to discuss at any length such differences. It seems to be agreed by the parties that both decisions should be either affirmed or reversed. It should be noted, however, that the remedies in the two cases are quite distinct and wholly inconsistent, and that the plaintiff cannot have both remedies. McGibbon v. Schmidt, 172 Cal. 70, 155 Pac. 460; Elliott on Con. vol. 3, § 2097. The action to recover the purchase money is based upon the theory that by the conduct of the vendors, acquiesced in by the vendee, the contract had been terminated, and the action is in the nature of one for money had and received, namely, money paid to the vendors for which, in view of the termination of the contract, the vendee has received no consideration. This is clearly pointed out in the case of Thomas v. Pacific Beach Co., 115 Cal. 136, 46 Pac. 899, which involved the application of the statute of limitations. It was there held that such an action was not an action upon the contract. See, also, Shively v. Semi-Tropic Land, etc., Co., 99 Cal. 259, 33 Pac. 848; Joyce v. Shafer, 97 Cal. 335, 32 Pac. 320; Aikman v. Sanborn, 52 Pac. 729; Heilig v. Parlin, 134 Cal. 99, 66 Pac. 186. On the contrary, the action for a breach of contract is one based upon the contract. Ahlers v. Smiley, 163 Cal. 200, 124 Pac. 827.

[2] As we have held in Sacramento No. 2676, when the final payment became due it was essential for the vendors to tender a deed in order to put the vendee in default and to enforce a forfeiture. It is also true that it is necessary for the vendee to tender the purchase money in order to put the vendors in default (Townsend v. Tufts, 95 Cal. 257, 261, 30 Pac. 528, 29 Am. St. Rep. 107; Leach v. Rowley, 138 Cal. 709, 716, 72 Pac. 403; Sausalito, etc., Co. v. Sausalito Imp. Co., 166 Cal. 302, 308, 136 Pac. 57), unless such tender was excused under all the circumstances (Merrill v. Merrill, 95 Cal. 334, 30 Pac. 542; Id., 102 Cal. 317, 36 Pac. 675; 38 Cyc. 135).

It is a matter of some doubt, which is not discussed by the parties, whether the general allegations of the complaint sufficiently allege either a tender or a sufficient excuse for a failure to make a tender. See Lynn v. Knob Hill Imp. Co., 177 Cal. 56, 169 Pac. 1009. In view of the fact that the parties concede that both cases should be determined in the same way by reversal or affirmance, and that the plaintiff cannot recover in both cases, and that the recovery in each case would be substantially the same, and that the other case must be reversed for the reasons stated in the opinion, it follows that this judgment should also be reversed.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; LAWLOR, J.; MELVIN, J.

SHAW, J. I concur in the judgment. The complaint does not allege that the plaintiff ever tendered to the defendants the one-half of the price that was to be paid upon the execution of the deed. The contract set forth in the complaint shows that the agreement of the defendants to convey the title and that of the plaintiff to pay the first half of the price upon such conveyance were dependent and concurrent covenants. In this respect the case differs from Glock v. Howard, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, where the payment of the price was made a condition precedent to the right to demand a deed. What is said in that case on the subject must be considered with this difference in mind. But under the contract here involved a tender would be necessary as a condition precedent to the accrual of a cause of action for damages against a vendor for a refusal to convey. This is the cause of action stated in the complaint. Such tender may be rendered unnecessary, however, by the conduct of the vendors, and where this occurs the tender is excused, and the action will lie without it. The question is discussed at length in Gray v. Dougherty, 25 Cal. 278. It is there said that, where the vendee "by any adversary steps makes it known that he does not intend to observe and perform his covenant except upon compulsion, thus in effect refusing in advance of a demand, neither law nor equity imposes upon the vendee the observance of a ceremony thus made idle and fruitless." Page 280. In this case the complaint avers that the defendants gave notice to the plaintiff that they had declared the contract rights of plaintiff forfeited and that the contract was terminated. This was notice in advance that they would not perform, and under the rule above stated it absolved the plaintiff from the necessity of making a tender of payment and demand for a deed in order to put the defendants in default and lay a foundation for the action. See, also, 39 Cyc. 1562; Merrill v. Hexter, 52 Or. 138, 94 Pac. 972, 96 Pac. 865; Sharp v. West (D. C.) 150 Fed. 461; 2 Warvelle on Vendors, § 756. For these reasons I believe the complaint stated a good cause of action, and that the court erred in sustaining a demurrer thereto.

It appears from the reference in the opinion of Justice WILBUR to case No. 2676 between the same parties that the plaintiff is at the same time pursuing two remedies against the defendants, based on the same transaction—one to recover the price paid, upon the theory that there has been a rescission or abandonment; the other to recover damages for the breach of the covenant to convey. In view of this fact, it seems proper to say that the two remedies are inconsistent, and that a recovery cannot be allowed in both actions. McGibbon v. Schmidt, 172 Cal. 75, 155 Pac. 460, and cases there cited. When the defendant wrongfully repudiated the contract of sale, the plaintiff had his election, either to consider it rescinded and sue for the part of the price he had paid, or to consider it still in force and sue for damages caused by the breach. When a contract is rescinded, it ceases to exist. If the action to rescind or an action based on an alleged rescission or abandonment is successful, the contract is forever ended, and its covenants cannot thereafter be enforced by any action. If it fails because the alleged rescission did not take place, it has been held that the prosecution of such action does not bar a subsequent action for damages for breach of the contract or to enforce the contract specifically. Zimmerman v. Robinson, 128 Iowa, 72, 102 N. W. 814, 5 Ann. Cas. 960; Harrill v. Davis, 168 Fed. 187, 94 C. C. A. 47, 22 L. R. A. (N. S.) 1153, and note; Bunch v. Grave, 111 Ind. 351, 12 N. E. 514; Clark v. Heath, 101 Me. 530, 64 Atl. 913, 8 L. R. A. (N. S.) 144, and note. But if the facts exist which justify a rescission by one party, and he exercises his right and declares a rescission in some effectual manner, he terminates the contract, and it cannot thereafter be made the basis of an action for damages caused by a breach of its covenants. The questions that may arise under such a dilemma are not presented upon this appeal; for the record in neither case shows the pendency of the other action, and the court cannot take judicial notice of it. The matter is mentioned in order to call the attention of the parties to the conditions that may arise in the subsequent progress of the two cases.

I concur: OLNEY, J.

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180 Cal. 771

THOMSON v. LA FETRA et al.
(L. A. 4719.)

(Supreme Court of California. July 30, 1919.)

WATERS AND WATER COURSES ⚷171(2)—FLOODING LANDS—DIVERSION OF STREAM—DAMAGES—"FLOOD WATER."

Where defendants, to prevent injury to their land from seasonal waters from a canyon, erected a wooden barrier which turned the waters onto plaintiff's land, they were liable to plaintiff as for a trespass; the rule as to waters which are a common enemy having application only to "flood waters," waters escaping because of their height from confinement in a stream and running over the adjacent county.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Flood Water.]

In Bank.

Appeal from Superior Court, Los Angeles County; Stanley A. Smith, Judge.

Action by Janet Thomson against T. W. La Fetra and another. From judgment for plaintiff, defendants appeal. Affirmed.

John E. Daly and James H. Daly, both of Long Beach, for appellants.

E. H. Allen and Porter, Morgan & Parrot, all of Los Angeles, for respondent.

LENNON, J. This is an appeal from a judgment upon the judgment roll alone which shows that the defendants maintain a dam which prevents the entrance and flow of certain surface waters upon and across their lands and so diverts these waters that they flow upon the land of the plaintiff.

The lands of the parties to the action are located near the city of Glendora in Los Angeles county. The lands are bounded on the north by a public highway which runs from east to west. The land of the plaintiff is situated several hundred feet to the east of that of the defendants. Some distance to the north are foothills. Seven hundred and fifty feet directly north of the defendants' lands is the mouth of a canyon. Following heavy rains there is a stream in this canyon, and, owing to the grade and to the fact that it follows the east wall of the canyon, this stream is given a southerly direction at the canyon's mouth. It originally proceeded in a southerly and southeasterly direction to a point 400 feet north of the defendants' lands, where, owing to the heavy growth of native vegetation, it became completely diffused. The water continued, however, to follow the slope of the country to the south and southeast toward the lands of the defendants, and some of it reached these lands. None of the water ever reached the plaintiff's land prior to 1915.

In 1900 a wooden flume was built to carry the water from the canyon. The flume was at that time carried no further than the former point of diffusion. The land at this point was cleared of the native vegetation and placed under a state of cultivation. In 1905 or 1906 this wooden flume was extended to the public highway by the upper proprietors, and by the county was continued by means of a culvert under the traveled portion of the highway which bounds the defendants' lands on the north. In 1914 this wooden flume was replaced by one of concrete of somewhat increased dimensions. The latter fact, however, did not materially alter the situation, for the wooden flume was large enough to carry any stream which has ever followed the course described.

Between the years of 1905 or 1906 and 1914 the defendants erected and maintained an earthen dam by which they sought to protect themselves from the water discharged from the flume. This dam was erected on the highway south of the point of discharge from the culvert, but north of the north line of the defendants' property. It appears that in the years 1907, 1911, and 1914, which were the only years between 1905 or 1906 and 1915 in which any appreciable amount of water was carried in the flume, this earthen dam did not prevent the flow of the water over the defendants' lands. In 1914 the defendants replaced the earthen dam with the structure here complained of, a substantial wooden affair 5 feet high and over 300 feet long. This was built without the permission of the county authorities. This structure effectively turned the large volume of water carried by the flume following the heavy rains of 1915 and caused it to flow upon the lands of the plaintiff, where it occasioned the damage complained of.

With these facts as a basis, the plaintiff sought and secured injunctive relief and a judgment in the sum of $329 as damages. The defendants have appealed, contending that the bulk of the water discharged from the flume would never have flowed naturally to their lands, and that the upper proprietors had gained no prescriptive right to have this water carried off by them. With these contentions as a basis, they argue that they had no duty to receive the water which they describe as a "common enemy" to themselves and the plaintiff. They claim the right to repel this so-called "common enemy" by means of the dam in question and assert that any injury which may be occasioned the plaintiff thereby is damnum absque injuria.

The rule applicable to waters which are a "common enemy" cannot be invoked under the facts of this case. That rule has application only to flood waters in the strict sense, that is to say, to waters escaping because of their height from the confinement of a stream and running over the adjacent country. The waters here involved are not of that sort.

The water not being in any sense flood water, the defendants, by changing its course and casting it upon the lands of the plaintiff, were guilty of a trespass. The fact that the water may have threatened injury to the defendants affords no justification or excuse to palliate the wrong done. If the injury threatened to the defendants' lands was the result of wrongful artificial changes made by upper proprietors, resulting in an increased, accelerated, or concentrated flow of water upon and across the lands of the defendants, their remedy was to proceed by appropriate action against the wrongdoers to enjoin such changes or to have the nuisance abated, and not by an attempt to shift the burden of the wrong upon an innocent third party who but for their intervening willful act would have suffered no injury at all. Larrabee v. Cloverdale, 131 Cal. 96, 63 Pac. 143; Castle v. Reeburgh (Okl.) 181 Pac. 297.

The damage suffered by the plaintiff not having resulted from a lawful act, it cannot be considered damnum absque injuria. The view which we have taken of the case makes it unnecessary for us to discuss and decide the plaintiff's contention that the upper proprietors had acquired a prescriptive right to have the water in question carried off over the defendants' lands.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LAWLOR, J.; MELVIN, J.; OLNEY, J.

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180 Cal. 730

THOMPSON v. SOUTHERN PAC. CO.
(L. A. 4913.)

(Supreme Court of California. July 28, 1919.)

1. PARTIES ⚷95(5)—AMENDMENT OF DEFECTS —MISNOMER OF CORPORATE DEFENDANT.

Where the agent of the real defendant, a corporation, appearing specially, received the summons and knew the contents of the complaint, there was proper service of process, despite a misnomer of defendant, which the court, having acquired jurisdiction of the person of defendant, as well as the subject-matter of the suit, possessed the power to correct.

2. MASTER AND SERVANT ⚷296(10) — INSTRUCTIONS — CONTRIBUTORY NEGLIGENCE — OBVIOUS DANGERS.

An instruction that it is not contributory negligence for an employé to neglect to investigate conditions as to the safety of appliances, and in such case he assumes only the risk of danger which he has knowledge of, or one so obvious he must know of it, or as to which he has been put upon inquiry by suggestion of danger, and which by gross carelessness he has neglected to notice, *held* not erroneous, as being too great a limitation on the doctrine of assumption of risk.

3. MASTER AND SERVANT ⚷295(7)—INSTRUCTION — ASSUMPTION OF RISK — KNOWLEDGE BY SERVANT OF DANGER.

An instruction that knowledge by an employé of the defective or unsafe character of appliances is not a bar to recovery unless it also appears he understood and appreciated the danger, and thereafter consented to use the appliances, is not erroneous as laying on employer the duty to prove employé's state of mind and the extent of his understanding.

4. MASTER AND SERVANT ⚷217(2)—ASSUMPTION OF RISK—KNOWLEDGE.

A servant is deemed to have assumed the risk when he knows, not only the defects in instrumentalities used by him, but the dangers and risks arising therefrom.

Department 2.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Paul Thompson against the Southern Pacific Company. From judgment for plaintiff, defendant appeals. Affirmed.

Henry T. Gage and W. I. Gilbert, both of Los Angeles, for appellant.

Chas. E. Barrett, of Las Vegas, Nev., and Harry A. Hollzer and L. D. Collings, both of Los Angeles, for respondent.

MELVIN, J. Plaintiff was successful in a suit for damages on account of personal injuries. Defendant appeals from the judgment.

In the complaint filed November 10, 1910, against Southern Pacific Railroad Company, it was alleged that the defendant was "a corporation organized and doing business as a railroad company in the state of California, and under and pursuant to the laws of the state of California." On that day summons was issued, and on November 1, 1911, an alias summons was given in said action. On December 29, 1911, a copy of said alias summons, attached to a copy of the complaint, was served upon F. H. Reed at San Francisco. Mr. Reed at that time was the duly authorized agent (upon whom process might be served in the state of California) of Southern Pacific Company, a corporation organized and existing under and by virtue of the laws of the state of Kentucky. An answer to the complaint was filed on January 18, 1912, by the Southern Pacific Railroad Company. On January 27, 1912, Southern Pacific Company, appearing especially for the purposes of the motion, gave notice of intention to move to quash the alias summons served on Mr. Reed and to set aside pretended service upon the grounds, among others, that said summons had not been regularly issued, and that said Southern Pacific Company was not a party to the action. This motion was heard and denied on February 19, 1912.

On December 10, 1914, plaintiff served and filed his notice of motion for leave to amend his complaint by striking out the word "Railroad" wherever it appeared as a part of the name of defendant. The motion was made upon the ground that the true name of defendant was "Southern Pacific Company" instead of "Southern Pacific Railroad Company," and on the further ground that Southern Pacific Company had been properly served and had appeared in the action. On December 12, 1914, Southern Pacific Company served and filed its notice of objections and answer to said motion to amend plaintiff's complaint, pleading, among other things, that it was organized under the laws of Kentucky, and denying that it had any corporate connection whatsoever with the Southern Pacific Railroad Company. There was also an averment that plaintiff's alleged cause of action (which was based upon physical injuries received on November 12, 1909) was barred by the statute of limitations. This answer was accompanied by certain affidavits. One of these was made by D. P. Ewing. In it he deposed that he was assistant secretary of Southern Pacific Railroad Company, defendant in the action, which was a corporation formed under the general laws of California, Arizona, and New Mexico, and that he was not an officer of Southern Pacific Company, a Kentucky corporation. T. O. Edwards deposed that he was assistant secretary of Southern Pacific Company, a corporation created by the laws of Kentucky; that said corporation had not been served with process, and that said Southern Pacific Company was a "different, separate, and distinct corporation from the above-named Southern Pacific Railroad Company, the defendant in the above-entitled action." Plaintiff's motion for leave to amend was heard, Southern Pacific Company appearing in opposition thereto, and on December 16, 1914, leave to amend the complaint was granted by the court. On December 18, 1914, the amended complaint, naming Southern Pacific Company, a corporation (but without specifying its principal place of business), as the defendant, was filed.

On December 28, 1914, Southern Pacific Company, still reserving its special appearance theretofore made in opposition to the motion for leave to amend the complaint, filed its answer, in which objection was still made to the jurisdiction of the court.

The cause was thereafter tried, and a verdict was rendered, which was set aside. Upon the calling of the case for trial the second time, Southern Pacific Company made formal objection to the introduction of testimony upon the grounds that, upon the face of the record it appeared that within one year after the accident Southern Pacific Railroad Company had been sued; and had duly answered; and that after five years following the accident the Southern Pacific Company, a Kentucky corporation, had been brought into the case by the expedient of amending the complaint, the said amendment having been made "without process ever having been served upon the Southern Pacific Company."

Respondent insists that there is no record to support the history of the controversy over the pleadings, and that as all intendments are in favor of the correctness of the orders of the superior court, they must stand. It appears that the two orders attacked by appellant were made each by a different judge. Another judge, the Hon. Louis W. Myers, who presided at the second trial of the cause, authenticated the entire record sought to be here used. As the two judges who presided at the hearings of appellant's motions were on the superior bench when the appeal was taken and the record prepared, respondent insists that no bill of exceptions embodying the supposed proceedings before them should be recognized and used by this court unless each authenticated that part of it relating to the motion which he heard. In support of this position they cite such authorities as Cummings v. Conlan, 66 Cal. 403, 5 Pac. 796, 903, Turner v. Hearst, 115 Cal. 394, 47 Pac. 129, Muzzy v. McEwen Lumber Co., 154 Cal. 685, 98 Pac. 1062, and Waymire v. California Trona Co., 176 Cal. 395, 168 Pac. 563.

[1] It is unnecessary to decide at this time the interesting question raised by respondent, because, assuming that the record is properly authenticated, it fully supports the orders attacked by appellant. The case upon which appellant relies principally for support of its assertion that it was brought into court without service of process is Altpeter v. Postal Telegraph-Cable Co., 26 Cal. App. 705, 148 Pac. 241. There is, however, a wide and essential difference between that case and the one at bar. In that case no representative of the corporation against which plaintiff had a cause of action was ever served with summons. In this case the real defendant's agent received the summons and knew the contents of the complaint because the corporation appeared specially in the action. True, there was a misnomer of the party defendant in the pleading, but the court having acquired jurisdiction of the person of the defendant, as well as the subject-matter of the suit, possessed the power to correct the misnomer. This case on the point under discussion is essentially identical with and is ruled by Nisbet v. Clio Mining Co., 2 Cal. App. 436, 83 Pac. 1077. Commenting upon that authority in the case of Reclamation District, etc., v. Diepenbrock, 168 Cal. 577, 143 Pac. 763, this court used the following language:

> "In Nisbet v. Clio Mining Co., 2 Cal. App. 441, 83 Pac. 1077, the authorities are discussed and the rule approved which sanctions an amendment to correct a mistake in pleading the corporate name of a party to an action. With the conclusions reached by the District Court of Appeal in that case we fully agree, and we find no error in the action of the court in the case before us, permitting the amendment."

The record reveals the following facts: Plaintiff, who was a painter, had been employed by defendant for a period of about three months before the occurrence of the injury to him. He was sent out to paint a semaphore near a station. He had never before been required to paint an entire semaphore. Opposite the station, not on a main track, but on a "house track," stood a box car, which was also near the semaphore. After painting a part of the semaphore from the ladder attached to the semaphore pole, and being unable, as he testified, to reach the other part of the semaphore from this ladder, plaintiff, with the assistance of another employé of defendant from whom he had formerly taken orders, procured from the platform a ladder, which was placed on top of the box car with the upper end against the semaphore pole. From this ladder plaintiff continued his work. Both the tower man (who signaled all trains and adjusted switches) and the station agent knew that plaintiff was then at work. While he was so engaged one of defendant's freight trains came in on the main track and stopped. Plaintiff was in plain view of the train crew, yet a car was uncoupled from the freight train and sent down the "house track" against a line of cars upon one of which rested the ladder on which plaintiff stood. As a result plaintiff was hurled to the ground and seriously hurt.

[2] Defendant attacks some of the instructions, among others the following:

> "It is the duty of the master to provide reasonably safe and suitable appliances with or upon which his employé is to work. As to those things and appliances which it becomes the master's duty to furnish, the servant, or employé, has the right to assume that the master has done his duty, and that the appliances are reasonably safe and secure, and it is not contributory negligence for an employé to neglect to investigate and examine the conditions as to the safety of the appliances. In such a case the employé is held only to have assumed the risk of a danger of which he had knowledge, or the risk of a danger which was so obvious that he must have known of it, or of one as to which he had been put upon inquiry by discovery or suggestion of danger, and which by gross carelessness he has neglected to take notice of."

The last sentence of the instruction comes particularly under defendant's condemnation as being too great a limitation upon the doctrine of assumption of risk. Virtually the same language will be found in the opinion in Silveira v. Iversen, 128 Cal. 187–192, 60 Pac. 687.

[3, 4] Another instruction was as follows:

> "Knowledge by the employé of the defective or unsafe character or condition of any ways, appliances, or structures of his employer is not a bar to recovery for any injury caused thereby, unless it shall also appear from a prepon-

derance of the evidence that such employé fully understood, comprehended, and appreciated the dangers incident to the use of such defective ways, appliances, or structures, and thereafter consented to use the same or continued in the use thereof."

It is asserted that this instruction entirely reverses the rule regarding "burden of proof," and lays upon defendant the duty of proving the state of plaintiff's mind and the extent of his understanding. The criticism is not well taken. The instruction merely states a well-known rule that a servant is deemed to have assumed a risk when he knows, not only the defects in the instrumentalities used by him, but the dangers and risks arising by reason of such defects. Nofsinger v. Goldman, 122 Cal. 609–618, 55 Pac. 425; Pigeon v. Fuller, 156 Cal. 691, 105 Pac. 976. In this case plaintiff must have known that he would almost certainly be injured if a car should be sent down against the cars on the "house track." But it was for the jury to determine whether or not he knew that there was any imminence of the use of that track for switching at that time and under the existing circumstances.

Two other instructions offered by defendant were given with modifications based upon the principles discussed above. The court committed no error in making the changes to which defendant objects. The charge to the jury was full and fair.

Defendant's motion for nonsuit was properly denied.

The judgment is affirmed.

We concur: WILBUR, J.; LENNON, J.

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180 Cal. 736

BENNETT et al. v. POTTER. (L. A. 4946.)

(Supreme Court of California. July 30, 1919. Rehearing Denied Aug. 28, 1919.)

1. Partition 🔑114(6)—Attorney's Fees.

Code Civ. Proc. § 796, contemplates that allowances for attorney's fees in a partition proceeding be made to the party, and not directly to the attorneys.

2. Attorney and Client 🔑144—Compensation—Construction of Contract.

In view of Civ. Code, §§ 1647, 1654, 1638, as to interpretation of contracts, under a contract between attorneys and client relating to attorney's compensation in action to partition land and for an accounting, providing that attorneys "shall receive as their compensation 10 per cent. of whatever is recovered, either by litigation or settlement, excepting that if the court makes an allowance for an attorney's fee in said partition suit or other suits then such fee shall belong to said law firm, exclusive of the said 10 per cent. so to be paid by" the client, the attorneys were not entitled to 10 per cent. of the land set apart to the client in addition to a fee allowed, but were only entitled to such fee, as far as the partition suit was concerned, and 10 per cent. of the amount recovered in the accounting.

3. Partition 🔑95—"Recover."

The land set off to one party in a simple partition suit to sever the unity of title and segregate the possession is not "recovered" by such party, partition in such case merely transforming the right of common possession of the whole tract into a right to the exclusive possession of the same interest or share as represented by a parcel set off in severalty.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Recover.]

4. Account Stated 🔑4—Mode of Stating and Settling.

An account stated may be shown by proof of an oral agreement as to the amount due, although no writing is exhibited at the time.

5. Contracts 🔑238(2)—Modification—"Account Stated"—"Executory Contract."

An account stated is a mere unperformed promise to pay a stated sum to another, and is therefore an executory contract, under Civ. Code, § 1661, and hence an oral statement of account cannot be shown to alter a written contract, under section 1698.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Account Stated; Executory Contract.]

6. Account Stated 🔑1—Theory.

The theory upon which an action of account stated is allowed is that transactions have occurred between parties from which the relation of debtor and creditor has arisen, that one or both have rendered or made statements specifying definitely the amount due on account thereof, and thereupon there has been an agreement, express or implied, by the one who is the debtor, to the other, that a sum is due from him on such account, together with express or implied promise to pay the same.

7. Account Stated 🔑1—Number of Items.

Originally an account stated could exist only when the accounts were mutual, or where there was more than a single item, but it has now become settled there can be an account stated where but a single item is included or referred to therein.

8. Account Stated 🔑7—Written Promises—Oral Statements.

Account stated cannot become a substitute for an action of debt upon a written promise in writing, the written promise being a higher evidence of the debt, and the debtor being already bound thereby, and there being no uncertainty to be settled which would constitute a consideration for a new oral promise to pay.

9. Contracts 🔑47—Consideration.

There must always be a consideration to support a valid promise.

10. Account Stated ⚿3—Previous Transactions.

There can be no account stated where there have been no previous transactions between the parties from which the relation of debtor and creditor could arise.

Department 1.

Appeal from Superior Court, Los Angeles County; G. W. Nichol, Judge.

Action by Edmon Gordon Bennett and others against Howard J. Potter. Judgment for plaintiffs, and defendant appeals. Reversed.

William M. Hiatt and Irwin, Smith & Rosecrans, all of Los Angeles, for appellant.
Hugh Kelley and Bennett, Turnbull & Thompson, all of Los Angeles, for respondents.

SHAW, J. The defendant appeals from a judgment in favor of the plaintiffs. The complaint is in four counts. The only controversy concerns the first and the third counts, each of which covered the same demand. The plaintiffs were attorneys at law and partners in the practice of law. The defendant was the owner as tenant in common with S. W. Slinkard and Laura Slinkard, his wife, of 160 acres of land and certain crops and other personal property used on the land in connection with its cultivation, the defendant having eleven-sixteenths interest therein and the Slinkards five-sixteenths interest. In July, 1914, he employed the plaintiffs, as attorneys, to prosecute actions for the partition of the land and the division of the property and for an accounting between himself and the Slinkards respecting their transactions as tenants in common of the land. The contract of employment was in writing. The plaintiffs began two actions, one for partition, the other for an accounting, and prosecuted the same to a final determination. The first count of the complaint states a cause of action on the written contract aforesaid, claiming $2,750 as the amount due thereon. The third count alleges that on April 6, 1915, an account was stated between the parties embracing the services in the two actions, whereby the sum of $2,750 was found to be due from the defendant to the plaintiffs, which sum remained unpaid. The decision of the case depends upon the meaning and effect of the aforesaid contract. It will be necessary to set out the important parts thereof in full.

It recited that the defendant and the Slinkards were the owners of the land and the personal property thereon as tenants in common, and stated their respective interests therein, and that the defendant desired to employ the plaintiffs "to prosecute on his behalf a suit for a partition of the said property, to the end that his interest in the said property may be set aside and segregated from that of the said S. W. Slinkard and his wife, and to secure his interests in the personal property, improvements, etc., and also to bring suit for an accounting between himself and S. W. Slinkard and his wife, to the end that he may recover, or it may be determined just what his interests are in the profit and income from the property since he purchased the $^{11}/_{16}$ interest on September 25, 1913." It then proceeded to state an agreement that plaintiffs should proceed with such litigation as they deemed necessary, and prosecute the same to a conclusion or settlement to the satisfaction of Potter. With reference to the liability of Potter to plaintiffs for the services the agreement was as follows:

> "It is understood and agreed that the said law firm will advance the necessary expenses and other costs and shall receive as their compensation ten (10) per cent. of whatever is recovered, either by litigation or settlement, excepting that if the court makes an allowance for an attorney's fee in said partition suit or other suits then such fee shall belong to the said law firm, exclusive of the said ten (10%) per cent. so to be paid by the party of the first part."

[1] The court found that in the partition suit the court had allowed to Potter, plaintiff therein, the sum of $1,000 as attorney's fees. This is inaccurate. The judgment in that suit was introduced in evidence, and it shows that the court allowed $1,000 to Bennett, Turnbull & Thompson, as attorneys for Potter, declaring the same to be a lien on the land awarded to Potter, and $500 to the attorneys for the Slinkards, and declared the same a lien on the land awarded to them. The allowance was made directly to the attorneys and not, as the law contemplates, to the parties. Code Civ. Proc. § 796.

1. As to the first count, the findings in the case at bar were to the effect that the plaintiffs were entitled to recover of Potter the sum of $2,750 on account of the services rendered in pursuance of the written contract. Of this sum $1,750 was allowed as 10 per cent. on the value of the land set off to Potter and $1,000 on account of the fee allowed in the partition suit. The findings declare that the meaning of the contract of employment is "that as compensation for such services said plaintiffs were to receive 10 per cent. of whatever was allowed or recovered by said litigation or settlement thereof; and in addition thereto, to receive any attorney's fees allowed to the defendant, Howard J. Potter, in such litigation."

[2] We cannot agree with this interpretation. The provisions of the contract regarding compensation are uncertain and ambiguous. Such a contract "may be explained by

reference to the circumstances under which it was made, and the matter to which it relates" (Civ. Code, § 1647); it is to be "interpreted most strongly against the party who caused the uncertainty to exist" (Civ. Code, § 1654); and the language does not of necessity govern its interpretation if it involves an absurdity (Civ. Code, § 1638). The contract was drawn by the plaintiff, Bennett. Hence it is to be interpreted most strongly against the plaintiffs. This rule is accentuated by the fact that the plaintiffs were attorneys at law and presumably familiar with legal terms and proceedings, and accustomed to the use of language appropriate to the framing of contracts, while the defendant was a business man, with no special knowledge of, or familiarity with, these subjects.

The partition suit was solely for the partition of the land. The judgment therein was for a partition in kind, setting off a certain parcel thereof in severalty to Potter and the remainder in severalty to the Slinkards. The complaint in the action for an accounting set forth the ownership of the land in common by the parties, that they had been farming the same together for the common benefit, their respective interests in the profits and the personal property in use being the same as in the land, as above stated; that Potter had expended certain sums of money in the enterprise; that the Slinkards had received profits therefrom for which they had failed to pay or account to Potter; and prayed that an account be taken, that the personal property be divided between the parties according to their interests, and that judgment be given to Potter for the amount found due him. Some alfalfa hay was divided between them by an agreement made while the action was pending, and is not mentioned in the judgment. The other personal property was sold by them and taken into the account. The judgment was for $375 in favor of Potter. The complaint in the case at bar contains no allegations relating to the value of the services in obtaining the division of the hay.

The attorney's fee allowed in the partition suit was based on the allegation of the complaint in that action "that $2,000 is a reasonable counsel fee for the services rendered and to be rendered herein." It is to be presumed that the amount allowed was considered by the court to be the full value of the services rendered, the more especially since an additional amount was allowed to other attorneys for services to the Slinkards. We must also presume that the provision of the contract that the plaintiffs should have "ten per cent. of whatever is recovered" was considered by the parties to be full compensation, so far as it applied to the particular suit, for all services to be rendered by plaintiffs as attorneys in that action, if, as might be the case, no attorney's fee was allowed therein. An interpretation which would give them both, as that of the court below does, would involve the absurdity of giving them twice the value of the service rendered. Such construction cannot be allowed if any other reasonable interpretation can be found. Under section 1638, aforesaid, the language which is supposed to declare the absurdity does not necessarily "govern its interpretation." The two provisions should therefore be held not to be cumulative with respect to the partition suit.

[3] Furthermore, the language itself does not warrant the court's interpretation. Its conclusion was that the phrase "ten per cent. of whatever is recovered" means "ten per cent. of the value of whatever is recovered." But the contract does not mention value. It was 10 per cent. of the thing itself that the plaintiffs were to receive. If we assume that the land set off to a party in an action for partition is "recovered" by him, then plaintiffs would be entitled to a one-tenth interest in Potter's share of the land, and they could not maintain an action for the value thereof. Moreover, there was no issue in the partition suit, as to the title to the land, or as to the respective interests therein. It was a simple suit to sever the unity of title and segregate the possession. The land set off to one party in a partition suit of that character is not "recovered" by him. A simple partition does not change the title, nor transfer it from one to the other, nor return or restore to either party anything lost by him, or of which he had been deprived. It merely transforms the right of common possession of the whole tract into a right to the exclusive possession of the same interest or share, as represented by the parcel set off to him in severalty. He thereafter holds in severalty that interest which he previously held in undivided form. He does not recover the segregated parcel, nor even the possession thereof, but keeps such possession, and thereafter excludes the other tenants from that parcel. Christy v. Spring Valley W. W., 68 Cal. 75, 8 Pac. 849; Richardson v. Loupe, 80 Cal. 503, 22 Pac. 227; Cunha v. Hughes, 122 Cal. 113, 54 Pac. 535, 68 Am. St. Rep. 27; Rose v. Mesmer, 142 Cal. 328, 75 Pac. 905; Freeman on Cotenancy, § 529. The only reasonable conclusion is that the two provisions are not cumulative, but are alternative, and that the intention was to substitute the allowed fee, if any, in the partition suit, as compensation for the services therein, instead of the 10 per cent. specified in the first part of the compensation clause of the contract. This is emphasized by the succeeding phrase, "exclusive of the ten per cent. so to be paid by the party of the first part." The word "paid" is significant. The 10 per cent. of the property set off to Potter could not be said to be paid, in

any sense of the word. But with respect to 10 per cent. of any money that might be recovered or obtained on the accounting, it would be in accordance with ordinary usage to say that it would be paid to the plaintiffs by Potter. The giving of the fee to be allowed in the partition suit to plaintiffs was not intended as compensation for their services in the other litigation. The meaning is that the receipt of the fee so allowed should not exclude the attorneys from receiving 10 per cent. upon the amount obtained in the accounting. This we believe to be the correct interpretation of the contract. It does not authorize a judgment which includes more than $1,000 for the services in the partition suit.

It may be noted here that the money recovered in the accounting suit did not cover the alfalfa hay on the farm. It was divided by agreement, and the plaintiffs, under the contract, were entitled to 10 per cent. thereof. But the complaint needs amendment in order to present clearly and specifically the claim for that part of the compensation.

2. The court also found that there had been an account stated between the plaintiffs and the defendant, as alleged in the complaint, and that it was thereby ascertained and agreed that defendant was indebted to plaintiff in the sum of $2,750 on account of the services rendered by them to Potter under the contract aforesaid. We think this finding is not supported by sufficient evidence.

The evidence does not show that any account was kept in writing, or that any written statement of account was ever presented or delivered to the defendant, or agreed to or acquiesced in by him. The finding is based exclusively on the testimony of the plaintiff, Turnbull, relating a conversation he says he had with Potter on the 6th of April, 1915, shortly after the judgments were given in the two actions.

[4] It has been held by this court that an account stated may be shown by proof of an oral agreement as to the amount due, although no writing is exhibited at the time. Converse v. Scott, 137 Cal. 239, 70 Pac. 13. The decision states the rule to be that such would be the case even if no written evidence of the account had ever existed. See, also, 1 Corpus Juris, p. 682, § 256. Somewhat in conflict with this is the case of Coffee v. Williams, 103 Cal. 556, 37 Pac. 504, where the court said:

> "An account stated is a document—a writing—which exhibits the state of the accounts between the parties and the balance owing from one to the other."

In Gardner v. Watson, 170 Cal. 574, 150 Pac. 994, and again in Merchants' Natl. Bank v. Carmichael, 173 Pac. 999, this court quoted the above passage from Coffee v. Williams with approval. But neither of these cases involved the question whether or not the account as stated must exist in writing. Converse v. Scott has not been overruled on this point, and we may assume it to be correct.

Turnbull testified that in the conversation with Potter they agreed that the value of the land set off to Potter in the suit should be fixed at $17,500 "for the purpose of fixing the percentage." The only testimony that tended to show an account stated was given on cross-examination. He said, "I did not make any statement to him that we would charge him any amount." He added that after Potter had assented to the proposal to fix the value of the ranch at $17,500 he said to Potter:

> " 'That makes $2,750 for those two cases.' We didn't have any words about it at all. We arrived at a figure of $2,750—$1,750 on the basis of 10 per cent. of $17,500, plus $1,000, which the court had agreed should be allowed to us, and at that time he gave us a check for $200 and told us he expected $1,500 from his ore shipment and would pay up the balance as soon as he could."

Potter denied that any such conversation occurred at any time, and he said that the $200 was paid because Turnbull told him the firm had been under heavy expenses, that their fees were not coming in, and that they needed some money; that the first knowledge he had that plaintiffs proposed to charge 10 per cent. of the value in addition to the $1,000 was on the day before this action against him was begun, and that he then vigorously objected to the double charge. But as the finding was against defendant we can consider only the testimony of Turnbull.

[5] We have already seen that the contract did not allow the plaintiffs double compensation for the services in the partition suit, or more therefor than the fee of $1,000 therein allowed. For the services in the accounting suit the contract fixed the sum of $37.50 (10 per cent. of $375.00) as compensation. The testimony shows that the value of the personal property divided was not considered or fixed. Even if it had been valued, the value would be immaterial, for the contract gave plaintiffs no right to 10 per cent. of its value, but only 10 per cent. in kind for that service. The result is that if the oral account stated is good, it would have the effect of materially altering the written contract in these particulars, and it would practically double the amount which plaintiffs would be entitled to recover for the services thereunder. An account stated is a mere unperformed promise by one party to pay a stated sum to another, and it is therefore an executory contract. (Civ. Code, § 1661;

Pearsall v. Henry, 153 Cal. 325, 95 Pac. 154, 159. To allow a written contract to be thus altered by an oral statement of account, or by any statement not agreed to in writing by the debtor, would violate the rule of the Code that "a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." Civ. Code, § 1698. This effectually cuts off any such claim in this case. Other reasons now to be stated lead to the same result.

[6, 7] The theory upon which the action on an account stated is allowed is that transactions have occurred between the parties from which the relation of debtor and creditor has arisen, that thereafter one or both have rendered or made statements or declarations specifying definitely the amount due on account thereof, and thereupon there has been an agreement, express or implied, by the one who is the debtor, to the other, that a certain sum is due from him on such account, together with an express or implied promise to pay the same. The action is based on the promise to pay, thus established; and, if it is not expressly made, facts from which such promise will be implied must be proven. Originally, an account stated could exist only where the accounts were mutual, or where there was more than a single item, but in the course of time it became settled that there could be an account stated where but a single item was included or referred to therein. 136 Am. St. Rep. 42, note.

[8-10] It was not every debt that could form the basis of such account stated or such action. It could not become a substitute for an action of debt upon a specialty, such as a promissory note or a bond for money. In such cases no subsequent statement of the amount due thereon, although agreed to by the payor, could supersede the special promise so as to form the basis of an action as upon an account stated to recover the original debt. Young v. Hill, 67 N. Y. 174, 23 Am. Rep. 99. The action in such a case must be upon the original promise in writing, and not upon account stated. The written promise being higher evidence of the debt, and the debtor being already bound thereby, there could be no necessity for a resort to a subsequent statement and promise to pay as the foundation of an action therefor. Moreover, the debtor being already completely bound for a specified sum, there is no element of uncertainty to be settled, and no difficulty in ascertaining the balance upon conflicting claims which could constitute a consideration for a new oral promise to pay, and therefore such promise would be a nudum pactum. There must always be a consideration to support a valid promise. From this the further rule follows that there can be no account stated where there have been no previous transactions between the parties from which the relation of debtor and creditor could arise. "It may not be made the instrument to per se create a liability where none before existed." Austin v. Wilson, 11 N. Y. Supp. 566; Stimson Mill Co. v. Hughes Mfg. Co., 8 Cal. App. 561, 97 Pac. 322. The case last cited is a good illustration of the proposition just stated. The plaintiff there had sold lumber and delivered it to one Coffey, and, claiming that it was really sold to the defendant, had thereafter rendered accounts therefor to the defendant as the debtor therefor, which defendant had kept for a long time without making any objection thereto, or any denial of its liability therefor, thus raising the inference that it acquiesced therein. In fact the lumber had been sold to Coffey and not to defendant, and defendant was in no wise liable therefor, unless upon account stated by reason of acquiescence in the aforesaid statements rendered to it. The court held that such "itemized statements could not be made to create an indebtedness." As an illustration of the proposition first stated there is the case of Jasper Tr. Co. v. Lampkin, 162 Ala. 388, 50 South. 337, 24 L. R. A. (N. S.) 1237, also reported in 136 Am. St. Rep. at page 33. Plaintiff held certain promissory notes of the defendant, and long after they had become due had sent to defendant written statements of the amounts due thereon for principal and accrued interest, and the defendant had assented to the accuracy of the amounts stated. We quote from the decision at length:

> "At an early day in England it was held that where a debt was evidenced by an instrument under seal, a recovery could not be had in an action of assumpsit. One reason seems to be that there is no consideration for the new promise, because the party is already bound by a higher evidence of debt to pay, and the court says: 'There must be at least some additional consideration, such as items, for instance, foreign to the articles of agreement, introduced into the account and included within the promise, in order to take the claim founded upon it out of the operation of the agreement or contract under seal; otherwise, the plaintiffs below must be confined to their action of covenant, founded upon the articles of agreement, for the recovery of their claim.' Gilson v. Stewart, 7 Watts (Pa.) 100. It was also decided that, 'where a sum of money is secured by a deed, and a balance is struck for the purpose of ascertaining how much remains due thereon, and the obligor admits the correctness of the account and promises to pay it, debt or simple contract on an account stated will not lie, but the action must be brought on the specialty,' the court saying: 'The defendant is charged with nothing but the money secured by the deed. There is no consideration for the suggested new liability, except the ascertaining how much remains due on the deed. It is a perversion of language to speak of this as an account stated.

It is merely a process adopted for the purpose of ascertaining how much of the original debt has been discharged, and all which is really done is to make out to what extent the defendant remains liable upon the deed.' Middleditch v. Ellis, 2 Ex. 623."

(The case of Middleditch v. Ellis will be found in 2 Welsby, H. & G. 623, and in 154 Eng. Rep. 640. The word "deed" may mislead the reader who has not the report at hand. What is meant is that the plaintiff held a bond, or note, for the payment of money, secured by a mortgage in the form of a deed.)

The above authorities do not depend on the ancient technical distinctions between the common-law forms of actions. They are, as the reasoning shows, founded on the fundamental difference between a mere promise to pay an existing debt made upon no new consideration and a promise to pay it which is founded upon a new consideration such as further forbearance, to which the creditor binds himself by accepting this new promise or by some other valid agreement, or a new promise which has the effect of merging the original obligation and in effect extinguishing it as a living contract. They are clearly applicable to the case at bar, so far as it depends on the alleged account stated. In the first place there was no liability from Potter to the plaintiffs for the services in the partition suit, except for the sum of $1,000. That was ascertained and established by the original written contract. In so far as the so-called account stated attempted to enlarge this liability by the addition thereto of another item consisting of the 10 per cent. upon the value of the land segregated thereby, an item not mentioned in the contract, it would, if enforced, operate to "create a liability where none before existed," which, as the authorities state, cannot be done by means of an account stated. In so far as the oral account stated purported to bind Potter to pay more than the sum of $1,000 for the services in the partition suit, it was based on no new consideration whatever. There was no promise to pay 10 per cent. of the value of the segregated land, and hence no necessity for coming to an agreement as to the value for the purpose of fixing the percentage. Therefore that process could not be a consideration for the new promise. No other consideration could possibly have existed, and consequently the new promise claimed upon the account stated is a nudum pactum and unenforceable, except for the services other than those rendered in the suit for partition.

For these reasons we are of the opinion that the judgment was erroneous.

The judgment is reversed.

We concur: LAWLOR, J.; OLNEY, J.

(181 Cal. 15)

In re CARRAGHAR'S ESTATE. (Sac. 2938.)

(Supreme Court of California. Aug. 8, 1919.)

1. HOMESTEAD 🔑84—PROBATE HOMESTEAD—PROPERTY OWNED JOINTLY.

A probate homestead cannot be created or set apart from property owned by the husband or wife and a third party as tenants in common or joint tenants.

2. HOMESTEAD 🔑3—STATUTES 🔑167(2) — ADOPTION OF CODES—ABROGATION OF STATUTE.

St. 1867–68, p. 116, relating to homesteads, and providing that a party entitled, if in exclusive occupation, should have his right though the land was held in joint tenancy, tenancy in common, etc., was abrogated by the adoption of the Codes January 1, 1873.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

In the matter of the estate of Edward James Carraghar, deceased. From an order denying the petition of decedent's surviving wife for a probate homestead, she appeals. Order affirmed.

R. Platnauer, of Sacramento, for appellant.

Aram & Carraghar, of Sacramento, for respondents.

ANGELLOTTI, C. J. This is an appeal by the surviving wife of deceased from an order denying her petition for a probate homestead out of the only real property owned by the deceased at the time of his death, which was an undivided half of a lot in the city of Sacramento, and was his separate property. The other undivided one-half of said lot was owned by one Buckman. In the year 1898 deceased constructed a dwelling house on this land. From the year 1899 to the death of deceased in 1917, the premises were occupied by deceased and his wife as their residence, and during all said time deceased had said premises inclosed, and, with his wife, was in exclusive occupation thereof. The learned judge of the lower court concluded that in view of the decisions of this court a homestead could not be set apart from this property so owned by the deceased as a tenant in common with another person, and therefore denied the application.

[1] Whatever we might think if the question were a new one in this state, it is clear that the general rule to the effect that a homestead cannot be created or set apart from property owned by the husband or wife and a third party as tenants in common or joint tenants is too thoroughly established by a long line of decisions, commencing with Wolf v. Fleischacker, 5 Cal. 244, 63 Am. Dec. 121, and running down practically to this

time, to permit us now to hold otherwise. Most of these decisions were discussed in the comparatively recent case of Schoonover v. Birnbaum, 148 Cal. 548, 83 Pac. 999 (decided in January, 1906), in which it was sought to have the prior decisions on the question overruled, and where we felt compelled to say that "without expressing any opinion concerning the soundness or unsoundness of the decisions in question, we are of the opinion that they should be adhered to, leaving it to the Legislature to extend the right of the homestead to cotenants if it shall see fit." This conclusion was reached in view of the rule of stare decisis, especially with regard to the rules of law upon the subject of titles to real estate. More than 13 years have passed since that decision without any legislative action in the respect referred to, and, of course, what was there said applies now with much more force than it did in 1906. Since the decision in Schoonover v. Birnbaum, supra, this general rule has been fully recognized in United States, etc., Co. v. Bell, 153 Cal. 781, 96 Pac. 901, Swan v. Walden, 156 Cal. 195, 103 Pac. 931, 134 Am. St. Rep. 118, 20 Ann. Cas. 194, and Estate of Davidson, 159 Cal. 98, 115 Pac. 49. In Swan v. Walden, supra, a case of a homestead selected by the wife during the lifetime of the parties, the homestead was upheld although the property was held in joint tenancy, but this was because the only joint tenants were the husband and wife, and the wife's selection was of the whole property, and the wife had the power under the law to declare a homestead upon the husband's separate property as well as upon her own property. As to this situation the court said:

> "The homestead thus attempted to be declared is upon land, all of which is susceptible at the instance of the wife of having the homestead characteristics impressed upon it. There is no occasion for segregation or partition or delimitation of boundaries, since the homestead attaches to all of the estate and all of the land. The reasons which, in the view of this court, made it legally impossible for the husband to declare such a homestead when there was a cotenancy between himself, his wife, or third persons does not exist in the peculiar instance of the case at bar."

See, also, In re Bailard, 173 Pac. 170. As we have seen in the case at bar the other tenant in common is a third party. The reason expressed for the rule enunciated by our decisions, as stated in Estate of Davidson, 159 Cal. 98, 101, 115 Pac. 49, 50, is that "on account of the nature of the tenancy, there can be no segregation or delimitation of the boundaries of the particular estate, or interest in the property of the cotenancy sought to be impressed whereby it can be determined as to what particular part of the land the homestead attaches." In Estate of Davidson, supra, it was sought by the surviving wife to have set apart as a probate homestead the deceased husband's undivided half of the property on which they resided at the time of his death, the wife being the owner of the other undivided half, and it was held by the same justices who participated in Swan v. Walden, supra, that, in view of the rule of our decisions, the husband's undivided one-half could not be selected as a probate homestead.

[2] Appellant's principal claim is that she is entitled to have her husband's undivided half of this property set apart as a homestead by virtue of the provisions of an act entitled "An Act Relating to Homesteads," adopted by the Legislature in the year 1868 (Stats. 1867-68, p. 116). It is probable, as was said in Swan v. Walden, supra, that this act was adopted to modify the rule of decision in this very matter. It substantially provided that whenever a party entitled to a homestead under the laws of the state is in exclusive occupation of any particular tract of land, having the same inclosed, and shall select and record and reside upon the same as a homestead, he shall be entitled to the same to the extent of his interest in the property, "although such land be held in joint tenancy, or tenancy in common, or such claimant own only an undivided interest." It may be assumed that if this act is still in force, appellant is entitled to have her deceased husband's interest set apart as a homestead, for it was held under this act in Higgins et al. v. Higgins et al., 46 Cal. 259, that the wife could select as a homestead the undivided interest of her husband in property exclusively occupied by him, to the exclusion of all other cotenants. But we do not see how it may reasonably be held that the act survived the going into effect of our Codes on January 1, 1873. The question whether this particular act was repealed by the Codes has never been determined or even discussed by this court, though the act was referred to in passing in both Swan v. Walden, supra, and Estate of Davidson, supra. The act does not appear to have been mentioned in either Estate of Carriger, 107 Cal. 618, 40 Pac. 1032, or Rosenthal v. Merced Bank, 110 Cal. 198, 42 Pac. 640, cases involving attempted selections since the Codes took effect. In each of these cases the right to a homestead was denied by the court, although, so far as we can see, the facts were such as to make the act of 1868 applicable, if still in force. The uniform course of our decisions on this matter has been the same since the adoption of the Codes as it was prior to the adoption of the act of 1868. We say this much simply for the purpose of showing that this court has never recognized the act of 1868 as surviving the taking effect of the Codes. When enacted in 1872 our Civil Code provided, as it still provides, as follows:

> "No statute, law, or rule is continued in force because it is consistent with the provi-

sions of this Code on the same subject; but in all cases provided for by this Code, all statutes, laws, and rules heretofore in force in this state, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed or abrogated. * * *" Section 20. A similar provision was contained in our Code of Civil Procedure. Section 18.

There is no claim that the act of 1868 was expressly continued in force. In title 5 of part 4 of division second of the Civil Code (sections 1237 to 1269), which was entitled "Homestead," and chapter 5, title 11, of part 3 of the Code of Civil Procedure, as originally enacted in 1872, was contained what clearly appears to have been intended as a complete and comprehensive system of laws on the subjects of homesteads. What a homestead consisted of, how and from what it might be selected, when and to what extent it was subject to execution or forced sale, how it might be conveyed, incumbered, or abandoned, its value, the rights of parties in the matter of probate homesteads and the manner of setting the same apart—all these things were fully covered by the Code provisions. In other words, the whole matter of homesteads was one of the "cases provided for by" the Codes. The rule embodied in section 20, Civil Code, and section 18, Code of Civil Procedure, is the statement of a well-settled principle applicable in considering the effect of revisory statutes. As was said in Mack v. Jastro, 126 Cal. 130, 58 Pac. 372:

> "Whenever it becomes apparent that a later statute is revisory of the entire matter of an earlier statute, and is designed as a substitute for it, the later statute will prevail, and the earlier statute will be held to have been superseded, even though there be found no inconsistencies or repugnancies between the two. Frequently, these cases arise where the latter statute covering the whole subject-matter omits or fails to mention certain terms or requirements found in an earlier, and it is insisted, as here, that those particular provisions of the earlier statute should be held to be still in force. But, as is said by the Supreme Court of the United States in Murdoch v. Mayor, etc., 20 Wall. 590 [22 L. Ed. 429], * * * 'It will be perceived by this statement that there is no repeal by positive new enactments inconsistent in terms with the old law. It is the words that are wholly omitted in the new statute which constitute the important feature in the questions thus propounded for discussion. * * * A careful comparison of these two sections can leave no doubt that it was the intention of Congress by the latter statute to revise the entire matter to which they both had reference, to make such changes in the law as it stood as they thought best, and to substitute their will in that regard entirely for the old law upon the subject. We are of opinion that it was their intention to make a new law so far as the present law differed from the former, and that the new law, embracing all that was intended to be preserved of the old, omitted what was not so intended, because complete in itself, and repealed all other law on the subject embraced within it. The authorities on this subject are clear and uniform.'"

See, also, Sponogle v. Curnow, 136 Cal. 580, 584, 69 Pac. 255; State v. Conkling, 19 Cal. 501. Our Codes, of course, were intended as complete revisions of the existing laws upon the subjects embraced therein. That was the main purpose of their enactment. And section 20, Civil Code, and section 18, Code of Civil Procedure, were enacted for the very purpose of putting it beyond the realm of possible dispute that existing statutes on subjects covered by the Codes, whether consistent or not with the provisions of the Codes on the same subject, were abrogated, unless expressly continued in force. True it is that there is no express provision in the Codes purporting to provide for the particular contingencies provided for by the act of 1868. But what we have quoted from Mack v. Jastro, supra, fully answers the claim based on this situation. The act of 1868 was one of the existing acts on the general subject of homesteads, the provisions of which the Legislature, in making the revision of the entire law on the subject, must be held to have intended to abrogate. We are satisfied that it must be held that this act was abrogated by the adoption of the Codes.

The cases cited by learned counsel on this point are not opposed to our conclusions. None of them involved any act upon a subject as to which, as here, an apparently complete revision was attempted by the Codes, and all were decided upon the theory that the act involved was regarding a subject in no way treated in any of the Codes. Here, as we have seen, we have in the Codes as enacted an apparently complete and comprehensive revision of the law on the subject of homesteads, and the fact that the Legislature did not include therein provisions for the selection of a homestead where the circumstances were as specified in the act of 1868 does not render the latter act one as to a "case" not "provided for" by the Code.

The order appealed from is affirmed.

We concur: SHAW, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.; MELVIN, J.

OLNEY, J. (concurring). I concur, but solely on the ground that the question is now determined by the previous decisions of this court. If it were not for those decisions I believe the rule should be that a homestead may be imposed in the instances provided by the statute regardless of the character of the title of the homestead claimant or his or her spouse, the homestead, of course, affecting only the interests of the claimant or spouse, whatever those interests may be. The only requirement of the statute in this resepct is that the claimant be residing upon the premises, and to require more than this and make the validity of the homestead dependent upon the character of the interests affected is without statutory warrant, and contrary to the object of the statute. The injustice, I think, is manifest in the present case. It is now too late, however, for this court to reverse its previous decisions, for such reversal would necessarily be retroactive in effect, and would destroy interests and rights acquired in reliance upon the existing decisions. It is hardly necessary to say that this objection would not lie to a change made by the Legislature, which, of course, would operate only in futuro.

41 Cal. App. 528

SAM KEE v. WILDE, City Clerk.

HOP WAH v. SAME.

(Civ. 2890.)

(District Court of Appeal, Second District, Division 2, California. June 10, 1919.)

Municipal Corporations 🔑600 — Police Regulations — Laundries — Restricted Districts.

Los Angeles Ordinance No. 22798 (New Series), a residence district ordinance, and No. 26555 (New Series), providing that in order to establish an industrial district within a residence district it is necessary to get a petition signed by property owners, etc., are constitutional and apply to laundries.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Proceedings in mandamus by Sam Kee and Hop Wah against Charles L. Wilde, City Clerk of the City of Los Angeles. From judgments in favor of plaintiffs, defendant appeals. Reversed.

Albert Lee Stephens, City Atty., Charles S. Burnell, Asst. City Atty., and Wm. P. Mealey, Deputy City Atty., all of Los Angeles, for appellant.

Dian R. Gardner, of Los Angeles, for respondents.

THOMAS, J. These appeals are from judgments of the superior court of Los Angeles county on the judgment rolls alone, ordering that peremptory writs of mandate issue commanding the city clerk of the city of Los Angeles to prepare and issue to the respective petitioners a license to conduct a laundry within the portion of the city set apart as a residence district. The issues are the same in both cases, and the pleadings, findings, and judgment are identical, save as to the name of the petitioner and the street address of his laundry. By stipulation, it is agreed that these two cases "may be presented, heard, and determined upon the same transcript and brief." The judgment roll, accordingly, has been omitted from the transcript in the Hop Wah Case.

The appellant has stated the case so well in his brief that we feel that we can do no better than to adopt his language as our statement of the case. This we do. It appears from the record before us that—

"The petition avers that respondent Charles L. Wilde is the city clerk, A. B. Conrad the city tax and license collector, and John S. Myers the city auditor of the city of Los Angeles, and their respective duties as prescribed by the charter are set forth. It is alleged that the petitioner is the lessee of a building at No. 241 North Figueroa street (in the Hop Wah case petitioner's laundry was located in the same neighborhood), and is conducting a laundry therein, and that up to November 30, 1915, he paid the city a license of $5 per month. The petition then sets forth section 3 of Ordinance No. 20000 (New Series), known as the license ordinance, providing that it shall be the city clerk's duty to prepare and issue licenses to persons liable under said ordinance to pay licenses, and to deliver said licenses to the auditor who shall sign and deliver them to the tax collector for collection. Section 81 of the same ordinance is also set forth; that section imposing a license of $5 per month on persons conducting a laundry business. It then alleged that on December 1, 1915, petitioner tendered the tax collector $5 for a license under said ordinance; that the tax collector refused to accept the money for the reason that the license had not been prepared and issued by the clerk; and that a few days later petitioner demanded of the clerk that he prepare, issue, and deliver to the auditor such license, and that the clerk refused so to do, whereupon petitioner again tendered $5 to the tax collector, who refused to accept it, whereupon petitioner deposited the same, in the name of the tax collector, in a reputable bank, immediately notifying the tax collector thereof, and upon the same day again demanded of the clerk that he prepare and issue a license to carry on the laundry business aforesaid, which the clerk refused to do. It is also alleged that the petitioner is beneficially interested in securing the license and is entitled to have it issued, and that he has no plain, speedy, or adequate remedy in the ordinary course of the law.

"By amendment to the petition it is alleged that on December 15, 1912, the city council adopted Ordinance No. 25555 (New Series), entitled 'An ordinance prescribing the method of making and filing petitions for the establishing of industrial districts' (hereinafter called the 'petition ordinance'), which ordinance is set forth in full; and that after this ordinance became effective the city council adopted various ordinances creating industrial districts, which ordinances number 25 in the aggregate, and that all of them were adopted after a petition had been filed with the city council in accordance with said Ordinance No. 26555 (New Series), and that no industrial districts have been created during said time except upon such petitions. It is further alleged that petitioner prepared a petition under said Ordinance No. 26555 (New Series) to have the lot upon which his business is located established as an industrial district, but he was unable to secure the signatures of the owners of the necessary proportion of the property fronting on the opposite side of the street, or of a majority frontage in the block.

"The respondent in his answer denied that the petitioner was entitled to have a license issued, and set up the adoption, on June 7, 1911, of Ordinance No. 22798 (New Series), which ordinance establishes a residence district and regulates and prohibits the conducting and maintaining of works and factories where power other than animal power is used within the boundaries of said district, and referred to the various amendments thereto; said ordinance, together with amendatory Ordinance No. 33393 (New Series), being attached to the answer as Exhibits A and B, respectively. Said Ordinance No. 33393 (New Series) merely amends the residence district ordinance by excepting from the residence district those portions of the city which have become annexed thereto subsequent to January 1, 1915. The residence district ordinance, as amended, establishes all of the city as a residence district, except (a) that portion included within fire district No. 1, (b) those portions included within the boundaries of such industrial districts as are or may hereafter be established as such by ordinances, (c) the portion of the city lying south of Manchester avenue, and (d) all territory annexed since January 1, 1915.

"The answer also sets forth Ordinance No. 19901 (New Series), entitled 'An ordinance fixing and establishing fire districts of the city of Los Angeles,' as amended. It is further alleged that the city council has from time to time adopted various ordinances excepting certain specified portions of the city from the residence district established by Ordinance No. 22798 (New Series); 103 ordinances having been adopted excepting from the residence district portions of the territory embraced therein. It is next alleged that petitioner's laundry is not within fire district No. 1, nor within the boundaries of any industrial district, nor within any portion of the city lying south of Manchester avenue or added to the city by annexation subsequent to January 1, 1915, but that it is within the residence district, and that the respondent refuses to prepare and issue a license for the petitioner, for the reason that under the provisions of the residence ordinance it is unlawful to maintain a laundry within said residence district.

"It is further denied that the petitioner ever prepared a petition under Ordinance No. 26555 (New Series), or otherwise, to have the lot on which his business is located established as an industrial district, and that he had endeavored to secure the signature of property owners to such, or any petition, or that any of them have refused to sign same.

"The first 15 findings of the court are identical in language with the allegations of the complaint. Finding No. 16 is identical in language with paragraph XV of the complaint, as added by amendment, while finding No. 17 is identical with paragraph XVI of the complaint; finding No. 18 is the same as paragraph II of the answer, except that Ordinance No. 22798 (New Series), as amended, including the amendments contained in Ordinance No. 33393 (New Series), is set forth in full as a part of the finding. Finding No. 19 is identical with paragraph IV of the answer; finding No. 20 is identical with the first half of paragraph IV of the answer, alleging the adoption of various ordinances excepting certain portions of the city from the residence district established by Ordinance No. 22798 (New Series); while finding No. 21 is that 65 of the 103 ordinances set out in paragraph V of the answer were passed only upon petitions prepared in accordance with section 6 of Ordinance No. 22798 (New Series), and subsequent to the adoption of the residence district ordinance. Finding No. 22 is that the petitioner's laundry is not within fire district No. 1, nor within the boundaries of any industrial district established by ordinance, nor within that portion of the city lying south of Manchester avenue, nor within any portion of the city annexed thereto subsequent to January 1, 1915. The court failed altogether to find upon the issue made by paragraph XVII of the complaint, and by the answer, namely, as to whether or not the petitioner prepared and endeavored to obtain signatures to a petition to have the lot upon which his laundry is conducted declared an industrial district.

"As conclusions of law the court finds that the residence district ordinance, Ordinance No. 22798 (New Series), as amended, is void and unconstitutional so far as it affects laundries; and also that the petition ordinance, Ordinance No. 26555 (New Series), is void and unconstitutional in so far as it affects laundries; and that the petitioner is entitled to a license, and that respondent has failed to show cause why he has not issued the same.

"From the above it will appear that there is no controversy whatsoever as to the facts, except with respect to the one issue upon which the court has failed to find.

"Appellant, contends that the residence district ordinance is valid and constitutional, and that under it the petitioner was prohibited from conducting a laundry, and that he, as city clerk, properly refused to prepare and issue a license for the conducting, at a specified locality, of a business the conducting of which was prohibited within that portion of the city wherein it was sought to conduct the laundry."

The principal question presented, therefore, is the sufficiency of Ordinance No. 22798 (New Series), the residence district ordinance, and No. 26555 (New Series), the petition ordinance, of the city of Los Angeles, in their application to petitioners.

The contention here was, and the court so found, that these ordinances are, and each of them "is, void and unconstitutional, and of no force and effect, so far as the same applies, affects, or tends to affect laundries or the laundry business."

No service of value could, we think, be rendered by a discussion of the various ordinances set out in the pleadings and findings of the court, nor even by setting forth here in extenso the particular ordinances under consideration, as we are of the opinion that the question here presented has been so thoroughly settled in this state that we shall not burden the record nor impose upon the profession the hardship of reading any discussion by us of this case. There is such a wealth of decisions from all over the United States, many of them discussed at great length, presenting exhaustive, thorough, and able arguments, and covering, we think, the identical question here presented, that we content ourselves by simply citing a few of them. The constitutionality of ordinances such as, or similar to, those here involved, has, we think, been upheld by the courts in the following cases: Ex parte Hadacheck, 165 Cal. 416, 132 Pac. 584, L. R. A. 1916B, 1248; In the Matter of Montgomery, 163 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914A, 130; Ex parte Quong Wo, 161 Cal. 220, 118 Pac. 714; San Luis Obispo County v. Greenberg, 120 Cal. 300, 52 Pac. 797; Ex parte Haskell, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527; Ex parte Lacey, 108 Cal. 326, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. Rep. 93; San Luis Obispo v. Pettit, 87 Cal. 499, 25 Pac. 694; Ex parte Christensen, 85 Cal. 208, 24 Pac. 747; Ex parte Moynier, 65 Cal. 33, 2 Pac. 728; Laurelle v. Bush, 17 Cal. App. 409, 119 Pac. 953; Goytiño v. McAleer, 4 Cal. App. 655, 88 Pac. 991; Hadacheck v. Sebastian, 239 U. S. 394, 36 Sup. Ct. 143, 60 L. Ed. 348, Ann. Cas. 1917B, 927; Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145; Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923.

In view, therefore, of this fact, we are unable to agree with the learned trial judge in his conclusions, and hence we hold the said ordinances valid and constitutional; that the appellant, accordingly, very properly refused to issue a license to respondents; and that, from the record before us, he has shown good cause why a writ of mandate should not issue. No other point presented need be considered.

The judgments are reversed.

We concur: FINLAYSON, P. J.; SLOANE, J.

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41 Cal. App. 607

LOMPOC PRODUCE & REAL ESTATE CO. v. BROWNE. (Civ. 2752.)

(District Court of Appeal, First District, Division 2, California. June 16, 1919. Rehearing Denied by Supreme Court Aug. 14, 1919.)

1. SALES 🔑409—BREACH OF CONTRACT—TIME FOR SUIT.

Where defendant seller refused to perform a contract for sale of a bean crop, plaintiff buyer had an immediate right of action, although time for delivering the crop had not arrived.

2. SALES 🔑418(2)—BREACH OF CONTRACT—DAMAGES.

In buyer's action for breach of contract for sale of a bean crop, the market value of the beans at time of breach is the proper measure of damages.

3. SALES 🔑196—CONTRACT—WAIVER.

Any breach by plaintiff buyer of a contract provision requiring him to purchase seed for defendant seller was waived, as a matter of law, where defendant retained a partial payment and kept the contract open for his own benefit for six months, without complaint regarding the alleged breach.

4. SALES 🔑413—BREACH—WAIVER.

Where defendant seller claimed plaintiff buyer had breached a sales contract, plaintiff may show that defendant's own testimony established a waiver of the alleged breach, although waiver was not pleaded, since any variance could not have surprised defendant and might be cured by amending complaint to conform to proof.

5. APPEAL AND ERROR 🔑1039(13)—HARMLESS ERROR—VARIANCE.

A variance between allegation and proof will not be prejudicial error, where, if complaint had been amended to meet the proof, the result would have been the same.

6. SALES 🔑182(3)—BREACH OF CONTRACT—WAIVER.

While waiver of a sales contract breach is a mixed question of law and fact, yet, when but one inference can be drawn from the facts, it is not error for the court to charge that these facts constitute a waiver.

7. TRIAL 🔑62(3) — REBUTTAL EVIDENCE — CONTRACTS—WAIVER.

Where defendant seller's own testimony showed he had waived an alleged breach of the sales contract by plaintiff buyer, the court did not abuse its discretion in refusing defendant permission to rebut claim of waiver, when permission was sought after defendant had rested and plaintiff's motion to withdraw issue regarding its breach of contract from jury had been granted.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by the Lompoc Produce & Real Estate Company against Maxwell Browne. Judgment for plaintiff, and defendant appeals. Affirmed.

C. F. Lacey, of Salinas, for appellant.

Oscar Samuels, of San Francisco, and Chas. B. Rosendale, of Salinas, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment in favor of the plaintiff for $16,505.36 damages for the alleged breach of a contract for the sale of a crop of beans. The court directed the jury to find for the plaintiff, leaving to them the determination of the amount of the damages. The contract is in writing, and was entered into upon February 13, 1917. It provides that the defendant shall grow for the plaintiff certain quantities and varieties of beans at a specified price. It acknowledges receipt by the defendant of $2,000 to apply upon the purchase price of the beans, and also provides that the conditions printed on the back thereof are a part of the contract. Among those conditions is one to the effect that the plaintiff agrees to furnish the defendant sufficient seed for the crop bargained for, said seed to be selected by the defendant, and for the seed furnished by the plaintiff the defendant agrees to return with the crop an equal amount, without charge, as the equivalent of the seed furnished. The contract provides that a certain price was to be paid for beans delivered to the defendant on or before October 1, 1917, and a different price was to be paid for beans delivered after October 1, 1917. It is also provided that delivery should be made on or before November 1, 1917. On October 18, 1917, defendant wrote to the plaintiff refusing to perform the contract and returning the $2,000 advanced to him thereunder. The plaintiff brought this action on October 25, 1917.

[1, 2] The defendant demurred to the complaint and urged as one ground of demurrer that the action was prematurely instituted because delivery was to be made on or before November 1, 1917, and the suit was brought before that time. This point was also urged upon the motion for a nonsuit made at the conclusion of plaintiff's proof. We believe this point is not well taken. The complaint set out the contract, and alleged that on October 18th the defendant had renounced the contract and refused to be bound by it or to deliver to plaintiff any portion of the crop, and that at said time a portion of the crop, approximately 200,000 pounds, was sacked and ready for delivery, and that, the balance was lying on the ground ready for sacking and delivery. We think that the absolute refusal of the defendant to perform conferred upon the plaintiff an immediate right of action. Garberino v. Roberts, 109 Cal. 126, 128, 41 Pac. 857; Stum v. Hadrich, 7 Cal. App. 242, 244, 94 Pac. 82; Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; Central Trust Co. of Illinois v. Chicago Auditorium Ass'n, 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580; Cabrera v. Payne, 10 Cal. App. 675, 678, 103 Pac. 176. The market value of the beans at the time of the breach was a proper measure of damages. Masterson v. Mayor of Brooklyn, 7 Hill (N. Y.) 61, 42 Am. Dec. 38, quoted with approval in Hale v. Trout, 35 Cal. 229, at page 243; Roehm v. Horst, 178 U. S. 1, at page 21, 20 Sup. Ct. 780, 44 L. Ed. 953.

[3] The plaintiff alleged complete performance by it of all the conditions of the contract by it to be performed. In regard to the provision in the contract that the plaintiff should furnish seed to the defendant, which seed should be selected by the defendant, the plaintiff proved that no seed had been selected by the defendant, and no request for any seed or for the privilege of selecting any seed had been made by the defendant to any authorized agent of the plaintiff company. The defendant denied that the plaintiff had performed its part of the contract, and introduced certain testimony of the defendant to the effect that he had selected certain seed from samples in the possession of one Grannas, who, it was claimed by defendant was ostensibly acting for the plaintiff company, and that defendant had requested Grannas to furnish such seed and that Grannas had refused because of the high cost of the same. But by his own testimony defendant also put in evidence facts which clearly indicate a waiver of this condition concerning the seed, even though we concede that the testimony established an ostensible agency in Grannas to act for the plaintiff company. Plaintiff, thereupon, at the close of defendant's case, made a motion to withdraw from the jury the issue of plaintiff's alleged breach of the seed provision, and upon this motion plaintiff urged that, even though it be conceded that the seed provision had been breached, yet it appeared from the defendant's own testimony that he had waived that breach. We emphasize the fact that it was upon defendant's own testimony that plaintiff asked for a directed verdict. This motion was granted and a verdict for plaintiff was directed. It appeared from the defendant's testimony that he had arranged for the purchase of certain seed known as the Soares seed from Mr. Soares before he made the contract with the plaintiff for the sale of his crop; that he mentioned this fact to Grannas, who, he claims, was acting for the plaintiff company; that later, after Soares had sold his seed to the plaintiff company, and they in turn had disposed of all of it, and after the contract between plaintiff and defendant had been entered into, the defendant asked Grannas for this Soares seed and was told that it had all been sold. He then selected other seed, a sample of which Mr. Grannas had in his office, which seed was known as the Santos seed, and which, it developed, was grown on the same land and was a part of the same crop as the Soares seed. Grannas then told him this seed was held at too high a price and that he could not buy it, and asked the defendant to try to purchase it himself. The defendant made no objection to doing this, but replied, "All right," and proceeded to purchase it. He never asked for reimbursement from the plaintiff for the amount he paid for the seed, and never objected that it had not fulfilled its contract in this regard, and did not return the $2,000 advanced to him under the contract until October 18, 1917, approximately the time fixed for the performance of the contract, when he attempted to repudiate it

because of this alleged breach. On several occasions after he had purchased the seed he met representatives of the plaintiff company and allowed them to go over the ranch and inspect the crop, but he never at any time indicated to them that he considered the plaintiff had breached its contract in any respect or that the contract was not in full force and effect. Even if it be conceded that a breach of the contract by the plaintiff occurred in April, 1917, the defendant would not have been permitted to have retained the consideration paid him and to have kept the contract open for his own benefit for six months, making no demand or complaint, and permitting the plaintiff to believe that he was going to comply therewith, and then, at the last moment, when the price of beans had advanced, repudiate the contract. The evidence of the defendant, without contradiction, indicates a waiver of this condition.

[4, 5] The defendant and appellant objects that the verdict and judgment were obtained upon an issue of waiver, and that, as no waiver was pleaded, the plaintiff was not entitled to judgment upon this issue when the pleadings alleged performance by the plaintiff and not a waiver by the defendant. While we have not been cited to any case involving this precise question of pleading in relation to waiver, a similar question has arisen in certain cases involving the pleading of an estoppel. In the case of Blood v. La Serena L. & W. Co., 113 Cal. at page 229, 41 Pac. 1017, 45 Pac. 252, it is said that had the plaintiff under the circumstances been called upon to rely upon an estoppel in order to maintain his action against defendant at all, it would have been necessary, of course, for him so to have pleaded. But such was not his cause of action, for he successfully made out a prima facie case, and might, without pleading it, use the evidence in estoppel to prevent the corporation from maintaining what, as against its acts, would be an injust and unwarranted defense. In the case of Donnelly v. S. F. Bridge Co., 117 Cal. 417, at page 422, 49 Pac. 559, at page 560, it is said: "* * * A party is not bound to plead an estoppel where he is without knowledge that his demand must ultimately rest upon it."

In the present case the plaintiff alleged and relied upon performance. It made out a prima facie case. The authority of Grannas, from whom it is asserted defendant selected and requested the seed, rested only upon an ostensible agency. It was not shown that he was the agent of the plaintiff in fact, but plaintiff throughout the trial denied his authority and objected to proof of any dealings with him by the defendant. The plaintiff, therefore, in its main case, relied upon the fact that the defendant had not selected seed from any of its authorized agents, and therefore there was no breach of the condition to furnish seed. The defendant met this by proof which, for the purpose of this discussion, let us concede established an ostensible agency of Grannas to act for the plaintiff company, and then showed that he selected and requested seed from Grannas. The plaintiff, while denying the authority of Grannas to act for it in this matter, may rely upon the defendant's testimony and take advantage of the waiver proven by it, even though such waiver may not have been pleaded.

Furthermore, the defendant could not have been surprised or injured by this variance between the pleadings and proof, because the evidence concerning waiver was largely his own testimony. He may not complain that his own testimony is construed most strongly against him, and he cannot be damaged by a consideration of the facts which he himself has admitted. If it be true that there is a variance between the allegations and the facts shown, then it is apparent that defendant could not have been prejudiced by the variance, because if the complaint had been amended to conform to the proof the result would have been the same, and no good would result from sending the case back for a new trial, as it is apparent that the result would necessarily be the same, under the evidence of the defendant himself. It is said in the case of Foster v. Carr, 135 Cal. 83, 67 Pac. 43, that even where there is a variance such as ordinarily would be ground for reversal, yet if there is no dispute about the facts, and the evidence could not be varied upon a new trial, there is no prejudicial error which requires a reversal of the judgment. Code Civ. Proc. § 469. A judgment will not be reversed or a new trial granted for mere error when it clearly appears that the appellant has sustained no injury therefrom. Edwards v. Wagner, 121 Cal. 376, 53 Pac. 821.

[6] Appellant also contends that the alleged waiver by defendant should have been submitted to the jury as a question of fact, and that the directed verdict was therefore improper. While waiver is a mixed question of law and fact, when, however, but one inference can be drawn from the facts, it is not error for the court to charge the jury that these facts constitute waiver. 40 Cyc. 270; Spring Garden etc. Ins. Co. v. Evans, 9 Md. 1, 66 Am. Dec. 308, 315. The uncontroverted evidence before the court in the present case was such that it would have been the duty of the court to set a contrary verdict aside as unsupported by the evidence. A directed verdict was therefore proper. Estate of Baldwin, 162 Cal. 471, 123 Pac. 267; Meyer v. Lovdal, 6 Cal. App. 369, 92 Pac. 322; Bunt v. Sierra Buttes Gold Min. Co. (C. C.) 11 Sawy. 178, 24 Fed. 847.

[7] The trial court did not abuse its discretion in refusing to permit the defendant to offer additional testimony to rebut the claim

of waiver. After the defendant had rested his case and the plaintiff had made a motion for the withdrawal of the issue of breach of the contract by the defendant from the jury, and after the court had granted that motion, the defendant asked leave to introduce further testimony to rebut the waiver which was shown by the defendant's own testimony. The court denied the application upon the ground that there was no showing made that such application could not have been made sooner and before the court had decided the matter. Apart from this objection, this is not a case of a refusal to permit a party to introduce evidence to overcome the testimony of the opposing party. All the testimony upon the subject of waiver was given by the appellant himself. He cannot claim to have been surprised by his own testimony, and should not object to its being given full credence. He should not be permitted to attempt to contradict it.

The judgment is affirmed.

We concur: BRITTAIN, J.; HAVEN, J.

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41 Cal. App. 435

WESTERN CALIFORNIA LAND CO. v. WELCH et al. (Civ. 2892.)

(District Court of Appeal, Second District, Division 2, California. June 7, 1919. Rehearing Denied by Supreme Court Aug. 4, 1919.)

1. Appeal and Error 🔑499(3) — Bill of Exceptions — Specifications of Error — Necessity.

Although a bill of exceptions does not attack insufficiency of evidence to sustain the findings and judgment, as required by Code Civ. Proc. § 648, no specifications are necessary to enable the reviewing court to consider errors of law in the rulings of the trial court on defendant's objection to the introduction of evidence, motion to strike them from the record, and for nonsuit on the ground of irrelevancy and immateriality, in the absence of proper foundation.

2. Ejectment 🔑86(1)—Evidence—Presumption of Title and Right of Possession.

Actual possession establishes presumption of title and right to possession in an ejectment suit which can only be overcome by proof of anterior possession or title from a paramount source.

3. Appeal and Error 🔑907(4)—Review—Presumption on Appeal — Burden of Showing Error.

The law will presume, where the extent and nature of the evidence in an ejectment suit is not sufficiently set forth in the bill of exceptions to show the contrary, that there was competent and sufficient evidence before the court to sustain its rulings and findings.

4. Trial 🔑412, 414, 419—Rulings on Motion to Strike—Evidence.

Where, after adverse rulings on objections to evidence, motion to strike and for a nonsuit, defendants proceed with the case and introduce evidence which supplies the defects in plaintiff's proof, the erroneous rulings of the trial court are cured.

5. Appeal and Error 🔑907(2)—Review—Presumption on Appeal.

Where plaintiffs in an ejectment suit offered a deed in evidence which was objected to as being irrelevant, and defendants introduced another deed without disclosing its contents in the bill of exceptions, it will, on appeal, be presumed that such deed, if its terms were shown, establishes a foundation for plaintiff's claim.

Appeal from Superior Court, Los Angeles County; Stanley A. Smith, Judge.

Ejectment by the Western California Land Company against Benjamin P. Welch and another. Judgment for plaintiff, and defendants appeal. Affirmed.

James R. Jaffray, of Los Angeles, for appellants.

Gray, Barker & Bowen and Donald Barker, all of Los Angeles, for respondent.

SLOANE, J. This is an action in ejectment. The complaint alleges plaintiff's ownership and right to possession of the land in question, and that defendants were wrongfully in possession and withholding it from plaintiff. The answer of the defendants denies plaintiff's claim of ownership or right of possession, and alleges that defendants are in the rightful possession. The findings support the allegations of the complaint, and judgment was for plaintiff. Defendants appeal on the judgment roll and a bill of exceptions.

While the bill of exceptions contains a statement to the effect that all the evidence introduced on the trial is set forth therein, it affirmatively appears on the face of the bill that it does not contain all of the evidence. So far as the evidence on plaintiff's part is concerned, the bill of exceptions is as follows:

"Plaintiff offered in evidence a deed from the Title & Guaranty Company to plaintiff, Western California Land Company, dated December 11, 1915. (Here set out so much of said deed as is necessary to the action). Plaintiff offered a decree of this court in case No. B-29782, In Matter of Voluntary Dissolution of the Los Angeles Title & Trust Company, entered and docketed Nov. 4, 1915. (Here set out so much of said decree as may be necessary to the action) Plaintiff rests."

"Defendants objected to each and every part of such offered evidence on the ground that the same was and is irrelevant, incompetent, and immaterial, and without foundation, which objection was overruled by the court, and the evidence admitted. Defendant then moved the court to strike out each and every part thereof, on the same grounds as objected to, which motion was overruled by the court. Defendant then moved the court to grant a nonsuit in this case on the ground that no evidence had been produced by defendant, or admitted in evidence, tending in any way to support all or any of the issues in favor of the plaintiff, which motion was denied by the court."

If defendants had rested their case at this point we would be justified in reversing the judgment.

[1] It is true, as respondent urges, that this bill of exceptions contains no specification of insufficiency of the evidence to sustain the findings and judgment, as is required by Section 648 of the Code of Civil Procedure and numerous decisions of the Supreme and appellate courts of this state, where the findings are attacked for insufficiency of evidence; but no such specifications are necessary to enable the court to consider on this appeal errors of law in the rulings of the trial court on defendant's objections to the introduction of these documents, their motion to strike them from the record, and for nonsuit on the ground of irrelevancy and immateriality of the evidence in the absence of proper foundation. Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; Barfield v. South Side Irrigation District, 111 Cal. 118, 43 Pac. 406; Harper v. Gordon, 128 Cal. 489, 61 Pac. 84.

[2] Notwithstanding the fact that the bill of exceptions fails to set forth, as therein suggested, the contents or substance of the deed and decree introduced by the plaintiff, it is difficult to conceive of anything these documents could have contained which, in the absence of a chain of conveyances or other basis of title by way of foundation, would show title or right of possession in the plaintiff as against the presumption of right and title in defendants arising from their actual and admitted possession at the time of the commencement of the action. There is no more firmly established rule of evidence than that actual possession establishes presumption of title and right to possession, which can only be overcome by proof of anterior possession or title from a paramount source. Hawxhurst v. Lander, 28 Cal. 331; Morris v. Clarkin, 156 Cal. 16, 103 Pac. 180; Civil Code, § 1006. It is unnecessary to review the long list of authorities submitted by appellants to sustain this proposition. Plaintiff's deed from the Title Guaranty & Trust Company, no matter what its terms, in the absence of a showing that the Title Guaranty & Trust Company had title to convey, was entirely irrelevant and immaterial; and a decree in the matter of the dissolution of the Los Angeles Title & Trust Company, an apparent stranger to the title to this property, was equally ineffective, no matter what its recitals. So far as appears from the record of plaintiff's side of the case, the defendants' objection and motions should have been sustained.

[3] But we find, however, in the record of defendants' bill of exceptions that the defendants introduced in evidence a deed from the Los Angeles Title & Trust Company to plaintiff's grantor, the Title Guaranty & Trust Company, antedating the deed to plaintiff. The contents of this instrument are not set out. It does not even appear whether it was a deed to the land in question. Nothing, however, appears to the contrary. It may have contained recitals as to grantor's source of title that would estop defendants from claiming against it. This deed was put in evidence by defendants, and they would be bound by its recitals. The law will presume, where the extent and nature of the evidence is not sufficiently set forth in the bill of exceptions to show the contrary, that there was competent and sufficient evidence before the court to sustain its rulings and findings. The burden is upon appellant to affirmatively show, by production of all the evidence on the point, that the ruling or finding was erroneous.

[4] If, after the adverse rulings on their objection and motions to strike and for a nonsuit, the defendants proceeded with the case and introduced evidence which supplied the defects in plaintiff's proof, the erroneous rulings of the court are cured. Robinson v. Nevada Bank, 81 Cal. 106, 22 Pac. 478; Russell v. Pacific Can Co., 116 Cal. 527, 530, 48 Pac. 616.

[5] The introduction of this deed by defendants, without disclosing its contents in the bill of exceptions, opens up a field for presumption which will support any conjecture as to its terms that might reasonably be made, and which would, if shown, establish a foundation for plaintiff's claim. Doubtless the failure to include the terms of these various instruments in the engrossed bill of exceptions was the result of an oversight, but, in the absence of any suggestion for the diminution of the record, the appeal must be determined by the record as it is presented.

Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

41 Cal. App. 420

ARNOLD v. CALIFORNIA PORTLAND CEMENT CO. (Civ. 2896.)

(District Court of Appeal, Second District, Division 2, California. June 7, 1919.)

APPEAL AND ERROR ⚿1060(1) —TRIAL ⚿ 108½ — HARMLESS ERROR — CONDUCT OF COUNSEL —EXAMINING JUROR —REFERENCE TO INSURANCE.

Counsel may ask prospective jurors whether they are interested in any insurance company but persistent inquiries as to whether they would be prejudiced by knowledge that a casualty company had insured defendant, and directly implying that such insurance had been affected, constitute reversible error in an evenly balanced case.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by Frank M. Arnold against the California Portland Cement Company. Judgment for plaintiff, and defendant appeals. Reversed.

J. H. Shankland, R. H. McHargue, and Gurney E. Newlin, all of Los Angeles, for appellant.

Frank B. Daley, Daley & Byrne, and Frank T. Bates, all of San Bernardino, for respondent.

FINLAYSON, P. J. This is an action for damages for personal injuries sustained by plaintiff in a dynamite explosion at defendant's plant, near the town of Colton, while plaintiff was in defendant's employ as a "powder man." The accident occurred May 9, 1909. This was prior to certain recent legislation enlarging the responsibility of employers for injuries to employés. From a judgment in favor of plaintiff, upon the verdict of a jury, defendant appeals. The case was before the Supreme Court on a former appeal (161 Cal. 522, 119 Pac. 913), where a previous judgment for plaintiff was reversed by that court upon the ground of error in the admission of certain evidence.

The gravamen of the action is that defendant negligently furnished for plaintiff's use an electric battery that was too weak to explode the dynamite in nine holes that he was directed by his foreman to explode in the process of "springing the holes," that is, preparing them to receive the charges of black powder. The nine holes were connected by wire in a series. Plaintiff attempted to explode all of them at one time by a single discharge of the electric current from the battery. The battery failed to explode at least one of the holes. The failure to explode all the holes could not be detected from surface indications. For some reason, perhaps because he suspected that some of the holes had failed to explode, plaintiff, immediately after his attempt to explode the nine holes at once, connected each hole separately with the battery, turning on the current each time. The connection so made separately with each hole caused no explosion. From this plaintiff concluded that all the charges had exploded with the first discharge of the current from the battery. Thereupon he commenced to drill the holes with a heavy steel drill for the purpose of cleaning them out and preparing them to receive the heavy black powder. He made no further examination, and took no precaution of any kind against any accident that might occur if it should turn out that the dynamite in some one or more of the holes had failed to explode the first time. While drilling in one of the holes, either the third or the fourth in the series, the dynamite that he had placed therein, and which had failed to explode when the current from the battery was turned on, exploded, and the injuries of which he complains were thus sustained. The battery had been used for several months, and at times had failed to discharge a blast when connected with but a single hole. Plaintiff had been at work for the defendant for about four months. He knew the battery was not new, and also, from his experience, that such a battery, which is but a mechanism for generating an electric current, gets weaker with use.

Inasmuch as the case must be reversed because of the misconduct of plaintiff's counsel while examining the jury panel upon their voir dire, we do not find it necessary to make a more extended statement of the facts. It will suffice to refer to the facts as stated in the opinion on the first appeal. In their essential aspects the facts brought out at the first trial do not differ materially from those adduced at the second trial.

Whether respondent was guilty of contributory negligence in assuming that the nine blasts were exploded by the first discharge of the electric current from the battery, and in failing to use any precautions against possible injury in the event that all the charges were not thus exploded, is a very close question. It is also a nice question as to whether the failure of the charge to explode when the current was turned on was due to weakness of the battery or to respondent's own negligence in failing properly to connect the wires from the battery with the charge of dynamite. We are not entirely satisfied that the evidence is sufficient to sustain the verdict. If it is, the margin is very slight indeed. However, since the case must be sent back for a new trial because of the error above suggested, and because the case for plaintiff on the next trial may be stronger than that disclosed by the record before us on this appeal, it will not be necessary to consider the sufficiency of the evidence.

Considering the weakness of the evidence and the exceeding narrowness of the margin to support respondent's theory of the accident, it is obvious that any improper questions propounded to the jurors upon their voir dire, calculated to bias them in favor of respondent, must be deemed to have been prejudicial to appellant. Questions of that character, over appellant's objections, were propounded and allowed during the examination of the panel. The objectionable questions were asked in the presence and hearing of all the panel from which the jury that tried the case was selected. For this reason we think the judgment should be reversed.

While examining the jury panel upon their voir dire, respondent's counsel asked these questions:

> "Now, if you were sworn as a juror, and during the trial of this case, near the end of it, you should learn that the New Amsterdam Casualty Company, one of these surety companies, was a surety at the time of this accident alleged, or an insurer against any injury to employés, would that in any wise affect your verdict in this case?" Also: "And if it came to your knowledge, if you were a juror in this case, and it came to your knowledge from any source whatever, that the New Amsterdam Casualty Company was a surety for any injury to the employés of the defendant company at the time of this alleged injury, would that knowledge of that fact in any wise influence your verdict in the case?"

Each of these questions carried with it the implication, if not the direct assertion, that appellant was insured by a casualty insurance company against any financial loss it might sustain by reason of the injury to respondent. To these questions, and others of a similar import persistently propounded, appellant's counsel strenuously objected upon the ground that the same were incompetent, irrelevant, and immaterial, and particularly upon the ground that each was an improper question to be asked the jurors upon their voir dire. The objections were overruled. It does not appear that the court in any manner or at any time endeavored to admonish the jury to disregard the damaging insinuation conveyed to their minds by this line of questioning. The questions were highly prejudicial, and it was error to overrule respondent's objections. Pierce v. United Gas, etc., Co., 161 Cal. 176, 188, 118 Pac. 700; Roach v. Llewellyn, etc., Co., 140 Cal. 563, 74 Pac. 147; De Liere v. Goldberg, etc., Co., 30 Cal. App. 612, 159 Pac. 197; Dameron v. Ansbro, 178 Pac. 874; Spinney's Adm'x v. Hooker (Vt.) 102 Atl. 53; Putnam v. Pacific Monthly Co., 68 Or. 36, 130 Pac. 986, 136 Pac. 835, 45 L. R. A. (N. S.) 338, L. R. A. 1915F, 782, Ann. Cas. 1915C, 256; Horsford v. Carolina Glass Co., 92 S. C. 236, 75 S. E. 533; Loughlin v. Brassil, 187 N. Y. 128, 79 N. E. 854; Cosselmon v. Dunfee, 172 N. Y. 507, 65 N. E. 494; Rothenberg v. Collins, 161 App. Div. 387, 146 N. Y. Supp. 762; Eckhart, etc., Co. v. Schaefer, 101 Ill. App. 500, 102 N. E. 778; Crowley v. Stresebreuter, 174 Ill. App. 538; Mithen v. Jeffery, 259 Ill. 372; Houston Car, etc., Co. v. Smith (Tex. Civ. App.) 160 S. W. 435; Beaumont, etc., Co. v. Dilworth (Tex. Civ. App.) 94 S. W. 352; Stratton v. Lumber Co., 39 Wash. 323, 81 Pac. 831, 109 Am. St. Rep. 881; Inland Steel Co. v. Gillespie, 181 Ind. 633, 104 N. E. 76; Duncan Coal Co. v. Thompson's Adm'r, 157 Ky. 304, 162 S. W. 1139.

There is a decided divergence of opinion among the courts of the several states as to the right of counsel for plaintiff in a personal injury action to suggest in any way, in the presence of the jury, that an indemnity insurance company is an actual party in interest. The cases are collected and reviewed in an exhaustive note to Egner v. Curtis, etc., Co., L. R. A. (N. S.) 1915A, p. 153 et seq. From what is said in De Liere v. Goldberg, etc., Co., supra, it is evident that, as yet, there is no decision in this state that has attempted to define the circumscribing bounds within which examining counsel, at their peril, must confine themselves. The question is one that, in so far as is reasonably possible, ought to be settled as a matter of general practice.

It is extremely difficult, if not impossible, to lay down a fixed rule that will apply on all occasions and define the restrictive limitations with absolute exactness. It is, however, possible and practicable to define the guiding principles applicable to such cases. Courts do not look with favor upon an attempt to impress the jury with the idea that, not the local defendant in the case, but an insurance company, which often is a foreign corporation, may be called upon to respond to such damages as the jury may assess. The knowledge that the defendant has such protection may have a tendency to make the jurors careless as to the amount of their verdict. As was said in a Maine case (Sawyer v. Arnold Shoe Co., 90 Me. 369, 38 Atl. 333):

> "* * * To allow juries, in cases of this kind, to take into consideration the fact that an employer was insured against accidents would do more harm than good, and would increase the already strong tendency of juries to be influenced, in cases of personal injury, especially where a corporation is defendant, by sympathy and prejudice."

Notwithstanding the apparent diversity of the decisions, we think that a correct statement of the rule, supported by reason and the weight of authority, is substantially as follows: It is entirely proper for counsel to ask the jurors such questions as may reasonably be necessary to ascertain whether they are free from a bias or interest that may affect their verdict. To this end it is proper for counsel, in good faith, to ask of each juror whether he is interested as an agent or stockholder or otherwise in a specified casualty company. Or he may be asked the broad question whether he is interested in any insurance company insuring against liability for negligence. Rinklin v. Acker, 125 App. Div. 244, 109 N. Y. Supp. 125; Grant v. National, etc., Co., 100 App. Div. 234, 91 N. Y. Supp. 805. But counsel must take pains to propound such questions in such a manner as not unnecessarily to convey the impression that the defendant is in fact so insured. It is misconduct on the part of counsel for plaintiff in such actions so to frame his question that it goes beyond what is reasonably necessary to serve the legitimate purpose of eliciting the facts he is entitled to adduce in order to secure a jury free from bias or prejudice, if it is also apparent that the question may fairly be said to have the effect of serving the illegitimate purpose of prejudicing the jury by fixing in their minds the idea that the defendant is protected by insurance against liability for negligence. And if the amount of the verdict is large as compared with the nature of the injuries sustained, or the defendant's liability is a close question, such misconduct is prejudicial and ground for reversal.

The plaintiff has the right to inquire about any interest, direct or indirect, of the jurors that may affect their verdict, but he has no right to abuse his privilege or make of it a strategem by which he can prejudice the jury with irrelevant matter. As was well said in one of the cases, counsel, at his peril, must steer a clear course between the Scylla of an interested jury on the one hand and the Charybdis of pettifoggery on the other. Asking a juror whether he is interested in a specified casualty company, or, generally, in any insurance company, if the question be propounded in good faith, may be necessary in order to insure the plaintiff a body of jurors unbiased by any connection in favor of the party really interested in the defense of the action. But beyond this it is neither necessary nor proper to go. It is not permitted to counsel, under the guise of testing their qualifications as jurors, to go beyond what is necessary to insure a body of unbiased jurors and seek to create the impression that an insurance company, and not the defendant in the case, will be called upon to respond to such damages as the jury may assess. When questions propounded to prospective jurors overreach the limit, they may prove unprofitable to the party asking them. As was said in Hoyt v. Davis Mfg. Co., 112 App. Div. 755, 98 N. Y. Supp. 1031:

> "When counsel ask such questions, overreaching the limit, with a hope to gain a benefit from them, it is but fair that he should take the risk, and in a close case the court may properly consider that such suggestion had the very effect which counsel intended it should have."

It appears from the questions propounded to the jurors in this case that respondent's counsel, not satisfied merely to ask the prospective jurors whether they knew any one connected with the New Amsterdam Casualty Company, or whether they were interested in that company as stockholders or otherwise, which questions they would have had the right to ask for the purpose of exercising their challenges, proceeded further, and, in effect, conveyed to the minds of the jurors, unnecessarily, the idea that the New Amsterdam Casualty Company was the real party interested in the defense of the action. And the court, by overruling the vigorous objections of appellant's counsel, stamped the statements with its approval. It is obvious, therefore, that counsel, presumably learned in the law, could not have asked the questions for any legitimate purpose, and, while we will not say they were deliberately made for the illegitimate purpose of prejudicing the jury, it is plain that they were well calculated to have that effect. The questions could have had no other tendency than to seduce a verdict on the ground that an insurance company, and not the defendant, would be the one really affected by a verdict in favor of the plaintiff. They certainly would have a tendency to render the jurors careless as to the amount of their verdict. It is possible in such cases for an attorney, who is acting in good faith and with a proper regard for the rights of his adversary, to elicit all necessary information without disclosing to the jurors the reason prompting the inquiry. Without attempting to mark out a definite course to be pursued in all cases, for that is neither necessary nor practicable, we hold that counsel here overstepped the bounds of fair and legitimate practice. The court erred in overruling appellant's objections. And, in view of the slight margin of evidence in favor of the proposition that respondent himself was not guilty of contributory negligence, we cannot say that the error was not without prejudice to appellant.

The conclusion at which we have arrived renders it unnecessary to consider appellant's complaint of certain questions propounded by respondent's counsel to the witness Mullen, and which appellant contends were an invasion of the province of the jury and of the kind held objectionable on the first appeal. Doubtless, on the retrial, respondent's counsel, in the examination of the witnesses, will so frame their questions as to avoid any risk of possible error.

Judgment reversed.

We concur: **SLOANE, J.; THOMAS, J.**

41 Cal. App. 439

LOS ANGELES ATHLETIC CLUB v. UNITED STATES FIDELITY & GUARANTY CO. (Civ. 2886.)

(District Court of Appeal, Second District, Division 2, California. June 7, 1919.)

1. Insurance 🔑542(6)—Surety Company—Itemized Statement of Claim.

In an action on fidelity insurance policy for loss by reason of dishonesty of an employé, itemized statement of claim *held* sufficient.

2. Insurance 🔑665(7) — Fidelity Insurance—Notice.

In an action on fidelity insurance policy, which required the employer to give notice by registered letter, addressed to the president of the insurance company at its office promptly after becoming aware of any act which might be made the basis of the claim, evidence *held* insufficient to show that the employer promptly gave notice after its executive officers received knowledge of the employé's dishonesty.

3. Insurance 🔑539(5) — Fidelity Insurance—Time of Notice of Claim.

Noncompliance with the provision of fidelity insurance policy, requiring prompt notice after the employer should become aware of any act which might be made the basis of a claim, cannot be excused on the ground that it was an immaterial provision, and that therefore, under Civ. Code, § 2611, a violation did not avoid the policy.

4. Insurance 🔑670—Fidelity Insurance—Evidence—Finding.

In an action on a fidelity insurance policy, *held* that, while the court had the right to arrive at an estimate of the employé's misappropriations, which consisted largely of consuming the employer's stock of liquor, by an approximation of the daily articles consumed, the finding of the court was insufficient, where it did not show what proportion of the value taken by the employé accrued prior to the discovery of his dishonest acts.

5. Insurance 🔑508½, New, vol. 4 Key-No. Series—Fidelity Insurance—Losses.

A fidelity insurer is not liable for any acts of fraud or dishonesty committed by the employé, after the employer became aware of any act which might be made the basis of a claim.

6. Insurance 🔑646(8) — Fidelity Insurance—Evidence.

In an action by an athletic club against a company insuring it against loss by reason of the dishonesty of the club manager, who, it was charged, in violation of his contract of employment, consumed without payment large amounts of liquors belonging to the stock of the club, *held* that the club had the burden of proving that the manager did not pay for the liquors consumed.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by the Los Angeles Athletic Club against the United States Fidelity & Guaranty Company. From a judgment for plaintiff, defendant appeals. Reversed.

Newlin & Ashburn, of Los Angeles, for appellant.

Clyde E. Cate, H. W. Creighton, Sol. A. Rehart, all of Los Angeles, for respondent.

SLOANE, J. This action was brought to recover on a bond or policy of fidelity insurance. The plaintiff employed one Walter L. Patterson as manager of its clubhouse at a salary of $300 per month, with the express agreement "that he was to receive no other remuneration, perquisites or consideration," and "that he should pay the customary price or charge so fixed by plaintiff for every article of said goods, wares and merchandise said Patterson should receive for himself and use to his own benefit"; and further, "that he was not, under any circumstances, to take, use or receive for his own benefit any articles of goods, wares or merchandise kept in stock by plaintiff as aforesaid without paying therefor the full price fixed by plaintiff as the selling price thereof to the members of its said club."

The defendant, a fidelity insurance company, for consideration, insured plaintiff against any pecuniary loss that might be sustained by reason of the fraud or dishonesty of said Walter L. Patterson up to and including the amount of $5,000.

It stands admitted by the pleadings that Patterson was in the employment of the plaintiff under the agreement as stated from the 1st day of November, 1911, until the 2d day of May, 1914.

The trial court finds:

> "That subsequent to the 1st day of July, 1912, the said Walter L. Patterson fraudulently and dishonestly, and contrary to and in violation of the terms of said agreement of employment, and without plaintiff's knowledge or consent, used, took, carried away, and converted to his own use goods, wares, and merchandise consisting of certain articles and commodities kept in stock by plaintiff for the use of its members, such as alcoholic and other beverages, cigars, candies, etc., of the reasonable value of $2,015.08. That said Walter L. Patterson has not paid the plaintiff for any of said goods, wares, and merchandise, although demand was made on him therefor."

The court further finds that plaintiff had no knowledge of the taking and appropriation of these commodities by Patterson until "on or about the 1st day of April, 1914, and that thereafter, about said date, plaintiff advised the defendant corporation of the alleged acts of fraud and dishonesty on the part of Patterson."

Defendant appeals from the judgment against it for $2,015.08, and costs. It is urged that the judgment should be reversed for the following reasons:

(1) Because plaintiff did not comply with the conditions of the insurance contract, which required "that the employer shall give notice by registered letter addressed to the president of the surety company at its office in Baltimore, Maryland, promptly after becoming aware of any act which may be made the basis of a claim," and also that "the employer shall, within ninety days after date of said notice, file with the surety company its itemized claim thereunder, duly sworn to."

(2) That the acts of Patterson on which the claim rests did not constitute fraud or dishonesty in the course of his employment, and were not such acts of dishonesty as were covered by the policy of insurance.

(3) Insufficiency of the evidence as to the amount and value of the goods taken by Patterson.

(4) Insufficiency of the evidence to sustain the finding that the articles taken and used were not paid for.

[1] On the second specification of the first ground of objection to the judgment, we are of the opinion that the requirement for an itemized statement of the claim was as fully and satisfactorily made as it could be under the circumstances, by the affidavit of various officers and employés of the club, which appear in the record, and which give in detail all the information as to the nature and amount of Patterson's alleged misappropriations which the various witnesses possessed. These affidavits were in reasonable time, before bringing suit, furnished to representatives of the defendant company.

[2] But as to the first specification, there does not appear at any time to have been a compliance with the express condition of the policy that notice should be given in writing to the president of the company; and it is more than doubtful if such notice as was conveyed to the local agents of the defendant was given with any degree of promptness after the officers of the plaintiff "became aware" of the acts of alleged dishonesty on which they base their claim.

It is claimed by plaintiff, and the trial court so found, that plaintiff had no knowledge of the alleged acts of dishonesty on the part of Patterson until on or about the 1st day of April, 1914. The only finding as to notice to the defendant is that "thereafter, and on or about said date, plaintiff advised the defendant corporation of the acts of fraud and dishonesty on the part of Patterson." This is perilously close to a vague and indefinite conclusion of law as to the matter of notice. Moreover, we are not at all satisfied that the evidence supports the finding as to the time of discovery of the facts, or of the alleged notice.

In the first place, there seems to have been a conspicuous lack of diligence on the part of the officers of the club in discovering Patterson's habits in the matter of personal consumption of the supplies of the club. It seems to have been a matter of common notoriety among the employés of the club, including the bartenders who served him, that he was a constant and capacious patron of the bar for years. From his subsequent investigations the vice president of the club estimates that the aggregate of the goods and wares received by Patterson—most of which seem to have been openly procured by him from other employés at the bar—amounted in value to about $6,000. Roberts, the head barkeeper, who was in that position throughout Patterson's employment as manager, testified that the latter received at his bar, on an average per day, four long whisky highballs, two cocktails, three to five pints of beer, two gin fizzes and two glasses of Lithia water; and that he smoked about eight cigars per day, and received from two to six quarts of whisky per week, and six pints of champagne per week—together with cigarettes, light wines, and other commodities not enumerated. The witness further states that he does not include in his list any liquor which Patterson might have drunk between 2:30 p. m. and 4:30 p. m. while the witness was off duty. Another bartender, named Sakai, testified that he was bartender of the club after July 14, 1913, and that he served Patterson drinks on an average of about four pints of Budweiser a day, a cocktail before dinner, another about 6:30 p. m. and about three pints of whisky a week; also occasional highballs and packages of candy. Shubata, another bartender, testifies to serving Patterson mostly highballs, Budweiser beer, and some champagne. He served him an average daily of from three to five highballs, about four pints of Budweiser, about three pints of whisky per week, a gin fizz in the morning, and sometimes wine, cocktails, and champagne.

All this was done openly, and from the service bar of the club. The witnesses further stated that Patterson paid very little, and that no account was kept by them.

One F. W. Lloyd, whose affidavit was admitted in evidence as part of the statement submitted to the defendant company, testifies: That he was the house detective of the plaintiff club. About March 1, 1914, it was reported to him "by numerous employés of the club that Patterson was in the habit of drinking quite heavily, and that he was frequently intoxicated, and that the said employés believed that said Patterson was not paying for the liquor which he drank and had sent out to his house from the club. That this affiant reported said rumors to Mr. Frank A. Garbutt, vice president of said club," and that Garbutt stated that he did not believe the rumors, but directed the witness to investigate. That on the expiration of a week, and "being convinced that said

Patterson was defrauding the club of many dollars' worth of liquor each day," the witness again reported to Garbutt the result of his investigations. This affiant further avers "that it was generally known among the employés of said club that said Patterson was mulcting said club out of large quantities of valuable commodities daily, but that this knowledge on the part of said employés was just on hearsay and upon their observations of Patterson's apparent intoxication." According to this witness, the information contained in his affidavit was conveyed to Mr. Garbutt, the vice president and a director of the club, early in March, 1914.

The testimony of Mr. Garbutt himself is rather confusing. He states in one of his affidavits that in his capacity as vice president of the club he did, "on or about the 25th day of January, 1914, become cognizant of said acts of fraud and dishonesty on the part of said Walter L. Patterson, whereby said Patterson was misappropriating goods belonging to said Los Angeles Athletic Club." In another place, in answer to the question, "Did Patterson ever do anything which you considered as a violation of the terms of his employment?" he answered, "On or about three months before Mr. Patterson was discharged it was brought to my attention that he was drinking at the club." Patterson was discharged May 2, 1914. At another place in his affidavit he states that—

> "During the period between January 28, 1914, and May 2, 1914, Patterson misappropriated goods of the value of $209.70," and "that the fraud and dishonesty of said Walter L. Patterson was not discovered or suspected by said Frank A. Garbutt, or any other officer of the Los Angeles Athletic Club, before or until the date last mentioned."

If this refers to the date of May 2d, the date when Patterson was discharged, it is inconsistent with all the other testimony on this point. It is more probable that he refers to the "period" somewhere between January 28th and May 2d. At another place in his affidavits Mr. Garbutt states that on or about the 1st of April, 1914, facts were reported to him tending to show that Patterson "was systematically defrauding the club." It is upon this date that the court fixes its finding, but it may be observed that the witness does not state in this connection that he had no information of an earlier date. We find in the record a letter, introduced by plaintiff, addressed to Mr. Garbutt, signed by one J. E. Murphy, of date March 3, 1914, purporting to confirm a previous interview with Garbutt, which letter calls attention to a liberal supply of liquors at Mr. Patterson's home, and a statement by Patterson that—

> 'Mr. Garbutt might be a shrewd business man, but he sure was easy when it came to club business, for he (Patterson) pulled it all over them when it came to taking an inventory in the wine room."

The letter also contains a statement of the writer that on leaving the club on one occasion he saw the storeroom man come up from the wineroom and give Patterson three large boxes of cigars. There are also further statements in the letter calculated to reflect upon Mr. Patterson's integrity in his relations to the club.

The conclusion cannot be avoided that the officers of the club had information as early as the first part of March, 1914, sufficient to demand an investigation, and that every facility was close at hand and accessible for getting promptly at the facts. There seems to have been no hesitancy on the part of the various employés in telling what they knew, when asked.

In spite of this remarkable history of events, there is no pretense of any notice to the president of the defendant company, as required by the policy, and no evidence of any notice at all, so far as we have been able to discover, earlier than the last of May or the first of June, 1914. The only definite evidence on this point is contained in the testimony of Mr. Creighton, an attorney for the plaintiff, who states that he first became aware of the matters involving Patterson about April 1, 1914, when Mr. Garbutt called him into his office and told him that he had information tending to show that Mr. Patterson had been violating his contract. He says that he took the matter up with Mr. Shroder, of the Frank M. Kelsey Company (local agents of the defendant, we assume), some time during the month of May. Further on in his testimony he says:

> "The first occasion of taking these facts up with Mr. Shroder, or anybody, was the latter part of May or the first of June."

Later on in his testimony, having examined certain correspondence of date May 7, 1914, he says that the claim was not presented to the Frank M. Kelsey Company "until after May 7, 1914." He states further that Mr. Shroder told him to place the claim in form and present it to him, and that he might wait until he had done so before sending formal notice to the president of the company. If any authority on the part of a representative of the local agent to make such a waiver of notice could be assumed under any circumstances, we are met by the provision of the insurance bond or policy that—

> "None of its conditions shall be deemed to have been waived by or on behalf of said surety unless the waiver be clearly expressed in writing, over the signature of its president or secretary, or their duly authorized officer, and its seal thereto affixed."

We have here, then, an entire failure to give the required notice to the president of the company, and a delay of about 60 days from the time the court found the plaintiff became aware of Patterson's alleged defalcations, and of from 90 days upwards from the time when they should have been, and probably were, sufficiently aware of these facts, before the matter was called to the attention of even the local agents of defendant. And the authority, by the way, of these agents to act for the company in any capacity does not appear in the record.

[3] Respondent contends that this condition of the policy, requiring prompt notice of the acts constituting the basis of a claim, is not material to the rights of defendant, and that under the Civil Code, § 2611, the violation of an immaterial provision of a policy does not avoid it, unless it is so expressly declared in the policy. The contention that this express condition for prompt notice is not material to the contract is not sustained by respondent's authorities, and is contrary to the generally recognized construction of such requirements in insurance policies. Respondent's citations to the effect that notice is not material unless it is shown that injury has resulted from the failure to give same, in nearly every instance, deal with the implied requirements of notice under the general law of guaranty and suretyship. Here the parties expressly stipulated in their written contract for prompt and specific notice. To quote from another opinion:

> "The conditions in policies requiring notice of losses to be given, and proofs of the amounts to be furnished the insurer within certain prescribed periods, must be strictly complied with to enable the insured to recover. And it is not perceived that the conditions under consideration stand upon any different footing. The contract of insurance is a voluntary one, and the insurers have the right to designate the terms upon which they will be responsible." Riddlesbarger v. Insurance Co., 7 Wall. 386, 390, 19 L. Ed. 257, cited in California Savings Bank v. American Surety Co. (C. C.) 87 Fed. 118.

Construing and applying a requirement of notice similar to the one here, in a fidelity insurance policy, in the case of California Savings Bank v. American Surety Co., supra, Judge Wellborn of the United States District Court, in his opinion, says:

> "In case of loss upon an insurance against fire, an insurer is exonerated if notice thereof be not given him by some person insured or entitled to the benefit of the insurance without unnecessary delay. Civil Code, § 2633. * * * Whether or not in other kinds of insurance notice is essential, depends upon the contracts which the parties make. The foregoing section, however, does emphasize in the strongest possible manner the materiality of notice in the case of fire insurance; and it is believed that in fidelity insurance, which is of recent origin, notice of the fraudulent acts of the employé is of equal, if not greater, importance, for the reason that prompt notification may often enable the insurer to avoid, or secure indemnity for, losses which otherwise would be inevitable or irremediable. The authorities cited by defendant to the effect that the requirement as to notice of loss is a material provision, and must be strictly complied with in order to enable the employer to recover, are numerous. Ermentrout v. Insurance Co. [63 Minn. 305] 65 N. W. 635 [30 L. R. A. 346, 56 Am. St. Rep. 481]; Quinlan v. Insurance Co., 133 N. Y. 356, 31 N. E. 31; Insurance Co. v. McGookey, 33 Ohio St. 555; 2 Wood, Ins. §§ 436, 437; 2 May, Ins. § 461; Tayloe v. Insurance Co., 9 How. 403 [13 L. Ed. 187]."

The opinion cited further states:

> "The allegations of the complaint that the defendant was in May, 1892, fully advised and informed of the breaking of the bond and the loss resulting therefrom do not, in my opinion, excuse plaintiff's failure to give the prescribed written notice of the fraudulent acts of the employé, and such failure is nonperformance of the contract on the part of plaintiff as to defeat recovery."

It may be conceded that the insured is not called upon to act on mere suspicion in the matter of giving notice to the insurer; but in this case the plaintiff knew, or had every opportunity of knowing, all the facts early in March, or the first of April, 1914, at the latest.

Our conclusion as to the materiality of the requirement to give notice of the facts upon which respondent's claim is based, and the failure to make a reasonable, or any, compliance with its terms, make it unnecessary to discuss to any extent the other points of appellant's argument. It may be said, however, that while under the terms of the employment of Patterson any ordinary running of a bill at the bar or restaurant of the club, although remaining unpaid, might merely create a debt and not constitute a fraud, the nature and extent of his appropriation and consumption of the supplies of the plaintiff club as shown here, particularly the carrying away of liquors and cigars, are, we believe, such as to justify a finding of fraud and dishonesty in his transactions.

[4, 5] We are satisfied, too, that the court had a right to arrive at an estimate of the amount of Patterson's misappropriations by the method of approximation from the daily average of articles consumed. The fact alone that it is difficult, and perhaps impossible, to reach an accurate accounting, should not deprive the insured of all relief. But the difficulty presented by the finding of the court on this point is that it does not show what proportion of the value taken by Patterson accrued prior to the discovery of his dishonest acts. It is well-settled law, and is expressly provided by this policy of insurance, that the insurer shall not be liable for any acts of fraud or dishonesty committed by the employé after the employer shall become

aware of any act which may be made the basis of a claim. The court here finds that "subsequent to the 1st day of July, 1912," the said Walter L. Patterson fraudulently and dishonestly, and contrary to the terms of his agreement, appropriated to his own use the goods and wares of plaintiff to the value of $2,015.08. Patterson's dishonesty was discovered not later than April 1, 1914. He continued in the employ of plaintiff until May 2, 1914. The evidence tends to show that his misappropriations continued throughout his employment. What proportion of the value found by the court accrued after April 1st cannot be determined from the record. The finding is insufficient in this respect.

[6] It is also doubtful if there is any sufficient evidence of nonpayment. The bartenders testified that Patterson paid them something, but not much. As to whether there was ever any settlement with the officers of the club, there is no evidence at all. If the action was against Patterson, the burden would be upon him to show payment. But in this action against his sureties it is certainly incumbent on plaintiff to show nonpayment. The action is not on the indebtedness of Patterson, but upon a contract to indemnify plaintiff against pecuniary loss from Patterson's dishonesty. The plaintiff must prove his loss, and to do this must establish the fact that Patterson has not paid for the goods taken.

The judgment is reversed.

We concur: FINLAYSON, P. J.; THOMAS, J.

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LUCKIE v. DIAMOND COAL CO. (Civ. 2907.)

(District Court of Appeal, Second District, Division 2, California. June 7, 1919. Rehearing Denied by Supreme Court Aug. 4, 1919.)

1. Appeal and Error 🔑856(5)—Review—Grant of New Trial.

Where an order granting a new trial stated, "The motion of plaintiff for a new trial herein is hereby granted, upon the grounds specified in the notice of intention filed herein, except upon the grounds of insufficiency of evidence, as to which grounds said motion is denied," the question of the sufficiency or insufficiency of the evidence to justify the verdict for defendant cannot be considered on appeal.

2. Appeal and Error 🔑1078(6)—Matters Reviewable—Briefs.

Where an appellee's brief urges only one ground why the court was warranted in granting a motion for a new trial, it will be assumed that there was no other valid ground for a new trial.

3. Municipal Corporations 🔑705(12) — Automobiles—Lights—Duty of Owner.

By the use of the alternative, "owned by him or under his control," in St. 1913, pp. 645, 646, §§ 13, 19, the Legislature intended to impose the duty of seeing that a motor vehicle carried a rear red light upon the owner when, and only when, he is in control of the motor vehicle, personally or through a servant, and to impose that duty upon some other person when such other person is operating the vehicle and it is under his control.

4. Master and Servant 🔑315—Independent Contractor —Violation of Automobile Regulations—"Allow."

The word "allow," as used in St. 1913, p. 646, § 19, providing that no person shall allow a motor vehicle owned by him or under his control to be operated in violation of the statute, means to acquiesce in, and, since knowledge, express or implied, is essential to guilt, a motor vehicle owner is not liable for the absence of a rear red light at night while the vehicle is in the hands of an independent contractor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Allow.]

5. Master and Servant 🔑316(1)—Injuries to Third Persons—Relation—Servant or Independent Contractor.

Whether a motortruck lessee employed by the lessor to haul coal is a servant or independent contractor, at the time of injury to a third person, must be determined not alone from the written contract of employment, but from the subsequent conduct of each, known to and acquiesced in by the other.

6. Master and Servant 🔑318(1)—Injuries To Third Persons—Relation.

A conditional vendee and lessee of a motortruck, who is under a contract of employment to haul coal for the lessor, who has no right to control and direct the manner in which the hauling should be done, is an independent contractor, for the negligence of whose servants the lessor is not liable.

7. Master and Servant 🔑316(1) —Contract of Employment—Modification.

Where the parties to a written contract of employment by mutual consent, inferred from their subsequent conduct, have modified their contract so as to create the relation of contractee and independent contractor, and have acted upon it as modified, it is valid in the modified form to the extent and during the period it was so acted upon and carried out.

8. Evidence 🔑424 —Parol Evidence Affecting Writing—Third Persons.

It is competent for one sued as master for the negligence of his alleged servant, where the written contract bears evidence of that relation, to show, by parol evidence, that he and his alleged servant by their conduct put a different construction upon their contract and treated each other as contractee and independent contractor.

9. Master and Servant 🔑318(1) —Independent Contractor.

The mere fact that a contract of employment gives employer right to terminate it at any time he chooses does not necessarily show that the person employed is not an independent contractor.

10. MASTER AND SERVANT ⚷318(1)—INDEPENDENT CONTRACTOR.

That a contract of employment of a motor-truck lessee and his truck, for making deliveries for the lessor, required that the lessee drive the truck, does not necessarily lead to the conclusion that he was a servant and not an independent contractor.

11. MASTER AND SERVANT ⚷332(3) —INJURIES TO THIRD PERSONS—QUESTION FOR JURY—INDEPENDENT CONTRACTOR.

Whether the relation between a coal company and one to whom it had leased a motor-truck with option to purchase, compensation under a contract to haul coal for the company to be applied on the truck, was that of master and servant or contractee and independent contractor, *held* for the jury.

12. MASTER AND SERVANT ⚷302(1) — RESPONDEAT SUPERIOR.

The doctrine of respondeat superior applies only where the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged with the result of the wrong, at the time and in respect to the very transaction out of which the injury arises.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Lorenzo Foster Luckie against the Diamond Coal Company. Verdict for defendant, and from an order granting a new trial it appeals. Reversed.

Harry A. Hollzer and J. Crider, Jr., both of Los Angeles, and Guy Le Roy Stevick, of San Francisco, for appellant.

Delphin M. Delmas, of Los Angeles, for respondent.

FINLAYSON, P. J. Defendant appeals from an order granting a new trial after a verdict in its favor.

The action is for the recovery of damages for personal injuries sustained in an automobile accident, alleged to have resulted from the negligence of defendant's servants. Whether the persons whose negligence caused the accident were the servants of defendant or of one whom defendant claims was an independent contractor, is one of the principal questions presented.

[1, 2] The order granting the new trial is as follows:

> "The motion of plaintiff for a new trial herein is hereby granted, upon the grounds specified in the notice of intention filed herein, except upon the grounds of insufficiency of evidence, as to which grounds said motion is denied."

The language of the order eliminates from consideration here the question of the sufficiency or insufficiency of the evidence to justify the verdict. Kauffman v. Maier, 94 Cal. 270, 29 Pac. 481, 18 L. R. A. 124; Siemsen v. Oakland, etc., Ry. Co., 134 Cal. 494, 66 Pac. 672; Higgins v. Los Angeles Gas, etc., Co., 159 Cal. 651, 115 Pac. 313, 34 L. R. A. (N. S.) 717. Though respondent, had he elected to do so, could have presented to this court any good reason, disclosed by the record, why there should be an affirmance of the order appealed from, other than as to the sufficiency of the evidence, he has chosen to limit his attempted vindication of the order to alleged error in giving and refusing certain instructions. Respondent's brief here consists of a printed copy of his oral argument in the lower court upon his motion for a new trial. From this it appears that the sole grounds there urged why a new trial should be granted, which are likewise the sole grounds here urged as reasons why the order should be affirmed, are that the court erred in giving the instructions complained of, and in refusing the requested instructions. It will be assumed, therefore, that there was no other valid ground for a new trial. So that, if none of the grounds urged by respondent in his brief be tenable, the order should be reversed. Piercy v. Piercy, 149 Cal. 163, 86 Pac. 507.

On the evening of December 16, 1914, more than a half hour after sunset, in the city of Los Angeles, an automobile, in which plaintiff was riding as a passenger, collided with a heavy autotruck, known as a Gramm truck, on which was the sign "Diamond Coal Company." The truck was in charge of one Terry, as driver, assisted by one Cunningham, as helper. It was standing on Sunset boulevard near the corner of that thoroughfare and Alvarado street. Upon approaching the corner, Terry and Cunningham discovered that the light known in common parlance as the "tail light" had gone out. It was a stormy, rainy night. Failing to light a match in the blustering wind, Terry secured an ordinary hand lantern which was regularly carried on the truck, took it to a nearby garage, lit it, and hurried back. As he approached the truck with the lighted lantern, the automobile in which plaintiff was being carried as a passenger, traveling on Sunset boulevard in the same direction that the truck had been going, collided with the rear end of the truck, resulting in the injuries to plaintiff.

At the time of the accident, the truck was in the possession and control of one Foulks, under a written lease from defendant, or conditional sale contract, bearing date June 20, 1914. Contemporaneously with the execution of this lease defendant and Foulks had entered into another written agreement, hereinafter referred to as the "contract of employment," wherein defendant is referred to as the first party and Foulks as the second party, and which, so far as is necessary to an understanding of the questions here presented, after reciting that defendant is desirous of securing the services of an autotruck and driver, and that Foulks, as the lessee of the Gramm truck, is desirous of securing a steady and permanent contract for the employment of himself and his truck, provides as follows:

> "That said second party shall use and drive said autotruck in the service of said first party at least ten hours per day of each working day, continuously, until all claims said first party has against second party for payments on lease of said Gramm * * * truck have been satisfied. * * * Second party will furnish all gasoline, oil, and grease necessary in the operation of said autotruck, and will prudently use, care for, and keep same in good order and repair. * * * In case the truck is held up for repairs for more than one hour of any working day, the time which said truck is held up in excess of one hour shall be deducted. * * * The entire responsibility for the operation of the truck and for any damage to the truck or to persons or property through its operation shall be with the party of the second part, who alone shall be held responsible. * * * Said second party shall at all times keep said auto truck insured against personal liability and fire. * * * Payment by first party to second party shall be made $275 per calendar month, from which shall be deducted $175 one month and $150 the succeeding month (amounts alternating each month), said amounts so deducted to be applied, first, on the payment of rental and interest of Gramm truck and, second, on the purchase price of the Garford truck."

The Garford truck referred to in this agreement was another autotruck which originally was owned by defendant, but which it had sold to Foulks, though the purchase price had not been paid at the date of this new arrangement. Upon this Garford truck defendant, early in the year 1914, had taken out a state license under the state motor vehicle act.

At the same time that defendant and Foulks entered into their written contract of employment, they executed their lease or conditional sale contract whereby defendant leased the Gramm truck to Foulks. This agreement, which was also in writing, declares that Foulks agrees to pay defendant, as rental, a certain sum for the Gramm truck, in equal amounts of $125 per month on the 20th day of each month, to and including April 20, 1916, and a further sum, in certain monthly installments, for the Garford truck and for certain items for repairs and insurance. The agreement further provided that—

> "When said hirer shall fail to pay said rentals or said interest or any part thereof in the manner and at the time above specified, or fail to keep or perform any of the agreements or conditions contained in this contract, or whenever said coal company shall think it necessary in order to be secure against loss, although no breach of this contract has been committed by said hirer, with or without legal process, the said coal company may demand, take, and repossess said autotruck [the Gramm truck], notwithstanding anything herein contained."

It was further agreed that Foulks, at his expense, should pay all state, county, and city taxes and licenses, and keep the autotruck insured against liability and fire to an amount not less than $2,750. Then follows a provision to the effect that if Foulks shall perform all the conditions of the lease and make all payments, he shall have the privilege of purchasing the Gramm truck from defendant for $1, and, upon the execution of a bill of sale title should vest in him.

At or about the time when the written agreements were executed, the metallic plate upon which was inscribed the license number for the Garford truck was transferred to the Gramm truck, and remained fastened thereto up to and including the time of the accident. This, presumably, was done or caused to be done by defendant in conformity with the requirements of section 8 of the state motor vehicle act of 1913 (Stats. 1913, p. 643).

Defendant's sole right to the Gramm truck was by virtue of a lease to it under a written conditional sale contract with one Colyear, by whom the truck was owned in the first instance, and who had executed to defendant a conditional sale contract similar, mutatis mutandis, to that which defendant gave to Foulks.

Foulks had an independent calling. He was in the transfer and delivery business. In that business he used autotrucks. He testified that, at the time of the accident, and in connection with his business, he was making deliveries for persons other than defendant. He hired the driver Terry and the helper Cunningham. He kept the Gramm truck on his brother-in-law's premises when it was not in use. Though defendant insured the truck, Foulks paid the premium by permitting defendant to deduct it from his monthly wage. Foulks, after ascertaining on the morning of each day where the various deliveries were to be made, selected the routes of travel. Terry received his orders from Foulks, and no one else; and whatever Foulks said to Terry the latter did.

The court, of its own motion, after giving correct definitions of the terms "servant" and "independent contractor," and stating that if Foulks was an independent contractor and Terry and Cunningham were his servants and not defendant's plaintiff could not recover, instructed the jury that if the written agreements were signed and delivered by the parties thereto, the law presumes that they were delivered on the day they bear date, to wit, June 20, 1914; that they are genuine and not sham, and were in force prior to and at the time of the accident; and that these presumptions, while satisfactory if uncontroverted, are not conclusive. The court further instructed the jury that if they found that these written agreements were genuine and in force at the time of the accident, and that, in carrying them out, Foulks selected and hired the men who were in charge of the truck at the time of the accident, fixed their duties, and had sole control over the details of their work, and that at that time they were performing some duty for Foulks, then the plaintiff would not be entitled to recover. Also that if the jury found that, under and by virtue of the contract relations between defendant and Foulks at the time of the accident, the latter was in the employ of the defendant for the purpose of using the truck in making deliveries for defendant, at such times and to such places as it should direct, and that he had the right to determine and control the manner or method and details of the operation of the truck in making such deliveries—being responsible to the defendant only for the making of deliveries at the time and places designated by it, but not for the method of making the same—and that Foulks had the right to operate the truck either by himself or, at his election, through some other person whom he might select and employ for that purpose, and that at the time of the accident Terry had been so selected and employed by him, and was then operating the truck under his direction and control as to the manner of its operation, then Foulks was an independent contractor, and Terry was not the servant of defendant, but was the servant of Foulks, and defendant would not be responsible for any negligent act or omission of Terry. Respondent contends that in giving these instructions the court erred.

Plaintiff requested, but the court refused, an instruction to the effect that the only right which the defendant acquired under the contract of employment between itself and Foulks was that of an employer of Foulks and the Gramm truck; that the duty of carrying a red light on the rear of a motor vehicle is imposed as a condition of the "license or privilege" of operating such vehicle upon the public highways of the state; and that responsibility for its neglect cannot be avoided by authorizing another person than the licensee to operate it. The court likewise refused an instruction, requested by plaintiff, instructing the jury, as a matter of law, that the relation created between defendant and Foulks by the written contract of employment was that of master and servant and not that of contractee and independent contractor. Respondent claims that in refusing to give these requested instructions the court committed error.

For the reasons stated at the beginning of this opinion, the order granting the new trial must be reversed, unless at least one of the grounds expressly assigned in this court by respondent for its affirmance is tenable.

To support his claim that the court erred in refusing the requested instructions and in giving those which it gave of its own motion, respondent contended in the lower court, as he does here: (1) That because the truck was registered under the state motor vehicle act in defendant's name, as owner and licensee, it is liable, even if Foulks were an independent contractor; (2) that Foulks was a servant merely and not an independent contractor; and (3) that the court erroneously left it to the jury to construe the documents and determine therefrom whether Foulks was a servant or an independent contractor.

To maintain his contention that, because the license on the Gramm truck was issued in appellant's name, presumably upon its application therefor, the latter is liable, regardless of whether Foulks was appellant's servant or an independent contractor, respondent claims that where the public has given to a licensee the privilege of using the public highways, such licensee is liable for any injury resulting from the omission of any statutory duty imposed as a condition to the right to enjoy the privilege—citing in support of this principle, among other cases, Lee v. Southern Pacific Ry. Co., 116 Cal. 97, 47 Pac. 932, 38 L. R. A. 71, 58 Am. St. Rep. 140. If this position be tenable, then the owner of a licensed automobile who may have loaned it for the day to a friend is liable for any injuries proximately caused by the friend's negligence in failing to observe any one of the numerous requirements of the motor vehicle act. If this be the law, then, harsh as it may be, ita lex scripta est, and there is nothing to do but enforce it. Is it the law? We think not.

[3, 4] Foulks was in possession of the truck under a conditional sale contract between himself and defendant, just as defendant, in its turn, under a similar contract with Colyear, had the right of possession as between itself and Colyear. We shall assume, however, that defendant, and not Foulks, was the "owner" of the truck within the meaning of the motor vehicle act (section 1 of the act [Stats. 1913, p. 640]); also that as such owner it was obliged to, as it in fact did, apply for and receive a license (section 3 of the act [Stats. 1913, p. 641]); and that it was defendant who caused the license plate to be affixed to the Gramm truck. It is provided by the motor vehicle act that—

"Every motor vehicle * * * while in use shall carry during the period from a half hour after sunset to a half hour before sunrise, * * * at the rear * * * a lighted lamp exhibiting one red light." Section 13 of the act (Stats. 1913, p. 645).

The act, however, does not impose this duty upon the owner and licensee regardless of whether he or some one else be in control of the vehicle. It is this that differentiates this case from those relied upon by respondent. The language of the act is:

"No person shall *allow* a motor vehicle owned by him or *under his control* to be operated * * * in violation of the provisions of this act." Section 19 of the act * * * (Stats. 1913, p. 646). (The italics are ours.)

We think it evident that, by the use of the alternative, "owned by him or under his control," the Legislature intended to impose the duty of complying with the requirements of the act upon the owner when, and only when, he is in control of the motor vehicle, personally or through his servant, and to impose that duty upon some other person—a friend to whom the vehicle may have been loaned, for instance—when such other person is operating the vehicle and it is "under his control." Aside from this consideration. the language of the act is that "no person shall allow," etc. This word "allow" materially limits the obligation of the owner, or the person in control, as the case may be. To allow is to acquiesce in or tolerate. Knowledge, express or implied, is essential before one may be guilty of either. Sawyer v. Mould, 144 Iowa, 185, 122 N. W. 813, 25 L. R. A. (N. S.) 602. The truck was in the possession of Foulks as lessee; and if at the time of the accident Foulks was using the truck as an independent contractor and not as a servant of defendant, no knowledge, actual or imputed, that the tail light was out, could be attributed to defendant; and in that case it could not be said that defendant had "allowed" any violation of the provisions of the motor vehicle act. If defendant did not "allow" any violation of the requirements of the act, it was not remiss in the due performance of any duty imposed upon it as a licensee of the state.

[5, 6] Both of respondent's remaining points, assigned by him as reasons for the affirmance of the order, appear to be grounded upon the assumption that the nature of the relation between defendant and Foulks at the time of the accident must be determined solely from the written agreements, particularly the written contract of employment. We think this an erroneous assumption. We think that the nature of Foulk's relation to defendant at the time of the accident, whether that of an independent contractor or servant, must be determined not alone from the terms of the written contract of employment, but from the subsequent conduct of each, known to and acquiesced in by the other.

We are not interested in the contracts between defendant and Foulks, or the right of either to enforce the same, save in so far as such contracts may afford evidence as to the nature of the true relation between them at the very time of the accident. For here the vital question is: What, at the time of the accident, was the actual relation between defendant and Foulks? Was their relation at that time that of contractee and independent contractor, or master and servant? Regardless of what may have been their written agreement six months before the accident, they unquestionably had the right to rescind it, or, by express verbal consent or by conduct mutually acquiesced in, wholly to disregard it, or to modify it, and create the relation of contractee and independent contractor, if, originally, their relation had been that of master and servant. So that if, with or without the written agreement, defendant, at the time of the accident, had the right to control and direct Foulks in respect to the manner in which the work was to be done, then the relation of master and servant existed. And, conversely, if, with or without the written agreement, defendant, at the time of the accident, did not have the right to control and direct Foulks in respect to the mode and manner in which the work should be done, the latter was an independent contractor, for the negligence of whose servants defendant would not be liable.

[7, 8] We do not think that the relation of master and servant, and none other, is conclusively established by the written contract of employment. But even if it were, that would not prevent the parties from changing that contractual relation and establishing another. Where the parties to a written contract of employment, by mutual consent inferred from their subsequent conduct, have modified their contract and have acted upon it as thus modified, it is valid, in the modified form, to the extent and during the period it was so acted upon and carried out. As between a third party and either party to the contract, such change or modification unquestionably could be shown by parol. In an action between a party to a contract and a third party, the rule that parol evidence cannot be received to contradict or vary a written contract does not apply, as the estoppel on which the rule rests must be mutual, and, since the third person is not bound by the contract as written, neither is his adversary in the action. Strangers to the contract are at liberty to show that the written instrument does not disclose the full or true character of the relation between the contracting parties. And if a stranger to the contract be thus at liberty, when contending with a party to the contract, the latter must be equally free to show the true relation between himself and the one with whom he has contracted. Both must be bound by this conventional rule of law, or neither. Dunn v. Price, 112 Cal. 46, 44 Pac. 354. Accordingly, it has been held that, in an action of this character, while, prima facie, the relation of the parties to a written contract of employment is that which is expressed by the terms of their writing, nevertheless, in order to determine their true relation, such contract should be considered in view, not only of the circumstances under which it was made, but of the conduct of the parties while the work is being performed. Klages v. Gillette-Herzog Co., 86 Minn. 458, 90 N. W. 1116. It is competent for the plaintiff in such an action to show that, as a matter of fact, the parties to a written contract creating the relation of contractee and independent contractor had put a different construction upon it by their conduct, and that the defendant has in fact exercised a supervision and control over the work in its details inconsistent with the presumed character of the other party to the contract as an independent contractor. Powell v. Construction Co., 88 Tenn. 692, 13 S. W. 691, 17 Am. St. Rep. 925; Klages v. Gillette-Herzog Co., supra; 1 Bailey on Personal Injuries, § 39. This being the rule, the converse must be equally true; and it is competent for one sued as a master for the negligence of his alleged servant, where a written contract between them bears evidence of that relation, to show that as a matter of fact, he and his alleged servant, by their conduct, put a different construction upon their contract and treated each other as contractee and independent contractor. For these reasons we hold that the nature of the relation between defendant and Foulks at the time of the accident was not determinable solely from the written contract of employment, but from all the evidence in the case, particularly that which bore upon the question as to whether, at that time, defendant was assuming the right to control and direct Foulks respecting the manner in which the work should be executed by him. As to this the evidence was conflicting. We hold, therefore, that whether defendant and Foulks were, respectively, master and servant or contractee and independent contractor, was a mixed question of law and fact, and that it was for the jury to determine, under proper instructions, the real relation of Foulks to defendant at the time of the accident. Greenberg v. Western Turf Ass'n, 148 Cal. 126, 82 Pac. 684, 113 Am. St. Rep. 216; Brophy v. Bartlett, 108 N. Y. 632, 15 N. E. 368. This is precisely what the court did. And if all the evidence in the case—that aliunde the writings as well as the writings themselves—was sufficient to justify a finding that the relation between defendant and Foulks was that of contractee and independent contractor, respondent cannot complain that this question, as a mixed question of law and fact, was left to the jury to determine. That there was sufficient evidence to justify such a finding, we have no doubt.

The accepted doctrine is that, where the essential object of the employment is the performance of work, the relation of master and servant does not exist unless the employer retains the right to direct the mode and manner in which the job shall be done; or, in other words, not only what shall be done, but how it shall be done. Labatt's Master and Servant, § 64; Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 Pac. 721. "The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for." Green v. Soule, 145 Cal. 96, 99, 78 Pac. 337, 339. He is deemed to be the master who has the supreme choice, control, and direction of the servant, and whose will the servant represents, not merely in the ultimate result of the work, but in all the details. The legal test for the determination of the question is stated by Thompson as follows:

> "An independent contractor, within the meaning of this rule, is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. The contractor must answer for his own wrongs and the wrongs committed in the course of the work by his servants." 1 Thompson on Negligence, §§ 621, 622.

Foulks exercised an independent occupation. He was, to use his own words, in the transfer and delivery business. There was evidence that defendant did not exercise, or assume the right to exercise, any authoritative control over Foulks as to how his truck should haul the loads. Foulks determined what route the deliveries should take. Terry and Cunningham were his servants. Defendant exercised no control over them or the truck, so far as the driving or method of taking the loads to their destination, or the general care of the truck and its equipment, were concerned; nor did it assume to exercise any. It did not hire the driver or helper, and had no power to discharge them. The driver and his helper were paid by Foulks with his money, though it seems that at times the money for one or the other of these men was furnished by defendant; but the evidence shows that this was done as a matter of accommodation to Foulks. We thinks there is ample evidence to sustain a finding that Foulks represented defendant only as to the result of the work his truck did—the delivery of the loads at their respective destinations—and not as to the manner of the performance of the work. The driver of the truck and his helper, by delivering the loads, caused them to be dumped in heaps at their respective destinations. This, in its essence, was a "result," as much as if, being a building contractor, Foulks had orderly arranged steel, brick, and mortar so as to produce a stately structure. Upon the facts as above stated, Foulks was not the servant of defendant, but an independent contractor, for whose negligence defendant was not responsible. Burns v. Michigan Paint Co., 152 Mich. 613, 116 N. W. 182, 16 L. R. A. (N. S.) 816; Foster v. Wadsworth, 168 Ill. 514, 48 N. E. 163; Jahn's Adm'r v. McKnight & Co., 117 Ky 655, 78 S. W. 862; Driscoll v. Towle, 181 Mass. 416, 63 N. E. 922; Western Indemnity Co. v. Pillsbury, supra.

Respondent argues that Foulks was a servant and not an independent contractor because: (a) Under the lease contract or conditional sale agreement between Foulks and defendant, the latter had the right at any time, and for no reason other than its own untrammeled will, to terminate the lease contract, and thus indirectly terminate the contract of employment; and (b) the contract of employment provides for the personal services of Foulks, in that it requires him to drive the truck.

[9] The contract of employment did not expressly give to defendant the right to discharge Foulks. Nor did the other contract—the so-called lease contract—give to defendant the right to terminate the lease of the truck merely because the manner whereby Foulks was performing his contract of employment might not be satisfactory to defendant. The so-called lease contract provides that it might be terminated by defendant if the latter shall deem it necessary to do so in order to secure it against loss, that is, loss under that particular contract. However, even if the contract of employment had given defendant the right to terminate it at any time it chose to do so, it would not necessarily follow that the relation between it and Foulks was that of master and servant. Though the fact that a contract provides that the employer may discharge the other party at any time is a circumstance that may be considered in determining the relation, and, in a doubtful case, may become an important circumstance, still it is not a controlling factor. It is not a "master fact"—it does not lead necessarily to the conclusion that the person employed to do work is not an independent contractor. Gall v. Detroit Journal Co., 191 Mich. 405, 158 N. W. 36; New Albany, etc., Co. v. Cooper, 131 Ind. 363, 30 N. E. 294; Thomas v. Altoona, etc., Ry. Co., 191 Pa. 361, 43 Atl. 215. For failure satisfactorily to accomplish the results contracted for, a contractee may discharge the contractor. Yet such right to discharge the contractor does not necessarily give the contractee the right to interfere with the manner the contractor may choose to use to accomplish the results contracted for.

[10, 11] Assuming, though not conceding, that the written contract of employment contemplated that Foulks should personally drive the truck, the fact remains that Foulks did employ others to drive it and deliver the loads; that these other persons received their orders and directions, as well as their pay, from him and not from defendant; and that defendant acquiesced in this course of conduct. And even if Foulks himself had been required to drive the truck, it would not necessarily follow that he was a servant and not an independent contractor. See Gall v. Detroit Journal Co., supra. The fact is there were many circumstances adduced at the trial, none of an absolutely controlling nature, but each pointing to the character of the employment—some squinting at the relationship of master and servant and others at that of contractee and independent contractor. For this reason different and discordant inferences were deducible from the attending circumstances, so that the question became one for the jury, under proper instructions.

[12] Furthermore, the doctrine of respondeat superior applies only where the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged with the result of the wrong, at the time and in respect to the very transaction out of which the injury arises. Foulks was in possession of the truck as lessee, or purchaser under a conditional sale contract. Upon him alone, under the terms of his contract with defendant, rested the obligation to take care of, house, and repair the truck. At the time of the accident the truck, which had been in a repair shop for certain repair work, was being taken from the repair shop to the place where Foulks habitually kept it overnight. At that time the truck was not being used in the service of defendant. At that time Foulks was the only master in whose business the driver and his helper were engaged.

Order reversed.

We concur: SLOANE, J; THOMAS, J.

41 Cal. App. 247

DOYLE v. BRADSHAW et al.

(Civ. 2800; S. F. 8900.)

(District Court of Appeal, First District, Division 2, California. May 22, 1919. On Rehearing in Supreme Court, in Bank. July 21, 1919.)

1. Exceptions, Bill of 🔑56(4)—Signature—Time for Presentation of Engrossed Bill.

Order relieving appellants from effect of failure to have bill engrossed within ten days after original proceeding was valid, though made after expiration of six-month period limited by Code Civ. Proc. § 473, where proceedings for obtaining such relief were commenced within such period.

2. Appeal and Error 🔑1024(5)—Findings of Trial Court—Review.

An order of the lower court based on conflicting affidavits must be sustained on appeal.

3. Boundaries 🔑46(3)—Agreed Location.

Where there was uncertainty as to true location of boundary line between lots, a dispute regarding it, possession, and payment of taxes for period required to establish adverse possession, the agreed line became in law the true line between the properties, regardless of the accuracy of the agreed location as made to appear by subsequent survey or measurement.

4. Quieting Title 🔑35(1)—Pleading Title and Possession.

An allegation in a suit to quiet title that the plaintiff is the owner of the land in possession of it is sufficient, even though plaintiff's right of recovery depends upon whether or not there was an agreed boundary line.

5. Adverse Possession 🔑66(1) — Agreed Boundaries.

In action to quiet title by one claiming by adverse possession, question of whether or not plaintiff's original entry was by virtue of an agreement for a boundary line has no bearing upon the character of his adverse possession up to such line.

6. Boundaries 🔑35(3)—Evidence — Materiality.

In an action to quiet title, evidence of surveyors as to the location of the measured boundary line is immaterial, where there is an agreed boundary line.

On Rehearing in Supreme Court.

7. Appeal and Error 🔑873(1)—Orders of Trial Court—Conclusiveness on Appeal.

Order of trial court relieving appellants from effect of failure to have bill of exceptions engrossed within ten days after original proceeding, although made after the expiration of the six-month period limited by Code Civ. Proc. § 473, was not void; and, where no appeal was taken therefrom, is conclusive on appeal from the judgment.

Appeal from Superior Court, Alameda County; Stanley A. Smith, Judge.

Suit by John M. Doyle against R. H. Bradshaw and others. A decree for plaintiff is affirmed by the Appellate Court, and the Supreme Court denies a petition for rehearing.

Elston, Clark & Nichols, of Berkeley, for appellants.

Dixon L. Phillips, of Hanford, for respondent.

BRITTAIN, J. [1, 2] The defendants appeal from a decree quieting plaintiff's title to a lot on the south side of University avenue, east of Milvia street, in the city of Berkeley. At the outset respondent contends appellants' bill of exceptions should not be considered, because it is claimed it was not engrossed within ten days after it was settled. The delay in the engrossment of the bill was caused by the fact that on the proceedings for its settlement the court ordered the transcript of the reporter's notes as to certain matters to be incorporated in the bill. The reporter who had taken the evidence at the trial had left the city of Oakland, no reporter's transcript had been prepared, and his notes were not available. Within six months from the original proceedings on the settlement of the bill, with an affidavit showing diligence on the part of the appellants to ascertain the whereabouts of the missing reporter, a notice of motion was served and filed, upon which motion the court on August 16, 1918, after the expiration of the six months' period limited by section 473 of the Code of Civil Procedure, made an order in terms relieving the appellants from the effect of their failure to have the bill engrossed within ten days after the original proceeding. In opposition to the making of the order, an affidavit was presented on behalf of the respondent showing the reporter was in Oakland until shortly before the original proceeding. It is argued the appellants should have anticipated that the transcript would be required. While the relief sought was not granted until after the expiration of the time limited in the Code section, the proceeding was commenced within that time. This procedure has been approved. Baker v. Borello, 131 Cal. 617, 63 Pac. 914. The order of the court was made on conflicting affidavits, and must therefore be sustained. Doak v. Bruson, 152 Cal. 19, 91 Pac. 1001.

The parties claim from a common source of title. The land actually in dispute is a narrow strip lying along the eastern boundary of the plaintiff's lot designated as lot 13. The defendants own the adjoining lot, No. 12, on the east. Doyle, the plaintiff, first received a deed to the property in 1879 and went into possession under that deed. Later the property was sold for delinquent taxes to Simon Fischel, who then owned lot 12. Fischel made a quitclaim deed of lot 13 to Doyle in

1889, under which he conveyed whatever he acquired under the tax deed. Doyle built a house on lot 13 40 years ago, and, except between 1880 and 1889, while it was in the possession of his tenant, he lived on the property from the time the house was built until his testimony was given in this suit. After receiving the quitclaim deed from Fischel, Doyle paid all taxes assessed upon lot 13.

In 1890 a dispute arose between Doyle and Fischel as to the location of Doyle's house, which extended to the eastern boundary of his lot. Fischel moved the house, and Doyle sued him to quiet title. The suit was settled by a payment by Fischel to Doyle. The latter then built his house up to the eastern line of lot 13, and built a fence along that line with Fischel's knowledge, and to the cost of which fence Fischel contributed.

[3-5] The fence line so established was at all times after 1890 recognized by the parties as the division line between lots 12 and 13. These facts meet all the requirements of an agreed boundary, there having been uncertainty of the true location of the line, a dispute regarding it, and possession and the payment of taxes for the period required to establish adverse possession. Clapp v. Churchill, 164 Cal. 745, 130 Pac. 1061. In such a case the agreed line becomes in law the true line between the properties, regardless of the accuracy of the agreed location as made to appear by subsequent survey or measurement. Price v. De Reyes, 161 Cal. 484, 119 Pac. 893; Schwab v. Donovan, 165 Cal. 363, 132 Pac. 447; Silva v. Azevedo (Sup.) 173 Pac. 929; Staniford v. Trombly, 28 Cal. App. Dec. 959.[1] The appellant contends that the establishment of such an agreed boundary rests in estoppel, and relies upon the cases holding that, where estoppel is relied upon, it must be pleaded by the plaintiff. In a suit to quiet title the allegation that the plaintiff is the owner of the land and in possession of it is sufficient. Souter v. Maguire, 78 Cal. 543, 21 Pac. 183; Gray v. Walker, 157 Cal. 381, 108 Pac. 278. The plaintiff alleged and proved adverse possession of lot 13 up to the agreed line. The question of whether or not his original entry was by virtue of the agreement for the boundary line had no bearing upon the character of his adverse possession. It is contended that the finding of occupancy of the land by the plaintiff was outside of the issues. The complaint alleged ownership and possession of lot 13 by the plaintiff. The evidence showed and the court found the division line between lots 12 and 13 to be in accordance with the agreement of the parties when the location of the line was uncertain.

[6] On the trial a motion was granted striking out the evidence of the surveyors as to the location of the measured line. If there was an agreed line, under the rule of Price v. De Reyes, the location of the measured line was immaterial, and there was no error in striking out the evidence.

In the closing brief of the appellants it is argued it was not shown the plaintiff had paid taxes on the land up to the fence. In the complaint, and in the findings, in addition to the description by called distances, the plaintiff's lot was described as lot No. 13, in block No. 1, etc., and the plaintiff testified without objection that he had been in possession and had paid all taxes on the lot occupied by him up to the division fence.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

On Rehearing in Supreme Court.

PER CURIAM. [7] With relation to what is said in the opinion as to the consideration of the bill of exceptions, it is sufficient to say that it is conceded that no appeal was taken by respondent from the order relieving the appellants from any possible effect of their failure to engross the bill within the time prescribed. The order certainly was not void, and is conclusive on this appeal. See Ryer v. Rio Land & Imp. Co., 147 Cal. 462, 82 Pac. 62. We express no view as to the correctness of what is said in the opinion on this subject.

The petition for rehearing in this court is denied.

All concur, except MELVIN, J., and OLNEY, J., absent.

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[1] Rehearing granted by Supreme Court June 23, 1919. Reversed 186 Pac. 599.

41 Cal. App. 547

WEICHERS v. DEHAIL. (Civ. 2791.)

(District Court of Appeal, First District, Division 2, California. June 12, 1919. Rehearing Denied by Supreme Court Aug. 11, 1919.)

1. Landlord and Tenant ⟹48(2) — Damages—Insufficiency of Evidence.

In action by hotel lessee against lessor for breach of covenant because of inadequate heating facilities, etc., evidence that some patrons had left the hotel, but not showing what portion of lessee's losses were due to the causes of which he complains, *held* to sustain an award of only nominal damages.

2. Trial ⟹397(2)—Findings—Necessity.

In action by a hotel lessee against the lessor for failure to provide proper heating facilities, court's conclusion that appellant lessee was entitled only to nominal damages rendered unnecessary an express finding regarding the adequacy of the heating plant.

3. Appeal and Error ⟹1071(6)—Harmless Error—Findings.

A judgment will be sustained though the trial court failed to find on a material issue, unless a finding in appellant's favor on that issue would require a reversal.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by A. J. Weichers against Elmo Dehail, administrator, etc. Judgment for plaintiff for nominal damages only, and he appeals. Affirmed.

Arthur H. Barendt, of San Francisco (William Klein, of San Francisco, of counsel), for appellant.

Albert J. Sherer, Robert Young, and Ingall W. Bull, all of Los Angeles (Henry T. Gage and W. I. Foley, both of Los Angeles, of counsel), for respondent.

BRITTAIN, J. The plaintiff appeals from a judgment in his favor for damages in the sum of $1 in a suit in which trial by jury was waived, upon a cause of action of the lessee of a portion of a building in San Francisco, for hotel purposes, for breach of an express covenant of the lease and of claimed implied covenants. The record is voluminous, and since the judgment must be sustained no purpose will be served by an extended recital of facts. It is enough to say that since the lease was for hotel purposes, the appellant claims there was an implied covenant that the heating and hot water plants should be adequate for the use to which the building was to be devoted. It is claimed the evidence shows that neither the heating nor hot water plant was adequate, and, because there was no direct and express finding upon the issue of adequacy that the judgment must be reversed.

On behalf of the respondent it is contended the rule of implied covenants does not go to the extent claimed by the appellant, and that the evidence upon the question of adequacy was conflicting; further, that a finding to the effect that the heating plant was installed and ready for use when the lessee entered into possession sufficiently met the issue of adequacy.

After the lease was executed, the landlord leased a portion of the ground floor of the building to other tenants, who installed an autotruck repair shop. There was evidence to the effect that the operation of the repair shop, by reason of vibration and noises as well as by the filtration of smoke and noisome gases into the hotel, constituted such an injury to the leasehold as to amount to a constructive eviction under the implied covenant for quiet possession. The finding of the court and the conclusions of law support the position of the appellant in regard to this matter.

There was an express covenant in the lease, the substance of which was that if the hot water tank of the building should be found to be inadequate, the landlord would install a second hot water tank. Plaintiff demanded the installation of such a tank. At the time of trial it had not been installed. The court found that the defendant had offered to install the tank, and that his offer had not been accepted. On behalf of the appellant it is argued that under the covenant when demand was made for the installation of the tank, the duty of the landlord to make the installation was fixed, and that he should be held liable for damages by reason of his failure.

[1] The questions of law and fact presented upon the matters involved in the foregoing statement are argued at length in the briefs. On behalf of the appellant it is most strongly urged that upon his proof of injury he was entitled to substantial damages, and that the $1 awarded him was wholly inadequate. There was evidence that some roomers left the hotel, that others insisted on having their rooms changed from a point over the autotruck shop to other parts of the hotel, and that one possible patron of the hotel refused to take a room there because of the conditions of which complaint was made. There was also evidence that by reason of those conditions the plaintiff had been compelled to reduce the price charged for certain of the rooms in the hotel. There is no evidence concerning the price placed upon any rooms by the lessee, nor the reduced price, nor the number of rooms involved in the reduction of the price. There is no evidence that there were not other vacant rooms in the hotel, nor anything upon which to base even

inferentially the amount of damages suffered by the plaintiff. In such a case nominal damages only may be awarded. The suit is upon the contract and not in tort. "The amount of recovery was not to be left, upon general principles, to the 'sound discretion' or 'dispassionate judgment' of the jury. It is an action to recover the actual and proximate damages caused to plaintiff by failure of defendant to perform his contract. Where there is a legal measure of damages, the jury must determine the amount as a fact; otherwise the law which so measures the damages would be of no avail." 1 Sutherland on Damages, 2. "It is often said to be a paramount principle that the person injured shall receive compensation commensurate with his injury, and no more. By reason of the breach of his contract, if he did break it, the defendant here became liable for the full amount of damages which resulted 'naturally' (that is, in usual course of things) and proximately from the breach. These were to be proved with reasonable certainty. The particulars of damage were so far capable of ascertainment, and upon the plaintiffs was imposed the obligation of proving them. The matter should not have been left to the conjectures of jurymen." Parke v. Frank, 75 Cal. 364, 369, 17 Pac. 427, 429.

The rule announced in Parke v. Frank has never been questioned in this state, nor, so far as the court is advised, in any other state. Damages, 13 Cyc. 214, and cases cited in the note. In the appellant's brief the only evidence called to the attention of the court on this subject is contained in a letter addressed to the landlord by the attorney for the tenant, in which upon the basis of the number of rooms in the hotel at fixed prices per room, less an arbitrary deduction of 10 per cent. for vacancies, it was computed the net income of the hotel should have been $2,196 per month. Following this computation is the statement:

> "This is what Mr. Weichers should take in from this hotel if it were in proper condition, located as it is on the main artery of the city. As you know, his income has ranged from $1,000.00 to $1,200.00 a month. The largest month he ever had was $1,600.00. In other words he has been running behind from nine hundred to a thousand dollars a month. Somewhere in these figures a basis of adjustment must be reached."

In the absence of any evidence upon the subject, it cannot be assumed that but for the conditions of which the appellant complains there would have been no vacancies other than the arbitrarily fixed 10 per cent. There is some evidence which would indicate that a portion of the failure of the lessee to receive what he ought to have received from the building was due to other causes than any default upon the part of the landlord. The trier of the facts would not have been justified in guessing what portion of the $900 to $1,000 a month the hotel proprietor was losing was due to causes of which he complained, nor without any basis of measure to render a judgment for unproved and speculative profits.

[2, 3] In view of the entire lack of evidence of the amount of damages resulting naturally and proximately from the claimed breaches of the lease, the conclusion of the court that the plaintiff was entitled to damages in the sum of $1, based on findings in favor of the plaintiff, rendered unnecessary an express finding on the adequacy of the heating plant. Even though the trial court fails to find upon a material issue unless a finding in favor of the appellant upon that issue would work a reversal, the judgment will be sustained. "The rule is that if all material issues are not found upon, a reversal will not be ordered, unless the findings on those issues in favor of the appellant would entitle him to a judgment. Morrison v. Stone, 103 Cal. 94 [37 Pac. 142]; Gould v. Adams, 108 Cal. 365 [41 Pac. 408]." Blochman v. Spreckels, 135 Cal. 664, 67 Pac. 1061, 57 L. R. A. 213. "Although findings are required upon all material issues, a judgment will not be reversed for want of a finding, unless it shall appear there was evidence before the court from which it was required to make a finding which would countervail its other findings." Bliss v. Sneath, 119 Cal. 528, 51 Pac. 849.

In this case, if the court should adopt the theory of the appellant that there was an implied covenant that the heating plant should be adequate, and the facts warranted a finding that the heating plant was entirely inadequate and the lessee had sustained injury thereby, in the absence of evidence from which the measure of damage for that injury could be ascertained, he would be entitled only to a judgment for nominal damages under the rule announced in Parke v. Frank, supra.

Criticism is directed in appellant's brief to certain other findings, but they fall within the same rule as that applied to the absence of the finding on inadequacy of the heating plant. If they were in any degree defective, and appellant's contentions in regard to them could be sustained, still there was no evidence to warrant a judgment for more than nominal damages.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVENS, J.

41 Cal. App. 497

CITY OF ORANGE v. CLEMENT, City Treasurer. (Civ. 3056.)

(District Court of Appeal, Second District, Division 1, California. June 9, 1919.)

1. MUNICIPAL CORPORATIONS 🔑89—ACTION OF BOARD OF TRUSTEES—NECESSITY OF NOTICE—SPECIAL MEETINGS.

Where no written notice of a special meeting of the board of trustees of a municipal corporation was delivered to any member of the board, and one member was absent, the meeting and all proceedings therein were void, in view of Municipal Corporation Act, § 858.

2. MUNICIPAL CORPORATIONS 🔑89—BOARD OF TRUSTEES—SPECIAL MEETING WITHOUT NOTICE—RATIFICATION OF VOID PROCEEDINGS.

Where a municipal board of trustees at a special meeting, invalid because of want of written notice, resolved to purchase certain lots, such action could not be ratified at a subsequent legally constituted meeting; the proceedings at the first meeting being not merely defective, but absolutely void.

3. MUNICIPAL CORPORATIONS 🔑85—ACTION OF BOARD OF TRUSTEES—SUFFICIENCY OF RESOLUTION.

Proceedings before a municipal board of trustees purporting to ratify its action at a prior illegal meeting in authorizing the purchase of land and directing a warrant to be drawn in payment, *held* insufficient in itself to authorize the purchase of the property, or to constitute the adoption of an original order for the payment of the specified amount.

Mandamus by the City of Orange, a municipal corporation, against W. E. Clement, as treasurer of the City of Orange. Petition for peremptory writ denied, and alternative writ discharged.

W. R. Garrett, City Atty., of Orange, and Scarborough & Forgy, of Santa Ana, for petitioner.

F. C. Drumm, of Orange, and Head & Rutan, of Santa Ana, for respondent.

CONREY, P. J. Mandamus. Assuming the facts to be those stated in the petition filed by plaintiff herein, an alternative writ of mandate was issued requiring that the defendant, as treasurer of the city of Orange, a city of the sixth class, pay out of the city hall fund of the city of Orange a certain warrant for the sum of $3,150 in payment for certain lands alleged to have been purchased by the city to be used as a city hall site, or show cause why he did not pay the same.

The complaint alleged that on March 3, 1919, at a special meeting of the plaintiff's board of trustees, duly called to consider certain offers and proposals to sell to the plaintiff suitable lots for the stated purpose, a resolution was duly adopted by the vote of four members of said board, the fifth member being absent, which resolution determined that the city should purchase certain described lots at a stated price, and which resolution was duly approved and published; that on April 14, 1919, at a regular monthly meeting of the board of trustees, a resolution was adopted which, after reciting the adoption and publication of the former resolution and that no objection had been made thereto and that no request for a referendum thereon had been presented or filed, ordered that the warrant be drawn; that said warrant was drawn and presented to the defendant, who refused to pay the same; that at an adjourned regular meeting of the board of trustees duly held on April 30, 1919, said refusal of the treasurer to pay said warrant was reported to the board, and thereupon a resolution was duly adopted by unanimous vote of the four members then present, ratifying and confirming all proceedings of the board for the purchase of said lots, and directing that proceedings be taken to compel defendant to pay the warrant; that at a special meeting of said board duly called and held on May 15, 1919, at which all members of the board were present and voting, a resolution was unanimously adopted demanding the payment of said warrant and instructing that the city attorney present the warrant to the defendant and demand payment of the same; that such demand was made, but defendant refused to make the demanded payment.

[1] In his answer to the petition, defendant denied that any special meeting of the board of trustees was held on March 3, 1919, to consider said offers or proposals, or for any purpose, and denied that at any meeting of said board of trustees any resolution was adopted as alleged in the paragraph of the petition referring to said meeting of March 3, 1919. Evidence was heard by this court upon the issue so raised. From such evidence it appears, and this court finds, that no written notice of said alleged special meeting of March 3, 1919, was delivered to any member of the board of trustees, and that one member of the board was absent from the alleged meeting. This being so, it follows that said meeting and all proceedings thereof were void. Municipal Corporations Act, § 858; Stats. 1883, p. 268; Deering's Gen. Laws, 1915 Ed. p. 1121.

[2] Counsel for petitioner contend that, even if the meeting and resolution of March 3, 1919, are void, the warrant nevertheless is valid by reason of the resolution of April 14, 1919, adopted at a regular meeting of the board; that the board of trustees had power at such regular meeting to ratify the former proceedings, and, at all events, had power at that time to purchase the property and order that a warrant issue to pay the

purchase price. This contention cannot be sustained on the ground that it was a ratification of former proceedings. Those proceedings were not merely defective action occurring at a legally constituted meeting; they were absolutely void, and were no action at all on the part of the city or any authorized agency thereof.

[3] In order to constitute authority for the issuance of the warrant in question, the resolution of April 14, 1919, must first be held to be sufficient in itself as an original proceeding for the purchase of the property and as an original order for the payment of the amount specified. But this resolution did not contain any language purporting to constitute a present determination that the city acquire land for city hall purposes or at all. It is wholly without those elements of legislative action which must precede the acquisition of property for purposes like those here proposed. There being, therefore, no legal ground for the issuance of the warrant, the defendant was justified in his refusal to make the demanded payment.

The petition for a peremptory writ is denied, and the alternative writ is discharged.

We concur: SHAW, J.; JAMES, J.

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41 Cal. App. 559

PATTERSON GLASS CO. v. THOMAS et al. (Civ. 1971.)

(District Court of Appeal, Third District, California. June 12, 1919.)

1. INJUNCTION 🔑118(3) — INDUCING EMPLOYÉS TO BREACH CONTRACT—NOTICE OF CONTRACT—PLEADING.

In an action by an employer to enjoin third persons from inducing employés to breach their contract of employment, complaint *held*, as against a general demurrer, to sufficiently allege that defendants had knowledge that a contract of employment existed.

2. INJUNCTION 🔑118(3) — INDUCING EMPLOYÉS TO BREACH CONTRACT—CONSPIRACY —PLEADING.

In an action to enjoin members of a labor union from inducing plaintiff's employés from breaching their contracts, complaint *held* to sufficiently allege that defendants conspired together for the purpose of inducing the employés to break their contract, and were engaged in an effort to induce them to abandon their employment.

3. INJUNCTION 🔑63—INDUCING EMPLOYÉ TO BREACH CONTRACT—REMEDIES.

An employer may enjoin third persons from inducing employés, by threats or otherwise, from breaching their contracts of employment.

4. INJUNCTION 🔑57 — INTERFERENCE WITH CONTRACTS OF EMPLOYMENT.

The employment of workmen under a contract by a glass manufacturer for the season of 1917 and 1918, *held* subject to protection by injunction against interference by third persons, and not an employment at will of such persons, although no number of months of the season were specified, and it was agreed that the workmen could be discharged or could quit on seven days' notice, so that the contract was terminable under Civ. Code, § 1999, at the will of either party.

5. MASTER AND SERVANT 🔑339—INTERFERENCE WITH CONTRACTS OF EMPLOYMENT.

Although workingmen have the right to organize a union of their craft for the purpose of improving the working conditions of the members of such organization, and to maintain such improved conditions by peaceable means, they do not have the right to induce employés, by threats or otherwise, to break their contracts of employment.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Suit by the Patterson Glass Company against Herbert Thomas and William Pickering, individually and as members of the National Window Glass Workers' Association. Judgment for defendants, and plaintiff appeals. Reversed.

Gordon A. Stewart and R. C. Minor, both of Stockton, for appellant.

Ben Berry and Lawrence Edwards, both of Stockton, for respondents.

CHIPMAN, P. J. A general demurrer to the amended complaint of plaintiff was sustained, plaintiff was given leave to file a second amended complaint, and, upon its failure so to do, judgment of dismissal was entered, from which judgment plaintiff prosecutes this appeal upon the judgment roll.

The sole question presented for decision is: Does the amended complaint state facts sufficient to constitute a cause of action?

The complaint alleges:

> That plaintiff is a California corporation doing business at the city of Stockton, in San Joaquin county, being engaged in the business of manufacturing and selling window glass and operating a glass plant for that purpose. That in the operation of its plant it is necessary that plaintiff should have in its employ skilled artisans. That "to that end and purpose the plaintiff entered into a contract during the month of September, 1917, at which time it commenced the operation of its plant, with approximately 75 artisans to work for the plaintiff during the season of 1917–1918, under the terms of which contract of employment the plaintiff agreed that the said artisans could work for the plaintiff during said period of time, and that so long as said artisans faithfully discharged their duties in the employ of plaintiff, the plaintiff would not discharge any of said artisans without giving to said discharged artisans seven days' notice prior to the date when said discharge became effective, and, in like manner, each of said artisans agreed with the plaintiff that he would not quit

the employ of the plaintiff during said season, unless prior to quitting such employ he gave to the plaintiff seven days' notice of his intention to leave the services of the plaintiff. That the foregoing mentioned artisans being insufficient in number to meet the requirements of the plaintiff, it was compelled to and did during the month of September, 1917, enter into a contract with approximately 30 artisans" in different cities of the United States "to leave their homes and come to Stockton, Cal., to work for the plaintiff in its plant." That plaintiff agreed to pay their traveling expenses and said artisans agreed to work for so long a period as would be necessary to repay to plaintiff, in weekly installments, the moneys so advanced as traveling expenses, and that a similar agreement as above mentioned, regarding seven days' notice, was entered into between said artisans and the plaintiff.

It is then alleged:

That the defendant National Window Glass Association "is a voluntary unincorporated association of individuals" composed of workers in the window glass business, and that defendants Thomas and Pickering are members thereof. That its office and principal place of business is in Cleveland, Ohio. "That the business of said association is the collection of dues and fines from said members, the fixing of hours of labor and the compensation of said members. * * * That the compensation of said members is based upon the value of the product produced by their labor. That the said association, for the purpose of increasing the sale cost of glass, limits the production of said glass by prohibiting its members from engaging as journeymen in the manufacture of window glass except for such duration of time in each year as may be designated by the association. That it has been the custom of said association to limit the annual output of glass by refusing to permit its members to work for a certain number of months in a year. That the association, in the fall of each year, fixes its scale of wages to be paid to its members by employers. That until said wage scale goes into effect its members are not to perform any services as journeymen to any employers. That said association gave notice to the plaintiff that it would not permit its members to work for plaintiff prior to the 1st day of December, 1917. That the plaintiff opened its plant for the manufacture of glass upon the 15th day of September, 1917, and thereupon received in its employ a large number of journeymen window glass artisans who were members of said association. That no dispute exists between the plaintiff and its employés as to the hours of labor or compensation, and said employés are satisfied and content with their employment."

It is next alleged:

That during the month of September, 1917, "the defendants entered into a combination, federation, and conspiracy for the purpose of coercing the plaintiff to shut down its plant and not to operate the same until such time as the said defendants would consent thereto; the object and purpose of said combination, confederation, and conspiracy being to limit the output of glass, restricting its manufacture, and thereby increasing the cost of production to the consuming public, and out of the increased cost so manipulated to increase the wages of said members employed in the manufacture of window glass." That defendants, for said purposes, "are seeking to induce, procure, and entice the said artisans to quit their employment with the plaintiff, without giving any notice to said plaintiff, * * * and to that end and purpose are promising divers employés of the plaintiff that in the event that such employés abandon their contract of employment with the plaintiff, said defendants will pay money to said employés in the way of living expenses of said employés to the 1st day of December, 1917, and at said last-mentioned time will transport, at the expense of the defendants, the said employés so abandoning their contracts" to Eastern points where they might find employment. That the acts of the defendants are for the purpose of rendering the operation of plaintiff's plant unprofitable, and that skilled workmen are not available in California to take the places of any employés who may be induced to leave plaintiff's employment.

It is further alleged:

"That it would be extremely difficult in a suit of law for the plaintiff to ascertain the amount of compensation which would equalize the damages sustained by it in the enticement of its employés from its service. That said damages would result from the loss of material and overhead expenses resulting from the decreased output of the plant, depreciation in the value of the glass products by its not being handled seasonably at the proper time, the fluctuating market in the sale of glass, and the expenses of procuring or endeavoring to procure other employés to fill the places of those who are enticed from its employment, and the cost of transporting said employés from Eastern points to Stockton, Cal. That these and other damages which will result to the plaintiff if the defendants are permitted to entice from its employment its skilled artisans are extremely difficult to ascertain, and an action at law against said defendants would not afford adequate relief."

Also:

"That the plaintiff is informed and believes that all of the defendants, save and except the National Window Glass Workers' Association, are insolvent and judgment proof. That the assets of the National Window Glass Workers' Association, if any, are without the state of California, and beyond the process of this court. That by reason of these facts, the plaintiff alleges that it has no plain, speedy, or adequate remedy at law. That said defendants threaten to and will, unless restrained by this court, continue to solicit and to entice plaintiff's employés from its employment, to the great and irreparable injury of said plaintiff."

The prayer is that—

Defendants and each of them be "enjoined and restrained from knowingly and intentionally causing or attempting to cause, by threats, offers of money, payments of money, offering to pay expenses, or by any like inducement or persuasion, any employé of the plaintiff under contract of hire to break such contract to render service to the plaintiff by quitting the plaintiff's employment, or from knowingly and intentionally causing, or attempting to cause, by threats, offers of money, payments of money, offering to pay expenses, or by like inducement or persuasion, any employé of the plaintiff to quit his employment, or preventing or deterring them or any of them from rendering services to the plaintiff by any like means, scheme, or plan; and for such other and further relief as to the court seems meet and equitable."

In support of the order sustaining the demurrer the respondents advance certain propositions: (1) Attention is called to the averments of the complaint in which it was stated that an agreement existed between plaintiff and its employés that so long as the latter faithfully discharged their duties plaintiff would not discharge any of them without giving seven days' notice, and that the employés agreed to give like notice before quitting the employ of plaintiff. It is hence claimed that the only definite time specified was for a period of seven days. Cyc. is quoted as follows:

> "When the complaint alleges a contract of employment for a period of time, no recovery can be had where there is no evidence of a contract for a definite term of service." 26 Cyc. 1585.

Section 1999 of the Civil Code is then quoted, which reads:

> "An employment having no specified term, may be terminated at the will of either party, on notice to the other. Employment for a specified term shall mean an employment for a period greater than one month."

It is contended that if the period of time is less than a month the employment may be terminated at will, for the statute provides first what shall and what shall not be considered a "specified term." It is further claimed that the complaint nowhere alleges that defendants knew or were informed that any contract of employment existed between plaintiff and its employés, and hence defendants "had a right to assume that the employment of the members of defendant association was upon a contract of employment at will."

It is alleged in the complaint that certain of plaintiff's employés were contentedly working under wages and conditions satisfactory to them; that, requiring more artisans and not being able to obtain them in California, plaintiff sent to Eastern states and entered into contracts with 30 artisans, by which it was agreed that they would go to work for plaintiff on the same terms as the others were working under, and they further agreed to work until they had by their wages paid to plaintiff the money plaintiff had advanced to bring them to California. And it is alleged:

> That these men will shortly arrive at Stockton, "and that said defendants, conspiring one with the other, threaten to and will, unless they are restrained by the order of this court, induce, persuade, and entice said persons, by the use of money and by threats and intimidation, to violate the terms of their contract, and will induce, persuade, and entice said persons to leave the plaintiff's employ and depart from the state of California."

The men who were there at work had voluntarily entered into these contracts, and were engaged in the performance of their duties when defendants appeared upon the scene and commenced their propaganda and persuasions, as alleged in the complaint, to induce these men to quit work, the result of which, if successful, would necessarily cause plaintiff to shut down its establishment and cease its productive activities. That such an injury may not be adequately compensated in damages, but may only be thwarted by injunctive relief, is manifest.

In closing their brief, defendants, after a somewhat extended examination of the cases and text-books, including the California cases, state the following as the result:

> "(1) Where a third person has knowledge of a lawful contract existing between employer and employé, to induce such employé to break his contract is actionable, whether done in good faith or not.
>
> "(2) Where the employment is at will, to maliciously induce an employé to quit is actionable, but not otherwise."

The complaint does not specifically and in terms charge knowledge by defendants of the contract of employment. Referring to the employés then at work, the complaint (paragraph V) states that—

> Defendants "are seeking to induce, procure, and entice the said artisans to quit their employment with the plaintiff, without giving any notice to said plaintiff, and are seeking to induce them to leave the employ of the plaintiff, and to that end and purpose are promising divers employés of the plaintiff that, in the event that such employés abandon their contract of employment with the plaintiff, said defendants will pay money to said employés in the way of living expenses of said employés to the 1st of December, 1917, and at said last-mentioned time will transport, at the expense of the defendants, the said employés so abandoning their contract of employment with the plaintiff from Stockton, Cal., to Eastern points where they might find employment in their respective trades."

We think that by fair implication it sufficiently appears that defendants knew that the employés of plaintiff were working under a contract with plaintiff. An inference that they were ignorant of the fact that a contract existed is inconsistent with the averments of the complaint. One of the points contended for by defendants was that the men should not work until December 1st, whereas some were then at work and others expected to commence work. By seeking to induce them not to go to work until

December 1st and to cease work until that time, defendants lend aid to the inference that they knew they were endeavoring to cause the employés to break the existing contract of employment under which they were working.

The acts which it was charged defendants were committing seem to have been directed to bringing about a breach of their contracts by the employés in respect to the express terms of their contracts, and this gives rise to the implication that defendants must have known, not only that the employés were working under contract engagements, but that they knew the terms of the contracts. We do not think, however, that it was necessary to allege specifically what the terms were. The defendants are charged with seeking to induce plaintiff's employés to quit work without giving any notice; they are promising to furnish the employés with money to cover their living expenses if they would break their contract; that they would furnish them money to pay their expenses in returning to the states from whence they came. These and like averments, admitted by the general demurrer, would seem to show that defendants had knowledge that plaintiff's employés were working under existing contracts.

We confess some difficulty in determining just what was intended by the Legislature in the enactment of section 1999 of the Civil Code. But, whatever the intention was and whatever its meaning, it cannot be held to dispute the facts, admitted by the demurrer, that plaintiff's employés were working under contract engagements, and, among other things, had agreed not to quit work without giving seven days' notice. In addition, the employés soon to arrive from the East were under contract to work until they had repaid to plaintiff the advances of money made by plaintiff in transporting them to California. We do not believe that the section of the Civil Code relied upon should be given a construction which would justify a court of equity in holding that these employés were working "at will," i. e., that they could quit work without notice and without paying plaintiff its money advances. What the section may mean as to the mutual relation of employer and employé, it was not intended that third persons could with impunity induce the employés to violate their contract and thus evade the lawful right of the employer to their services. If the section may be construed, as between employer and employé, that the engagement was "at will," it cannot mean that the employé was working at the will of a third person.

The questions here involved have had the attention of the courts in many cases and under great variety of circumstances. Certain principles have been settled with but little disagreement—defendants' proposition that it is actionable for a third person, having knowledge that an employé is working under contract, to induce such employé to break his contract, may be set down as one of these settled principles. Indeed, some of the courts have held that such acts are actionable where no contract for a specified period exists.

In Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 251, 38 Sup. Ct. 65, 72 (62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461), the court said:

> "Plaintiff, having in the exercise of its undoubted rights established a working agreement between it and its employés, with the free assent of the latter, is entitled to be protected in the enjoyment of the resulting status, as in any other legal right. That the employment 'was at will,' and terminated by either party at any time, is of no consequence."

The writer of the opinion quotes as follows from Truax v. Raich, 239 U. S. 33, 38, 36 Sup. Ct. 7, 9 (60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283):

> "It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time for any reason or for no reason; the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employé has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion, and, by the weight of authority, the unjustified interference of third persons is actionable, although the employment is at will" (citing many cases).

Pursuing the subject the court said:

> "In short, plaintiff was and is entitled to the good will of its employés, precisely as a merchant is entitled to the good will of his customers, although they are under no obligation to continue to deal with him. The value of the relation lies in the reasonable probability that by properly treating its employés, and paying them fair wages, and avoiding reasonable grounds for complaint, it will be able to retain them in its employ, and to fill vacancies occurring from time to time by the employment of other men on the same terms. The pecuniary value of such reasonable probabilities is incalculably great, and is recognized by the law in a variety of cases" (citing cases).

In the Hitchman Case the defense was advanced that all measures may be resorted to if they are "peaceable," that is, if they stop short of physical violence, or coercion through fear of it. The court said:

> "In our opinion, any violation of plaintiff's legal rights contrived by defendants for the purposes of inflicting damage, or having that as its necessary effect, is as plainly inhibited by the law as if it involved a breach of the peace. A combination to procure concerted breaches of contract by plaintiff's employés constitutes such a violation" (citing cases).

Eagle Glass & Mfg. Co. v. Rome, 245 U. S. 275, 38 Sup. Ct. 89, 62 L. Ed. 286, is similar to the Hitchman Case, and was decided upon the authority of that case. Upon the question of employment "at will" the case of George Jonas Glass Co. v. Glass Blowers' Ass'n, 77 N. J. Eq. 219, 79 Atl. 262, 41 L. R. A. (N. S.) 445; Folsom v. Lewis, 208 Mass. 336, 94 N. E. 316, 35 L. R. A. (N. S.) 787, are instructive.

We do not think it necessary in the present case to follow these cases in their view as to engagement "at will," for here, we think, were contracts which defendants had no right, by peaceable or other means, to cause the employés to break. Our Supreme Court seems to have held that an employé may, with or without reason, stop work, if by so doing he does not violate his contract, and where there are no contractual relations employés may strike without notice. Parkinson & Co. v. Building Trades Council, 154 Cal. 594, 98 Pac. 1027, 21 L. R. A. (N. S.) 550; Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324. Holding, as the learned trial judge did, that no contract was pleaded, he probably regarded the object of defendants to be lawful. If so, we think his decision was without a sustaining premise.

We quote from the text-books as follows:

> "The doctrine that it is not lawful to induce to quit employment applies even in the absence of any contract to serve for a fixed period; a fortiori does not apply to inducing to quit employment in violation of a contract to serve for a fixed period." Cooke on Combination, Monopolies, and Labor Unions, § 67.
>
> "Where a union (by statute made liable to be sued) or its officers or members, intentionally and without just cause or excuse, induces another's employés to quit his service in breach of their contracts of employment, he is entitled to recover the damages resulting from such tortious acts, from such union, or from such combination of officers or members, and this has been held true whether the means used is peaceable persuasion, or intimidation, or threats, or abusive language, or a system of espionage. Procuring a breach of such contracts is not justifiable as legitimate trade competition, and it is immaterial that those inducing the breach of contract acted in good faith and without ill will toward the employer." Martin on Modern Laws of Labor Unions, § 207.

The right to injunctive relief is no longer questioned, and it is no justification that defendants acted without ill will but in good faith, in pursuance of the provisions of the constitution of the union prohibiting its members from working with nonunion men; the employer not being aware of or a party to such provisions.

> "The rule applies where the means to procure the breach of contract are mere molestation or annoyance, payment of money or of transportation advances, abusive language, or violence or threats of violence, and where no justification is shown the rule is applicable, where the method employed to procure the breach of contract is persuasion." Id. § 209.

In Thacker Coal & Coke Co. v. Burke, 59 W. Va. 253, 53 S. E. 161, 5 L. R. A. (N. S.) 1091, 8 Ann. Cas. 885, it was held that—

> "Persons who conspire to induce others to break a valid contract between other persons are liable to actions therefor."

In Frank v. Herold, 63 N. J. Eq. 443, 52 Atl. 152, the court said:

> "Now, the relation of master and servant being shown to exist, the law is quite clear that no person has a right to entice away another's servant. * * * The right of a master to have his servant continue in his employ without molestation * * * is a recognized property right."

This doctrine finds support in many cases, among which are the following: Brown Hardware Co. v. Indiana Stove Works, 96 Tex. 453, 73 S. W. 800; Butterfield v. Ashley, 6 Cush. (Mass.) 249; Bixby v. Dunlap, 56 N. H. 456, 22 Am. Rep. 475; Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780; Jones v. Blocker, 43 Ga. 331.

Some objection is made to the complaint in failing to state the particular acts or facts relating to the things which it is alleged have been done or that defendants threatened to do. The foregoing, however, disposes of the grounds on which, counsel seem to agree, the trial court sustained the demurrer, and is, we think, decisive.

The judgment is reversed.

BURNETT, J. [1-3] I concur in the judgment and generally in the opinion of the Presiding Justice. It is admitted by respondents that—

> "Where a third person has knowledge of a lawful contract existing between employer and employé, to induce such employé to break his contract is actionable, whether done in good faith or not."

Assuming that to be the law, we must hold that the complaint, while admittedly imperfect, is sufficient as against a general demurrer. It does appear, as pointed out in the main opinion, that defendants had knowledge of the contract, although it is to be regretted that such fact was not explicitly alleged. That the contract between plaintiff and its employés was and is lawful, of course, does not admit of doubt. And that it sufficiently appears that defendants have not only conspired together for the purpose of inducing the employés to break such contract, but are actually engaged in the effort to induce them to discontinue and abandon their employment, I think cannot be successfully controverted. In my opinion, there is much of surplusage in the complaint, and I feel satisfied that it is open to attack on the ground of uncertainty in certain particulars. But we are called upon to deal with the single question whether it states facts sufficient to constitute a cause of action. Accepting the law applicable to the case as stated by respondents themselves, it seems to me we must hold the complaint sufficient. In considering the case, it is not improper to notice that the conduct of respondents relates not only to those artisans in the East who have contracted to work but have not yet entered upon their employment, but it has reference also to the employés who were actually engaged in carrying out the terms of their employment. While it might be doubted whether the allegations of the complaint are sufficient as to those who have not entered upon their employment, there is no such doubt of the sufficiency of the complaint as to the other class.

[4] I may add that, in my opinion, the situation does not call for a discussion of the rule applicable to instances of employment at will. It appears that the workmen herein were employed for the season of 1917 and 1918. While the number of months of the season is not specified, I think we have a right to assume that it was for a longer period than one month, and that its exact duration was capable of ascertainment and proof. It is true that there was another agreement that the employés would not abandon their work until certain advancements had been restored to plaintiff, and that they would give seven days' notice of their intention to quit, but this was not inconsistent with the terms of the contract requiring them to work during the season of 1917 and 1918.

[5] Of course, there is no intention herein to question "the right of workingmen to organize a union of their craft for the purpose of improving the working conditions of the members of such organization, and to maintain such improved conditions by peaceful means," but we have to take the complaint as we find it, and it appears therein that defendants are violating the law, which is enacted for the protection of all classes; and whether the allegations can be proved or not, we must hold them sufficient to require an answer.

I concur: HART, J.

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41 Cal. App. 577

FLICKINGER v. McKESSON. (Civ. 2901.)

(District Court of Appeal, Second District, Division 2, California. June 13, 1919.)

1. Evidence ⚷348(2)—Foreign Judgments—Clerk's Certificate.

In an action on a foreign judgment, a certificate of the clerk of the foreign court that papers offered in evidence "are true and correct copies" of certain enumerated records, "as full and complete as the same remains on file and of record in my office," will be held sufficient as against an objection that it fails to certify "that the papers are copies of the originals on file in this office."

2. Evidence ⚷348(2)—Foreign Judgment—Authentication.

In an action on a foreign judgment, the certificate of authentication of the clerk of the foreign court will not be held insufficient in that the words "county clerk of County of P. and ex officio" were erased from before the words "clerk of the district court of said P. County," where the judge certified that he was the clerk, and that his signature was genuine, although the clerk in his certificate to the official character of the judge did not erase such descriptive words, and although such erasures were unexplained.

3. Appeal and Error ⚷757(1)—Alternative Method of Appeal—Record.

Where an appeal is taken under the alternative method, it is incumbent upon appellant to point out in the record the matter he relies upon to support his points.

4. Evidence ⚷178(9)—Secondary Evidence—Assignment of Judgment.

In an action by an assignee of a foreign judgment, a certified copy of an assignment of the judgment as recorded in the court where the judgment was rendered was properly admitted in evidence, where the evidence was undisputed that the original assignment which had been made and delivered to plaintiff was lost, and that the lost assignment was in the same form as the one shown in the record.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Laura Flickinger, administratrix of the estate of I. N. Flickinger, deceased, against O. P. McKesson. Judgment for plaintiff, and defendant appeals. Affirmed.

Lucius M. Fall, of Los Angeles, for appellant.

P. S. McNutt, of Los Angeles, for respondent.

SLOANE, J. This is an action by the assignee on a foreign judgment. Defendant appeals from the judgment here under the alternative method. The only errors assigned are as to the sufficiency of the identification and authentication of the record from the district court of the state of Iowa, where the judgment sued on was obtained, and of the assignment thereof to plaintiff. We find no merit in the appeal.

In the first place, our attention is called to an exhibit in the record, being marked Defendant's Exhibit 3, exemplified abstract of judgment in the original suit, with certificate of the clerk of the court in which the matter was pending of the subsequent assignment of the judgment to the plaintiff here. The facts therein set forth, if binding on the

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

defendant—as they appear to be, he having introduced them in evidence—are sufficient to support the judgment here appealed from. But, aside from this, the exhibits, to the introduction of which defendant takes exception, were sufficiently proved and authenticated to admit them as evidence.

[1] The first exception is to Plaintiff's Exhibit 1, being a certificate of the clerk of the Iowa court to the record supporting the original judgment, on the ground that it fails to certify "that the papers are copies of the originals on file in this office." What the clerk does certify is that the papers therein enumerated "are true and correct copies" of certain enumerated records, "as full and complete as the same remains on file and of record in my office." As the copies enumerated include all that is necessary to prove the judgment, and are of the records on file, we see no reason to question the sufficiency of the certificate, so far as the specified ground of the objection goes.

[2] The second specification is alleged error in admitting in evidence Plaintiff's Exhibit 2, being the certificate of authentication, because of certain unexplained erasures. The typewritten certificate of the clerk to the judgment record, and the certificate of the judge to the clerk's attestation, contain the following descriptive words in each reference to the clerk:

> "I, J. N. Tollinger, county clerk of the county of Pottawattamie, state of Iowa, and ex officio clerk of the district court of said Pottawattamie county, state of Iowa."

In these recitals the words "county clerk of the county of Pottawattamie, and ex officio," have been erased. This leaves these certificates as relating alone to the official in question as the "clerk of the district court of said Pottawattamie county." The judge of the district court certifies that the signature is the genuine signature of said J. N. Tollinger; that the seal annexed thereto is the seal of said district court; that said Tollinger, as such clerk, is the proper official to execute the said certificate and attestation; and that such attestation is in due form, etc.

Section 1905 of the Code of Civil Procedure provides that a judicial record of a sister state "may be proved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate that the attestation is in due form." The certificates, therefore, as they stand, contain all that is necessary to the authentication of the record. If the certifying officer is, as described, the clerk of the court, that is sufficient. The matter erased is mere surplusage. The certification would be good under either state of the facts. The final certificate to the official character of the judge in this exemplification contains the full recital without erasures, and is signed, "J. N. Tollinger, County Clerk of the County of Pottawattamie, State of Iowa, and ex officio Clerk of the District Court of Iowa, in and for Pottawattamie County." As the certificate is in due form either way, the erasures are immaterial.

[3, 4] The third assignment of error is upon the admission in evidence of Plaintiff's Exhibit 3, which is in terms an assignment by the judgment creditor of the Iowa judgment to the plaintiff here, before the present action was commenced. The exhibit is certified to by the clerk of the Iowa court as being a true copy of an assignment of said judgment, "as the same remains of record and on file" in his office. Appellant's counsel states in his brief that this exhibit was admitted in evidence over defendant's objection that it was incompetent and not the best evidence; but we find no record of such, or any, objection, either in the appendix to appellant's brief or in the reference given to the reporter's transcript. This appeal being taken under the alternative method, it is incumbent on the appellant to point out in the record the matter he relies upon to support his points. In any event, the undisputed evidence outside of this record is ample to show that an assignment in writing, which was lost, had been made and delivered to the plaintiff here before suit on the judgment was commenced, and the document introduced as Plaintiff's Exhibit 3 was properly used in evidence as the basis of plaintiff's parol testimony as to the contents of the lost assignment; it being testified by one of plaintiff's witnesses that the lost assignment was in the same form as the one shown in the exhibit.

Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

41 Cal. App. 509

CRIST et al. v. FIFE et al. (Civ. 2816.)

(District Court of Appeal, First District, Division 1, California. June 10, 1919.)

1. Appeal and Error ⚷1011(1)—Findings of Fact—Conflicting Evidence.

A finding of the trial court based upon conflicting evidence is conclusive on appeal.

2. Covenants ⚷42(1)—Against Incumbrances—"Suffered."

"Suffered," as used in Civ. Code. § 1113, relating to implied covenant against incumbrances "suffered by the grantor," implies reasonable control, and does not apply to an incumbrance not caused by the act of the party nor within his power to prevent.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Suffer.]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Suit by Wiley F. Crist and others against Nettie Fife and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Edward R. Eliassen, of Oakland, for appellants.

Roscoe D. Jones, of Oakland, for respondents.

KERRIGAN, J. This suit is one for the rescission of a contract for the purchase of certain residence property, the cancellation of a note and mortgage given as part payment therefor, and the recovery of money paid thereon.

The complaint charged that respondents had falsely and knowingly, and with intent to deceive appellants, represented that the title to the property was free and clear of all incumbrances of every kind, and that appellants relied upon these representations, whereas there were in fact certain building restrictions against the property. The trial court found that the claimed representations were not made, and judgment went in favor of defendants.

[1] It is first claimed as ground for reversal that this finding on the alleged representations is not supported by the evidence. There was a conflict upon this subject, and the finding is conclusive here.

As a further ground for reversal it is urged that, notwithstanding this question, the facts found by the trial court necessitate a reversal of the judgment. These facts, in substance, are as follows:

On the 28th day of August, 1911, the respondents sold to appellants the residence property for the sum of $6,850, receiving $1,000 on account thereof, with a mortgage for $5,850, upon which appellants subsequently paid $4,400. On May 28, 1917, appellants discovered that the property was burdened with certain building restrictions. The restrictions provided: (1) That the building should be used only as a residence; (2) that no building should be erected on the premises to cost less than $3,000, nor nearer than 20 feet to the street frontage; (3) that no saloon or mercantile business should be maintained or conducted thereon.

These restrictions were to remain in force until the 29th day of November, 1917, and in the case of any violation thereof the property was to revert to the original grantor. There was also a sewer right of way across the property. Appellants first learned of the existence of the restrictions and conditions above set forth on May 28, 1917. None of them were contained in the deed from respondent to appellants. The former had purchased the property at a foreclosure sale, and they too knew nothing concerning their existence at the time of the conveyance to appellants. The form of deed adopted by the respondents in making the conveyance of the property to appellants was one of grant, bargain, and sale.

These facts appellants claim show that the property was burdened with incumbrances that the form of deed adopted by the parties insured against, for which reason they claim the right of rescission.

We are of the opinion that there is no merit in the contention. By section 1113 of the Civil Code the word "grant," in any conveyance by which an estate is to be passed, insures to the purchaser an implied covenant, unless restrained, of (1) that previous to the time of the execution of such conveyance the grantor has not conveyed the same; (2) that such estate is at such time free from incumbrances done, made, or suffered by the grantor.

[2] Assuming that the building restrictions here involved constitute incumbrances under the implied covenants contained in the statute, and that they are enforceable against appellants, such incumbrances were upon the property at the time the grantor acquired the title to it, and they are therefore not within the covenant against incumbrances "done, made, or suffered" by the grantor, for the reason that he has not created or caused them to exist. "Suffered," as used in the statute, implies reasonable control, and it cannot be held to apply to an incumbrance not caused by the act of the party nor within his power to prevent. Smith v. Eigerman, 5 Ind. App. 269, 31 N. E. 862, 51 Am. St. Rep. 281; Polak v. Mattson, 22 Idaho, 727, 128 Pac. 89.

Conceding therefore, that this question is properly before us, it can avail appellants nothing.

For the reasons given the judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

41 Cal. App. 323

MAUPIN v. SOLOMON et al.

(Civ. 2860; S. F. 8741.)

(District Court of Appeal, First District, Division 1, California. May 29, 1919. On Rehearing in Supreme Court, in Bank, July 29, 1919.)

On Rehearing in Supreme Court.

1. MASTER AND SERVANT ⚷330(1)—INJURIES TO THIRD PERSONS—AUTOMOBILE COLLISION —EVIDENCE.

The prima facie case made by one damaged by negligent driving of an automobile, when he proves that the automobile belonged to defendant and that the driver was the employé of defendant, is based on an "inference," and not on any "presumption" declared by law, that the employé was acting within the scope of his employment.

2. EVIDENCE ⚷53—"INFERENCE."

When we say that a certain "inference" is warranted by certain facts proved, we mean no more than that jury is reasonably warranted in making that deduction from those facts, under Code Civ. Proc. § 1958.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Inference.]

3. MASTER AND SERVANT ⚷330(3)—INJURIES TO THIRD PERSONS—EVIDENCE—INFERENCES.

Where plaintiff shows that he was damaged by defendant's automobile through the negligence of defendant's employé in driving, an inference arises that the employé was acting within the scope of his employment, but such inference disappears upon the introduction of uncontradicted evidence that the employé was not acting within the scope of his employment, and a verdict for plaintiff, under such circumstances, would be contrary to the evidence.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by J. L. Maupin against B. Solomon and M. A. Gunst & Company, Incorporated. Judgment for plaintiff, and the last-named defendant appealed. Judgment reversed in appellate court, and petition for rehearing denied in Supreme Court.

Short & Sutherland, of Fresno, for appellant.

M. M. Dearing, of Fresno, for respondent.

KERRIGAN, J. This is an appeal by the corporation defendant from a judgment in favor of plaintiff in an action for damages arising through the destruction of an automobile belonging to plaintiff as a result of a collision alleged to have been due to the negligence of the defendants.

At the time of the collision the defendant Solomon was in the employ of his codefendant, M. A. Gunst & Co., as a traveling salesman, with headquarters in the city of Fresno, and whose duties embraced the solicitation of customers for the purpose of selling the merchandise of his employer. To facilitate the discharge of that duty he was furnished by his employer with an automobile, which he was instructed to use only in the course of his employment. In the forenoon of February 22, 1917, being a public holiday, Solomon called on several customers, but in the afternoon he transacted no business, spending most of that time at the Elks' Club. In the early part of the evening, in pursuance of his personal recreation, he took two of his friends for a ride in the aforesaid automobile, intending thereafter to dine in a public café in Fresno. During this ride, and while the automobile was being driven by Solomon at a high rate of speed in said city, it collided with plaintiff's car, which was standing near or alongside of a street sidewalk, with its tail light burning. Plaintiff's car was practically demolished by the force of the collision.

It is not denied, as testified to by the witnesses introduced by appellant, and corroborated by the surrounding circumstances, that at the time of the accident Solomon was engaged in a pursuit wholly his own, and that such use of the automobile was without the consent of and against the instructions of the appellant. Nor is it disputed that the accident was the result of the negligence of Solomon. But plaintiff's contention in support of the judgment is that when he proved that the automobile belonged to the appellant and was being operated by its employé at the time of the collision, a presumption arose that the employé was acting within the scope of his employment, and that such presumption remained in the case in spite of the clear, positive, and uncontradicted evidence that Solomon was not so acting, and created a substantial conflict in the evidence, with the result that the action of the court in denying a motion for a new trial must be sustained upon appeal.

With this position we cannot agree. The inference relied upon by respondent cannot be indulged under the circumstances of this case. It must yield to the direct and unequivocal evidence rebutting such inference. "Presumptions," such as the one relied on here, "are allowed to stand, not against the facts they represent, but in lieu of proof of them," and when "the fact is proven contrary to the presumption, no conflict arises; the presumption is simply overcome and dispelled." Savings, etc., Soc. v. Burnett, 106 Cal. 514, 39 Pac. 922. The authorities in this state abundantly support this view. Freese v. Hibernia, etc., Soc., 139 Cal. 392, 73 Pac. 172; King v. Hercules Powder Co., decided by this court December 20, 1918, 178 Pac. 531; Mullia v. Ye Planry Building Co., 32 Cal.

App. 6, 161 Pac. 1008; Mauchle v. Panama Int. Exp. Co., 174 Pac. 400.

The very recent case of Brown v. Chevrolet Motor Co. of Cal., 179 Pac. 697, in an essential respect is like this case. There a traveling salesman employed by the defendant borrowed its automobile for a pleasure excursion, and while so using it injured the plaintiff. There, as here, the plaintiff contended that he had made out a prima facie case when he had shown that the automobile belonged to the defendant, and that it was the province of the jury to weigh any evidence in conflict therewith; but the court held that a nonsuit had been properly granted, and, quoting from the case of Matter of Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507, Ann. Cas. 1918B, 540, said:

> "The presumption growing out of a prima facie case * * * remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and, unless met by further proof, there is nothing to justify a finding based solely upon it."

In the last analysis respondent's position is in effect that, granting the evidence introduced by appellant rebutting the presumption relied upon is convincing and uncontradicted, it merely creates a conflict in the evidence, and that a finding of the jury in accordance with the presumption is under those circumstances supported thereby. This, we think, is not the law.

The judgment is reversed.

We concur: WASTE, P. J.; RICHARDS, J.

On Rehearing in Supreme Court.

PER CURIAM. [1-3] In denying the petition for hearing in this court after decision by the District Court of Appeal of the First appellate district, division 1, we desire to point out that respondent's prima facie case was based solely on an "inference," and not on any "presumption" declared by law. When we say that a certain inference is warranted by certain facts proved, we mean no more than that the jury is reasonably warranted in making that deduction from those facts. Section 1958, Code Civ. Proc. In this case the direct uncontradicted evidence introduced in response to the prima facie case as to the circumstances under which the employé of appellant was driving appellant's automobile was of such a nature as to leave no reasonable ground for an inference, based solely on the fact of appellant's ownership of the automobile, and the further fact that the person driving was an employé of appellant, that the driver was acting within the scope of his employment at the time of the accident. The verdict therefore was contrary to the evidence, and this is all we understand the opinion of the District Court of Appeal to decide.

The application for a hearing in this court is denied.

All concur.

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41 Cal. App. 664

DOUGHTY v. MOORS. (Civ. 2793.)

(District Court of Appeal, First District, Division 2, California. June 19, 1919. Rehearing Denied by Supreme Court Aug. 18, 1919.)

BANKRUPTCY ⟹186(1)—CORPORATE ASSETS—RECOVERY.

A purchaser of corporate property within four months prior to adjudication in bankruptcy who complied with a request of the seller's president and general manager by applying a portion of the purchase price toward discharging personal debts incurred for the corporation's benefit cannot be required to make such payments a second time to the corporation's trustee in bankruptcy.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by E. W. Doughty, as trustee in bankruptcy of the Electric & Garage Company, against Frank Moors. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 175 Pac. 273, 275.

Wallace Rutherford, E. L. Webber, U'Ren & Beard, and U'Ren, Beard & Linn, all of Napa, for appellant.

G. Clark, of San Francisco, for respondent.

HAVEN, J. Plaintiff is the trustee in bankruptcy of the Electric & Garage Company, a corporation. As such trustee he brought this suit to recover from the defendant an alleged balance of the purchase price of certain real property, improvements thereon, and equipment of a garage business, agreed to be purchased by the defendant from said corporation within four months prior to its adjudication in bankruptcy. The judgment was for the defendant, from which plaintiff appeals. It is alleged in the complaint that the defendant agreed to buy the real and personal property above referred to for the sum of $9,192.93, of which the sum of $5,500 had not been paid, and for which latter sum plaintiff prayed judgment. The court found that, with the exception of the formal denials of the corporate character and bankruptcy of the corporation, and the appointment of plaintiff as trustee, all the allegations of defendant's answer were true, and all denials therein contained were true denials. Among these are allegations that the consideration for the agreement of purchase, referred to in plaintiff's complaint, was not the payment of $9,192.93 in cash, as alleged by plaintiff, but was an assumption by

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the defendant of an indebtedness against the real property purchased in the sum of $3,600, an agreement by the defendant to pay $2,000 in cash, a further agreement by defendant to release one Armstrong from an obligation to said defendant in the sum of $2,000, and a still further agreement by the defendant whereby he guaranteed payment of a promissory note in the sum of $1,500, which had theretofore been executed by C. W. Crouch and J. R. Clark. The said C. W. Crouch was the president and general manager of the corporation whose property was purchased by the defendant, and was also the owner of all its capital stock, with the exception of one share. The dealings of the defendant were all had with said Crouch as such president and general manager. The answer further alleges that the defendant paid to the corporation all sums of money agreed by him to be paid and fully performed all of the undertakings which he agreed to perform in consideration of the transfer by said corporation to him. The finding of the trial court that these allegations are true is supported by sufficient evidence.

Appellant concedes that there is no material dispute as to the facts of the case, but insists that, inasmuch as the defendant testified that he was purchasing the property from the corporation, it was his duty to make payment to that corporation, and that payments made by him on personal obligations of the officers of the corporation cannot be credited on account of the purchase price. It is not alleged that the defendant knew at the time of his purchase, that the corporation was insolvent. Waiving the question as to the right of a purchaser from a corporation, without knowledge of its insolvency, to apply the agreed purchase price in accordance with the terms of a contract made with its president and general manager, it appears from the testimony that both of the payments to which objection is made by appellant were made in discharge of debts of the president and manager, Crouch, and covered moneys borrowed by him for the use of the corporation. Under such circumstances, it would indeed be a harsh rule which would compel the purchaser of corporate property to make a second payment to the trustee of a bankrupt corporation, for the reason that in making his first payment he had complied with the request of the president and general manager, and applied a portion of the purchase price to the discharge of personal debts incurred for the benefit of the corporation. The fact that one of the amounts of the indebtedness so discharged was a note payable to the defendant himself does not make him liable a second time to the plaintiff in this action.

The complaint contains no charge of fraud, and does not attempt to rescind the contract of sale. On the contrary, the demand of plaintiff for the payment of an alleged balance of the purchase price is an express affirmance of the contract. The finding of the trial court is specific to the effect that defendant has fully performed all obligations resting upon him under the contract as made. This finding is not assailed, and cannot be under the evidence. Having once performed, defendant cannot be held liable a second time to a trustee in bankruptcy who does not seek to set aside the contract.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

41 Cal. App. 661

CHARLES BOLDT CO. v. JULIUS LEVIN CO., Inc. (Civ. 2685.)

(District Court of Appeal, First District, Division 2, California. June 19, 1919. Rehearing Denied by Supreme Court Aug. 18, 1919.)

1. SALES ⚷81(5) — CONTRACT — IMPLICATION AS TO TIME.

Where a contract of sale merely provided that deliveries were to be taken before September 1st, in the absence of statement as to when the orders for and specifications of the goods should be given, the law will presume they were intended to be given within a reasonable time before the date fixed for delivery, especially under Civ. Code, §§ 1655, 1657, providing stipulations necessary to make a contract reasonable or conformable to usage are implied, and that if no time is specified for performance of an act required, reasonable time is allowed.

2. SALES ⚷88—ACTION FOR PRICE—QUESTION FOR COURT.

In action to recover for goods sold and delivered to defendant, it was the duty of the trial court to find what was a reasonable time for defendant to give orders for and specifications of the goods before the date fixed by the contract for delivery; the contract having been silent as to when the orders should be given.

3. SALES ⚷87(2)—ACTION FOR PRICE—EVIDENCE.

In an action for goods sold and delivered, evidence of the usual time required and allowed for the filling of orders given plaintiff by defendant, and of the previous dealings of the parties with respect to the time allowed for the filling of orders, and of similar matters, *held* relevant on the issue of what was a reasonable time for the giving of orders and specifications before the time for delivery fixed by the contract.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Action by the Charles Boldt Company against the Julius Levin Company, Incorporated. From judgment for plaintiff, defendant appeals. Affirmed.

L. H. Brownstone, of San Francisco, for appellant.

Gavin McNab and Nat Schmulowitz, both of San Francisco, for respondent.

LANGDON, P. J. This is an action to recover $778.76 for goods sold and delivered to the defendant. The defendant answered, admitting this amount due, and set up a counterclaim and cross-complaint against plaintiff, alleging damages for breach of contract. The trial court held that the defendant was not entitled to damages against the plaintiff upon its cross-complaint, and gave judgment for plaintiff for the full amount of its claim. Defendant appeals from this judgment and the question presented to this court is in regard to the cause of action set up in the cross-complaint. This arose out of a contract for the sale and delivery to the cross-complainant of certain "skeletons" for bottling whisky, consisting of boxes, bottles, cartons, etc. The contract is evidenced by certain letters and telegrams introduced in evidence. It calls for 15,000 cases at specified prices, delivery of the entire number to be taken by September 1, 1917. The cases were to be marked in a certain way as per directions from the cross-complainant, who was also to have the privilege of specifying sizes, the contract providing different prices for different sizes. Up to August 27, 1917, about 7,000 "skeletons" had been delivered. On that date, defendant telegraphed plaintiff, asking for an extension of 90 days within which to take delivery. This was refused by telegram, and on August 28th, defendant telegraphed for the balance of the cases called for by the contract, specifying sizes, etc., and saying that it would specify distillery markings in a day or so. On August 29th, the cross-defendant telegraphed, refusing to deliver because the order came too late to allow of delivery before September 1st. On August 31st, the cross-complainant telegraphed the cross-defendant, giving the balance of the directions necessary to fill the order and demanding delivery. This was a night letter, and arrived September 1st.

[1-3] The contract between the parties, as evidenced by the letters and telegrams, is silent as to when the orders for the "skeletons" were to be sent to the cross-defendant. The contract merely provides that deliveries are to be taken before September 1st. In the absence of any statement in the contract as to when the orders should be given, we think the law will presume that they were intended to be given within a reasonable time before the date fixed for delivery. Especially is this true, under Civil Code, §§ 1655, 1657. Section 1655 provides that stipulations which are necessary to make a contract reasonable or conformable to usage are implied in respect to matters concerning which the contract manifests no contrary intention. Section 1657 provides that if no time is specified for the performance of an act required to be performed, a reasonable time is allowed. Easton v. Montgomery, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123. It was the duty of the trial court to find what was a reasonable time under all the circumstances. Evidence of the usual time required and allowed for the filling of such orders, of the previous dealings of the parties with respect to the time allowed, and similar matters, to which the cross-complainant objects, seems to us relevant upon this issue of what was a reasonable time; and such evidence is sufficient to justify the finding made by the court that "no additional skeleton cases were requested for delivery of and from plaintiff and cross-defendant by the defendant and cross-complainant reasonably in advance of and prior to the 1st day of September, 1917."

We think the evidence objected to was properly admitted. The judgment is affirmed.

We concur: BRITTAIN, J.; HAVEN, J.

(41 Cal. App. 773)

HARMON v. KEOGH et al. (Civ. 2697.)

(District Court of Appeal, First District, Division 1, California. June 27, 1919.)

1. APPEAL AND ERROR 🔑768—ADMISSIONS IN BRIEF—EFFECT.

Where appellants' brief conceded the complaint in a claim and delivery case, sustained the judgment if there was sufficient evidence of plaintiff's right of possession, any error the trial court made, in a finding without evidence to sustain it, that defendants had taken the property from plaintiff's possession without his consent, is cured.

2. REPLEVIN 🔑72—RIGHT TO POSSESSION—SUFFICIENCY OF EVIDENCE.

In a claim and delivery case, evidence that plaintiff paid defendant for certain number of mules, but that defendant delivered three less than stipulated number, *held* to sustain trial court's finding that plaintiff was entitled to possession of the three animals in question.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by S. D. Harmon against John Keogh and others. Judgment for plaintiff, and defendants appeal. Affirmed.

E. S. Van Meter and C. K. Bonestell, both of Fresno, for appellants.

Harris & Hayhurst, of Fresno, for respondent.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff in an action brought in claim and delivery to recover three mules. The complaint alleged that on or about November 22, 1917, the defendants, without the consent of plaintiff, took said mules from his possession, and have ever since retained possession of them. It also alleged that the plaintiff at the time of the commencement of said action was the owner and entitled to the possession of the mules in question, and that he had demanded their delivery prior to the institution of the action. The court found these allegations of the complaint to be true, and gave judgment accordingly in plaintiff's favor for the possession of the animals.

[1, 2] The only contention of the defendants upon appeal is that the evidence does not sustain the findings and judgment of the trial court.

There is no merit in this contention. The facts of the case, as testified to by the plaintiff and his witnesses, and which the court believed and based its findings upon, were these: On November 20, 1917, the plaintiff, who was engaged in purchasing mules for the purpose of selling them to the United States government, went with one Veach, who was a salaried employé of the government, to the defendant's ranch, located about 20 miles from Fresno, and there arranged to buy 24 head of mules, 19 of which were at the time being used in plowing the fields of the defendants, the rest of them being elsewhere about their premises. Plaintiff and Veach inspected all of these mules but one, which was described to them, and offered to buy the lot at $150 per head, which offer being accepted, the plaintiff paid a deposit of $1,000 upon the purchase price, and it was agreed that the mules should be delivered to him at the Southern Pacific stockyards in Fresno a few days later. Upon the date of delivery, the plaintiff went with Veach to the stockyards, and, according to their testimony, they there found 20 of the mules they had theretofore seen, together with 4 other mules which had been substituted for 4 of the best of those inspected and purchased. The evidence shows that this substitution was deliberately made by the defendants, and that their conduct in that behalf was reprehensible. The plaintiff rejected the four substituted animals, and with reference to them had a separate transaction with the defendants, by which he agreed to buy two of the latter mules for $75 each, and one of them for $2. He gave the defendants the $2 in cash and a check for $2,300, and then received 18 of the mules he had originally bought, returning the rejected animals.

It would thus appear that he paid the defendants upon the original transaction $3,150, which would have entitled him to 21 mules at the price of $150 each. Having received but 18 of these, he thus became entitled to the other three, which, the evidence showed, were at the time upon the defendants' ranch, where, prior to the institution of this action, the plaintiff made his demand for said three mules, which are the subject of this action.

From this statement of the facts of the case it would seem that the averments of the plaintiff's complaint to the effect that the defendants had, without the consent of the plaintiff, taken said mules from his possession, and also the finding based upon said averment, do not find support in the evidence in the case. The defendants, however, expressly concede in their brief that "the complaint contains sufficient, in addition to these useless allegations, to sustain a judgment if there was sufficient evidence of right of possession at the time the case was commenced." By this admission whatever error the court may have made in the finding above referred to is cured; and the evidence otherwise is amply sufficient to sustain the averment of the complaint and the finding of the court that at the time of the institution of this action plaintiff was entitled to the possession of the animals in question.

The judgment is affirmed.

We concur: WASTE, P. J.; NOURSE, Judge pro tem.

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41 Cal. App. 511

ARENDT v. McCONNELL. (Civ. 2740.)

(District Court of Appeal, First District, Division 2, California. June 10, 1919. Rehearing Denied by Supreme Court Aug. 7, 1919.)

1. EXCHANGE OF PROPERTY ⚷3(1)—FALSE REPRESENTATIONS.

One cannot have a contract for exchange of land for corporate stock annulled on the ground that the other party made false representations, where such representations were not relied on.

2. VENDOR AND PURCHASER ⚷15 — CONSIDERATION.

One who exchanged land for corporate stock cannot maintain that there was no consideration in that the stock was worthless, where the defendant paid $1,500 in cash and assumed a certain indebtedness on the land conveyed, although the cash was paid to the former's agent and was retained by him as his commission in negotiating the exchange.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by M. Arendt against Emmett W. McConnell. Judgment for defendant, and plaintiff appeals. Affirmed.

Hugo D. Newhouse, of San Francisco, and Milton Shepardson, of Oakland, for appellant.

Wise & O'Connor, of San Francisco, for respondent.

HAVEN, J. This action was brought for the purpose of obtaining a decree annulling an agreement of exchange between plaintiff and defendant. Plaintiff and one Edward A. Lesser were the owners in common of a certain tract of land in the county of Tulare. They jointly agreed with the defendant, McConnell, to exchange the above referred to tract of land for 3,250 shares each of the preferred and common capital stock of the Consolidated Concessions Company, and certain other considerations hereinafter referred to. The agreement was consummated by the execution and delivery to McConnell of a deed of the real property and the delivery by McConnell to the plaintiff and Lesser of certificates for the required number of shares of the capital stock of the corporation referred to. Plaintiff alleged in his complaint that the defendant made certain false representations to him with regard to the value of said stock and the assets and indebtedness of the corporation which had issued such stock; that plaintiff believed said statements were true, and relied upon them, and by reason thereof was induced to enter into the agreement of exchange; that he later discovered that the assets and affairs of the corporation were not as represented by the defendant; that defendant knew the said representations were false, and that if plaintiff had known the same, he would not have entered into the agreement of exchange; that upon the discovery of the falsity of said statements plaintiff rescinded the agreement, and so notified the defendant, and then and there tendered and offered to return to the defendant the 1,625 shares of the corporate stock which he had received as his portion of the consideration exchanged for the deed of the land; that the said shares of stock constituted everything of value which he had received in the exchange; that the defendant had refused to comply with plaintiff's demand for rescission; and that the title of the real property still stood in the name of defendant. The prayer was for a decree canceling, annulling, and setting aside the agreement of exchange, requiring defendant to account for the rents, issues, and profits of the real property, and further requiring him to execute and deliver to plaintiff a deed for his undivided interest in the real property, and for the recovery of damages. The findings of the trial court were all in favor of the defendant, and expressly negatived the making of any false or fraudulent representations by him, or the reliance by plaintiff on any such representations.

[1] Appellant concedes that these findings cannot be disturbed, in so far as they are based upon conflicting evidence, but claims that there is no evidence to support at least one of the findings. As a part of a long recital of representations which were found not to have been made by defendant, it is found that the defendant did not state or represent:

> "That said corporation owned shares of the capital stock of other corporations which owned or had or would conduct concessions at the Panama Pacific International Exposition to be held in the city and county of San Francisco, state of California, in the year 1915."

The contention of appellant that the above portion of the finding is contrary to the evidence is well founded, as it was proved without conflict that such representation was made by the defendant. It was necessary, however, for the plaintiff to show, not only that said representation was made, but that the same was false, and that plaintiff relied thereon. With regard to the latter matter, the court found:

> "That plaintiff did not rely on any representations made to him by defendant nor was he induced thereby to enter into the exchange of property above referred to."

This finding was supported by the evidence, and is not attacked by appellant. As reliance by plaintiff upon the representations alleged to have been made by defendant was a necessary part of his cause of action, proof that certain admitted representations were made, and that the same were false or fraudulent, would not have entitled plaintiff to a judgment, in view of the above finding that he did not rely upon such representations.

Appellant contends that the evidence in the record shows that the Consolidated Concessions Company did not own the shares of capital stock of the other corporations referred to in the findings, for the reason that the transaction under which said shares were purported to have been acquired by that corporation was fraudulent and void. It is also urged that the illegality and fraudulent character of this transaction would have been more clearly established if certain additional evidence offered by the plaintiff and erroneously excluded by the trial court had been admitted. Discussion of these contentions is unnecessary, for the reason that, if all that is contended for by appellant with regard thereto be conceded, his cause of action still fails on account of the above referred to finding as to lack of reliance by him upon any of the representations made.

[2] It is further contended that it is shown without conflict that the stock of the Consolidated Concessions Company never had any value, and that therefore there was no consideration for the agreement of exchange, for which reason it may be canceled without regard to a rescission on the part of plaintiff.

The evidence disclosed that, in addition to the corporate stock delivered by defendant to plaintiff and his co-owner, the sum of $1,500 was paid by defendant to Mr. Lesser, the co-owner of plaintiff, who acted as plaintiff's agent throughout the transaction. This sum was retained by Lesser and claimed by him as a commission for negotiating the exchange, but it was, nevertheless, paid by the defendant as a part of the consideration moving from him for the single agreement here sought to be set aside. It also appeared that as further consideration the defendant assumed certain indebtedness upon the real property conveyed to him by plaintiff and his co-owner, and agreed to hold them harmless from such indebtedness. Under these circumstances, it cannot be said that there was a failure of consideration for the contract of exchange.

The judgment is affirmed.

We concur: LANGDON, P. J.; KERRIGAN, J.

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41 Cal. App. 782

ROOS v. LOESER. (Civ. 2633.)

(District Court of Appeal, First District, Division 1, California. June 27, 1919. Rehearing Denied July 26, 1919; Denied by Supreme Court Aug. 25, 1919.)

1. Animals ⚿=2—Dogs—Property Rights.

Dogs constitute property of their owners. and are recognized as having pecuniary value, depending on their market value, or some special or pecuniary value to their owners, to be ascertained by reference to their usefulness or other qualities.

2. Animals ⚿=81—Vicious Dogs—Liability of Owner.

The owner of a dog is liable for injuries caused by it only if it is vicious and he has notice thereof.

3. Animals ⚿=82—Vicious Dog—Servant's Knowledge.

Knowledge by servant in charge of master's dog of its vicious character will be imputed to the master.

4. Animals ⚿=81—Killing of Unlicensed Dog.

That a dog on the street killed by another vicious dog is not licensed, as required by ordinance, does not prevent recovery for its death; absence of the license not contributing to the attack.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by E. L. Roos against Robert L. Loeser. Judgment for plaintiff, motion for new trial denied, and defendant appeals. Affirmed.

Andrew Thorne, of San Francisco, for appellant.

Wise & O'Connor, of San Francisco, for respondent.

KERRIGAN, J. This is an action for damages alleged to have been sustained by plaintiff by reason of the killing of her dog, of the variety known as Pomeranian, by an Airedale belonging to the defendant. A jury trial was had, and judgment went for the plaintiff in the sum of $500. Defendant made a motion for a new trial, which was denied, and he now appeals from the judgment.

The complaint alleges that on the 16th day of May, 1907, the plaintiff was the owner of a Pomeranian dog of the value of $1,000; that the defendant was the owner of an Airedale, of vicious disposition and dangerous character, which on said date and for a long time prior thereto was evilly disposed towards other dogs, and was accustomed to attack them without provocation, all of which matters were well known to the defendant; that nevertheless, the defendant carelessly and negligently permitted said Airedale to go upon the public streets of San Francisco unleashed and free from restraint, and that on the day mentioned, without provocation, and while the plaintiff's dog was proceeding peaceably along the public street, said Airedale attacked it from behind, the attack resulting in breaking the neck of the Pomeranian, from which its death immediately ensued.

From the evidence it appears that on said day the Pomeranian, attended by two maids, was pursuing the even tenor of its way upon the street, "tarrying" now and then and occupied with matters entirely his own, when the Airedale, an arrogant bully, domineering and dogmatic, being beyond the reach of the sound of his master's voice and having evaded the vigilance of his keeper (for the maids and the man were vigilant), dashed upon the scene, and with destruction in his heart and mayhem in his teeth pounced upon the Pomeranian with the result already regretfully recorded; the plaintiff's dog had had its day. It crossed to that shore from which none, not even a good dog, ever returns.

[1] Leaving this painful subject and turning to the considerations elaborately discussed in the briefs of able counsel, we remark that there was a time in the history of the law when, as is said in one of the early cases, "dog law" was as hard to define as "dog Latin." As Blackstone puts it, dogs were the subject of property to a very limited and qualified degree; they had no intrinsic value, and were regarded as being kept only through the whim or caprice of their owner. They were not the subject of larceny. 2 Blackstone's Comm. 393. But that day has passed, and dogs now have a well-established

status before the law. Considerable sums of money are invested in dogs, and they are the subject of extensive trade. Aside from their pecuniary value their worth is recognized by writers and jurists. Cuvier has asserted that the dog was perhaps necessary for the establishment of civil society, and that a little reflection will convince one that barbarous nations owe much of their subsequently acquired civilization to the dog. From the building of the pyramids to the present day, from the frozen poles to the torrid zone, wherever man has wandered there has been his dog. In the case of State v. Harriman, 75 Me. 562, 46 Am. Rep. 423, he is eulogized in the following language:

> "He is the friend and companion of his master, accompanying him on his walks; his servant, aiding him in his hunting; the playmate of his children, an inmate of his home, protecting it against all assailants."

In his well-known tribute to the dog United States Senator Vest characterizes him as "the one absolutely unselfish friend a man may have in this selfish world, the one that never deserts him, never fails him, the one that never proves ungrateful or treacherous." See, also, Sabin v. Smith, 26 Cal. App. 676, 679, 147 Pac. 1180.

The Pomeranian was small, weighing about 4½ pounds, but history discloses that the small dog, perhaps oftener than his bigger brother, has rendered modest but heroic service, and by his fidelity has influenced the course of history.

As already indicated, the law now recognizes that dogs have pecuniary value, and constitute property of their owners, as much so as horses and cattle or other domestic animals. Ten Hopen v. Walker, 96 Mich. 236, 55 N. W. 657, 35 Am. St. Rep. 598. It may be the market value, or some special or peculiar value to its owner to be ascertained by reference to its usefulness or other qualities. Heiligmann v. Rose, 81 Tex. 222, 16 S. W. 931, 13 L. R. A. 272, 26 Am. St. Rep. 804. Its amount is a question for the jury, after hearing evidence directed to those points. Parker v. Mise, 27 Ala. 480, 62 Am. Dec. 776. The plaintiff's dog was the proud possessor of the kennel name Encliffe-Masterpiece; his pedigree and reputation entitled him to be regarded in dog circles as possessing the bluest of blood; in short, in canine society he belonged to the inner circle of the 400. In West and East he had won the first prize in every bench show at which he had been exhibited. He was middle-aged and in good health. Experts testifying placed his monetary value at $1,000.

[2, 3] The owner of a dog is not liable for the injuries caused by it unless it is vicious and the owner has notice of that fact. 3 Corp. Juris, p. 89, § 330. But we think the evidence in this case shows, by inference at least, that while the defendant's dog was an estimable animal in many respects, he was, nevertheless, prone to attack without provocation other dogs irrespective of size, and that such an assault upon a dog of the weight and physical characteristics of that owned by the plaintiff was likely to prove harmful, if not fatal, to the object of the attack. As to the defendant's prior knowledge of the vicious propensities of his Airedale, while the evidence may not clearly show that he was personally aware of them, it sufficiently demonstrates that his employé, in charge of it at the time of the attack, and whose custom it was to exercise it on the public streets, knew of its dangerous character, which knowledge the law charges to the employer. The knowledge of a servant or agent of an animal's vicious propensity will be imputed to the master when such agent or servant has charge of or control over the animal. 3 Corp. Juris, p. 96, § 328.

[4] It is urged by the appellant that the court erred in refusing to instruct the jury, as requested, that the plaintiff was guilty of contributory negligence arising from the fact that her dog was upon the public streets without being licensed—unlike the defendant's Airedale, whose master had ornamented his favorite with a tag entitling him to roam the city's streets secure from interference by the poundkeeper or his myrmidons. The appellant's contention in this respect would be well grounded if the plaintiff's omission to comply with the ordinance requiring dogs to be licensed had contributed to the incident resulting in the Pomeranian's untimely end. But for aught that appears the absence of a tag from the collar of plaintiff's dog was unnoticed by the Airedale, and was not the matter that aroused his ire or induced him to make the attack. His was the canine point of view, and not that of the license collector. When the violation of an ordinance has no causal connection with the injury, as contributing thereto, the rule contended for by appellant has no application. This was held in the case of Shimoda v. Bundy, 24 Cal. App. 675, 142 Pac. 109, where, in its discussion of the subject, the court says:

> "One who violates an ordinance wherein a penalty is fixed for noncompliance with its provisions, may be subjected to the penalties therein prescribed, but he cannot, in addition thereto, be deprived of his civil rights to recover damages, perhaps in many thousands of dollars, sustained by reason of the negligence or wrong of another, when such violation bore no relation to the injury, and did not contribute in the remotest degree thereto."

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

41 Cal. App. 580

FROST v. SUPERIOR COURT IN AND FOR MODOC COUNTY et al. (Civ. 2019.)

(District Court of Appeal, Third District, California. June 13, 1919.)

1. CERTIORARI 🔑16 — QUESTIONS REVIEWABLE—FINAL DETERMINATION.

Certiorari will not issue to review a proceeding by an inferior tribunal prior to court's final adjudication.

2. CONTEMPT 🔑67—REVIEW—CERTIORARI.

Statutory contempt proceedings by superior court, under Code Civ. Proc. § 714 or 715, will not be reviewed by certiorari until a final order has been made, although the court may have made jurisdictional mistakes during the proceedings.

Application for writ of review by Herman Frost against the Superior Court in and for the County of Modoc and Clarence A. Raker, Judge of said court. Writ dismissed.

Milton S. Hamilton, of San Francisco, and Driver & Driver and Frank Tade, all of Sacramento, for petitioner.

J. E. White, of San Francisco, for respondents.

HART, J. In an action previously instituted by Sallie C. Turner against the petitioner and one Patrick L. Flanigan, a judgment for the sum of $8,166.60 was entered by the clerk of the above-named respondent court against petitioner and said Flanigan on the 13th day of March, 1919. On the same day a writ of execution was issued in said action by the clerk of said court (respondent herein), directed to the sheriff of the city and county of San Francisco. Said writ was returned to said clerk partially satisfied, and on the 10th day of April, 1919, was filed by said clerk with the papers in said action. The petition here alleges that—

> "On the 10th day of April, 1919, an oral application was made by said plaintiff (Sallie C. Turner) to said Hon. Clarence A. Raker, in his chambers and not while he was holding court, for an order directing said petitioner to appear before John McCallan, a notary public in and for the said city and county of San Francisco, as a referee, to answer on oath concerning his property; that said judge thereupon, in compliance with such application, made in said action the following order"

—and then follows the order made by the judge, commanding the petitioner to appear before the said John McCallan, notary public, a referee, etc., in room 1012, Mills building, San Francisco, on the 23d day of April, 1919, at 10 o'clock in the forenoon, to answer on oath concerning his property, etc.

It is made to appear that the said McCallan, as referee, made and signed a return to the respondent superior court, setting forth the fact:

> That the order above mentioned was served in due time on the petitioner by the sheriff of the city and county of San Francisco; that petitioner "did not appear before me at room 1012, Mills building, * * * on the 23d day of April, 1919, at the hour of 10 o'clock a. m., or at all; and I hereby recommend that the said Herman Frost be punished for contempt in failing to obey the said order, and that the court take such steps as may seem meet and proper in the premises to punish the said Herman Frost for his contempt of this referee and the order of the court."

Upon receiving and the filing of the said return or report of the said referee, the respondents, it is alleged, ordered the issuance of and the clerk of said court issued—

> "a writ of attachment for contempt against your petitioner and directed to the sheriff of said county of Modoc; that the time for the return of said writ of attachment has by order of said superior court been continued to the 16th day of May, 1919, at the hour of 10 o'clock a. m."

The petition further alleges, and thus are stated two of the grounds upon which a writ of certiorari is herein prayed for to annul the proceedings thus far in the contempt matter inaugurated against the petitioner:

> "That no affidavit or other verified application was presented to said judge or filed in said action as the basis for said order so issued by said judge in his chambers. That it was not made to appear to the said judge at the time of said application and at the time of the issuance of said order, or at all, that the petitioner was at that time a resident of the said city and county of San Francisco, or of any other county, * * * or had a place of business therein. That there is no paper or document filed in said action or with said court or in the office of the clerk thereof showing or tending to show the residence of your petitioner at the time said order was made, and that the only paper referring to said matter is the order set forth hereinabove."

It is further contended that it nowhere appears that the court ever made an order appointing the said McCallan a referee to take the testimony of the petitioner concerning his property; the only reference to a referee in said proceeding being in the order of the court requiring petitioner to appear before the said McCallan, "a referee by me appointed," etc. It is also maintained that the statute requires that the order compelling a judgment debtor to appear before a referee to answer on oath concerning his property shall be made in court as a court order and not in chambers by the judge, as was the fact in this case.

There was some discussion in the oral argument before the court of the question whether the order requiring the petitioner to appear before the referee was the one authorized by section 715 or that authorized by section 714 of the Code of Civil Procedure; the respondent contending that the order was based on the last-named section and the petitioner contending that upon the provisions of the section first named the order was made. But a consideration of this as well as the other points made by the petitioner is, as we view the matter as it stands before us now, foreign to any requirement imposed upon us in the determination of what we conceive to be the controlling question submitted by this petition.

[1] Counsel for petitioner, in his brief, states that—

> "Section 1068, Code Civ. Proc. subd. 4, provides that a petition for writ of review must show that there is a final determination or judgment the subject of the attack."

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We have found no such provision in section 1068, nor, after some investigation, have we found such a provision in any other part of said Code, nor of any other of our Codes. But we think the rule as thus stated is the correct one, and that no review of a proceeding had by an inferior tribunal through the writ here asked for should be allowed unless in such a proceeding there has been a final adjudication or determination of the subject-matter thereof.

[2] The petitioner declares that the order requiring him to appear before the referee to answer on oath concerning his property is a final order, and that therefore the same is subject to review and annulment, if illegal, through the writ of certiorari. It is undoubtedly true that said order was in a sense, if not entirely, final. Its purpose merely was to direct the petitioner to appear before the referee for the purpose therein stated. It was final as to that matter because there was nothing further to be done in that particular. But the question which we are asked to review herein is whether or not the proceedings instituted against petitioner for contempt are legal, or within the jurisdiction of the respondent court to hear and determine, although therein there has been no final determination or adjudication. It is true that the order directing the petitioner to appear before the referee is the basis of said proceedings, but it does not constitute a final order in said proceedings. Of course, counsel will not attempt to dispute the proposition that, whether the proceedings in contempt were inaugurated under the provisions of section 714 or those of section 715 of the Code of Civil Procedure, the superior court nevertheless has jurisdiction to hear and determine such proceedings. Both sections expressly invest superior courts with such jurisdiction. It follows that those courts, on all proper occasions, are to be permitted without interruption to exercise such jurisdiction until their judgments, following from the employment of the power given them by the statute in that respect, have become final. In other words, error may be committed in the steps essential to the starting in operation of the jurisdiction vested by law in superior courts of certain proceedings, yet, notwithstanding that error, such court must be permitted to proceed to a final determination of the matter, and then, if it should appear that the court has not correctly followed the course marked out by the statute to put in motion its jurisdiction, and it appears that there is no adequate remedy at law, the party suffering from the final adjudication may have the proceeding reviewed through a writ of certiorari. It certainly cannot be held to be the law that the proceeding before a court may be arrested at any particular time in the progress thereof to determine whether the court has committed error either in the matter of putting its jurisdiction in motion or in ruling upon some proposition arising during the course of the hearing of the proceeding.

Counsel for the petitioner, however, maintains that the proceeding authorized by either section 714 or 715 of the Code of Civil Procedure is special, and that therefore every step necessary to its consummation is jurisdictional. He argues from this premise that if the court omits to observe any of the essential facts necessary to start its jurisdiction in motion the proceeding may be stopped and the error reviewed through the writ prayed for here. Of course, the statute must be followed with substantial strictness, but the same is true of statutes authorizing other proceedings in the superior court. Indeed, the same argument may be advanced as to a proceeding in eminent domain. That is a special proceeding, and the action authorized for the purpose of the exercise of the right of eminent domain is distinctly different in many respects from that of the ordinary action at law or in equity. Would counsel contend that, notwithstanding that the statute specially invests superior courts with jurisdiction to hear and determine eminent domain proceedings, a writ of review would be available to determine whether the complaint in such an action stated a good cause of action or was sufficient in the statement of facts to put the court's jurisdiction of such a proceeding in motion? We think that no such contention would be made. The contention of counsel for the petitioner in this case, however, in substantial effect, involves the same proposition.

We think that the petition here is premature; that if the objections to the proceedings thus far had in the contempt matter against the petitioner are in any sense legally valid the same may be urged before the superior court having jurisdiction of the proceeding; and that the writ here should therefore be dismissed. It is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

(42 Cal. App. 44)

CRENSHAW BROS. & SAFFOLD v. SOUTHERN PAC. CO. (Civ. 1950.)*

(District Court of Appeal, Third District, California. July 1, 1919.)

1. APPEAL AND ERROR 🔑1221, 1222—AMENDMENT OF REMITTITUR.

After regular issuance of remittitur by the appellate court which has modified a judgment for plaintiffs and reduced their recovery, such remittitur having gone down, the appellate court cannot amend it and correct the judgment, having lost jurisdiction of the cause except in case of mistake, fraud, or imposition.

2. APPEAL AND ERROR 🔑1218—AMENDMENT OF REMITTITUR — MISAPPREHENSION OF COUNSEL.

A misapprehension of counsel as to the effect of the judgment of the appellate court modifying the judgment of the trial court for plaintiffs by reducing the recovery furnishes no ground for recalling the remittitur after it has gone down and for setting aside the judgment and amending it in any particular.

3. APPEAL AND ERROR 🔑1221—RELIEF FROM JUDGMENT—LOSS OF JURISDICTION.

The wide discretion of the appellate court, under Code Civ. Proc. § 473, to relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or inexcusable neglect, cannot be exercised where the court has lost jurisdiction, as by the going down of its remittitur.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by Crenshaw Bros. & Saffold, a partnership consisting of John A. Crenshaw and others, against the Southern Pacific Company. From judgment for plaintiffs, defendant appealed; the appellate court modifying judgment by reducing the amount of recovery (181 Pac. 252). On application for order recalling remittitur and to correct the judgment. Application denied.

Arthur L. Levinsky, of Stockton, for appellant.

L. T. Hatfield, of Sacramento, for respondents.

CHIPMAN, P. J. This is an application for an order recalling the remittitur, and also to correct the judgment of this court in the action made on the 8th day of April, 1919. The judgment of the lower court from which the appeal was taken was for the principal sum of $3,163.50, with interest thereon at the rate of 7 per cent. per annum, as follows: ———. In reviewing the case, this court reached the conclusion that the amount of recovery should be the sum of $1,528.06. with interest thereon at the rate of 7 per cent. per annum, as follows: ———, thus modifying the judgment and reducing the principal in the sum of $1,635.44. The plaintiff in the action petitioned the Supreme Court for a hearing in that court, which was on June 5, 1919, denied. No petition for rehearing in this court was filed, and no motion made to correct the judgment of this court, either as to the amount found to be due plaintiff from defendant or as to the matter of costs on the appeal. The matter stood thus until June 13, 1919, when the present application was filed.

It appears from the application that after the remittitur was received and filed by the clerk of the lower court appellant served its cost bill upon respondents' attorney, who thereupon came to this court for the relief asked.

Section 1027, Code of Civil Procedure, provides as follows:

> "The prevailing party on appeal shall be entitled to his costs excepting when judgment is modified, and in that event the matter of costs is within the discretion of the appellate court. * * *"

Rule 23 provides (176 Pac. xi) that:

> "In all cases in which the judgment or order appealed from is reversed or modified, and the order of reversal or modification contains no directions as to the costs of appeal, the clerk will enter upon the record, and insert in the remittitur, a judgment that the appellant recover the costs of appeal. In all cases in which the judgment or order appealed from is affirmed, the clerk will enter upon the record, and insert in the remittitur, a judgment that the respondent recover the costs of appeal."

The clerk of this court acted in obedience to this rule in issuing the remittitur, and the rule itself is authorized by the statute. The Supreme Court, in Granger v. Sheriff, 140 Cal. 190, 195, 73 Pac. 816, 818, said:

> "'Under the Constitution, by the lapse of time and the issuance of the remittitur, the judgment has become a finality beyond the power of the court to modify or amend' (Martin v. Wagner, 124 Cal. 204 [56 Pac. 1023]), and the jurisdiction of the Supreme Court ends (Herrlich v. McDonald, 83 Cal. 505 [23 Pac. 710]. In re Levinson, 108 Cal. 450 [41 Pac. 483, 42 Pac. 479]). When the remittitur is filed with the clerk 'with whom the judgment roll is filed,' the jurisdiction of the superior court attaches."

In the case In re Levinson, supra, a motion was made to recall the remittitur for the purpose of securing a modification of the

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Certiorari denied 250 U. S. —, 40 Sup. Ct. 14, 64 L. Ed. —.

direction made therein for the payment of the costs of the appeal. The court said (108 Cal. 459, 42 Pac. 479):

> "Without reference to the merits of the motion, it comes too late. The remittitur was regularly issued on September 6, 1895, and this motion was not noticed until October 18th following. If respondent desires a modification of the judgment in any respect, the proper application should have been made before the going down of the remittitur. Gray v. Palmer, 11 Cal. 341. When the remittitur has been duly and regularly issued, without inadvertence, we have no power to recall it. This court thereupon loses jurisdiction of the cause, except in a case of mistake, or fraud, or imposition practiced upon the court, neither of which elements appear in this case. People v. Sprague, 57 Cal. 147; Rowland v. Kreyenhagen, 24 Cal. 52."

See Trumpler v. Trumpler, 123 Cal. 248, 55 Pac. 1008.

In Martin v. Wagner, 124 Cal. 204, 56 Pac. 1023, cited in Granger v. Sheriff, supra, the court said:

> "Where fraud or imposition has been practiced upon this court in procuring its judgment, the remittitur will be recalled, and jurisdiction will be reasserted upon the ground that the judgment so procured is a nullity. But in this case no charge of fraud is made. In its legal aspect it stands in no different position from that of any other case in which an erroneous decision may chance to have been made by this court. Under the Constitution, by the lapse of time and the issuance of the remittitur, the judgment has become a finality, beyond the power of this court to modify or amend."

[1, 2] Obviously we cannot amend the remittitur should we recall it without first amending the judgment, and, as we have seen, this we cannot do. It is not claimed that there was fraud, or that the court was imposed upon, or that, by its judgment, it inadvertently failed to state which party should pay the costs of the appeal. The mistake alleged was on the part of counsel for respondent, as counsel stated, in assuming that the judgment reading, "and, as thus modified, the judgment is affirmed," meant that the judgment of the superior court was "affirmed in every particular, except the amount recovered thereunder." The misapprehension of counsel as to the effect of the judgment furnishes no ground for recalling the remittitur and setting aside the judgment and amending it in any particular. As we understand the decisions in the cases cited, we must hold that this court, under the circumstances shown, is without jurisdiction to afford the relief prayed for.

[3] Section 473 of the Code of Civil Procedure gives the court wide discretion to "relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect." But this discretion cannot be exercised in a case where the court has lost its jurisdiction.

The application is denied.

We concur: BURNETT, J.; HART, J.

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42 Cal. App. 37

PEOPLE v. PATTERSON. (Cr. 475.)

(District Court of Appeal, Third District, California. June 30, 1919.)

1. CRIMINAL LAW 🔑1036(1)—APPEAL—OBJECTION TO EVIDENCE.

The introduction of evidence received without objection in a criminal case cannot be urged as error upon appeal.

2. FALSE PRETENSES 🔑49(1) — DRAWING CHECK WITHOUT FUNDS — CORPORATE EXISTENCE OF BANK.

In a prosecution for drawing a check upon a banking corporation in which accused had insufficient funds, it is sufficient to prove the de facto existence of the banking corporation.

3. CRIMINAL LAW 🔑400(6) — PAROL EVIDENCE—CORPORATE CHARACTER.

In a prosecution for drawing a check upon a banking corporation in which accused had insufficient funds, the bank's corporate character may be proved by parol.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

B. C. Patterson was convicted of drawing a check upon a bank in which he had insufficient funds, and he appeals. Affirmed.

Charles L. Gilmore, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was charged by information with the crime of uttering and delivering a certain bank check for $15 to one George Carlton; it being alleged that the check was drawn November 11, 1918, upon the California National Bank of Sacramento, a banking corporation existing under the laws of the United States, and that at the time of the uttering of said check defendant had neither funds nor credit in said bank.

[1-3] No attack is made upon the information, the instructions, or any of the rulings of the court. The only contention is that the evidence is insufficient to support the verdict in two particulars; that is, as to the bank being a corporation, and that defendant had insufficient funds in the bank at or about the time the check was uttered and presented for payment. Appellant is, however, totally in error in this contention, as will be seen from the following quotation from the testimony of Charles S. King, the assistant cashier of the California National Bank of Sacramento:

"Q. The California National Bank of Sacramento is a corporation organized and existing under the laws of the United States? A. Yes, sir. Q. And it has its principal place of business in the City of Sacramento, state of California? A. Yes, sir."

After stating how long he had been assistant cashier of said institution and that an account was opened with B. C. Patterson on October 16, 1918, with a deposit of $20 to his credit, and that the largest balance he had to his credit during November and December, 1918, was $3, he further testified that at no time during the said month of November did the defendant have any arrangements with the bank for credit.

But appellant contends that said evidence was incompetent, especially as to the incorporation of the bank; the claim being that the articles of incorporation should have been introduced. As to this, it may be said in the first place that no objection was made to the introduction of the evidence, and it is now too late to urge the point. Again, in such cases it is sufficient to prove the de facto existence of the corporation, and its corporate character may also be proved by parol.

In People v. Barric, 49 Cal. 342, the defendant was convicted of stealing certain property of a corporation, and the Supreme Court said:

> 'The prosecution proved by the witness Rondel that the company known by the name given in the indictment was a corporation de facto, doing business as such. This was sufficient. People v. Frank, 28 Cal. 507; People v. Hughes, 29 Cal. 257; People v. Ah Sam, 41 Cal. 645."

In the Ah Sam Case it was held that proof of the bank being a corporation may be made by "general reputation" and by showing that the bank was known and acted as an incorporated company, and as such issued bank bills. There are many cases to the same effect, but we need cite no further. Indeed, there seems to be no merit in the appeal. The evidence is abundantly sufficient to support the verdict and the defendant had a fair and impartial trial.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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41 Cal. App. 556

STOUFFER v. EYMANN et al. (Civ. 2028.)

(District Court of Appeal, Second District, Division 1, California. June 12, 1919.)

1. BROKERS ⟹38(3) — LAND EXCHANGE TRANSACTION — MISREPRESENTATION — OWNERS' RIGHT TO DAMAGES.

Owners cannot recover from their broker who effected real estate exchange transaction, damages for misrepresentation of value of property received by them in exchange, without alleging and proving that such property was of a less market value than their own land.

2. BROKERS ⟹82(2) — LAND EXCHANGE TRANSACTION—MISREPRESENTATION BY BROKER—PLEADING.

In land broker's action on commission notes, in which owners seek to avoid liability and counterclaim for damages upon ground of broker's misrepresentation as to value of property received in exchange, *held*, that answer failed to plead that property received in exchange was not worth as much as property transferred in return therefor.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by H. A. Stouffer against Dorothea H. Eymann and another. From judgment for plaintiff and an order denying motion for new trial, defendants appeal. Appeal from order denying motion for new trial dismissed, and judgment affirmed.

Andrew J. Copp, Jr., of Los Angeles, for appellants.

Minor Moore, of Los Angeles, for respondent.

JAMES, J. Appeal by defendants from a judgment in favor of plaintiff and from an order denying defendants' motion for a new trial.

[1] The complaint stated in the ordinary form causes of action upon two promissory notes admitted to have been executed by the defendants and made in favor of the plaintiff. The notes were given as the result of an agreement made between plaintiff and defendants; the amount represented thereby being for commissions to be paid to the plaintiff by defendants in consideration of services rendered. Plaintiff was a real estate broker and was instrumental in effecting an exchange of certain property of the defendants in the county of Riverside, Cal., for real property in the state of Colorado. Defendants in their answer sought to avoid liability on the notes by setting up the defense that their agent had been guilty of fraud in that he had misrepresented the value of the Colorado property which was received by them in exchange for the California real estate. It should be remembered, then, that this is not an action against the other party to the exchange for falsely representing the value of his property, but is an action based solely upon an alleged breach of confidence committed by an agent toward his principals. In such a case it was incumbent upon the complaining principals to allege and prove that the property received by them in exchange for their own land was of a less market value than was the latter property; in other words, if the

Colorado property was worth as much in the market at the time of the alleged transaction as the Riverside property, no damage would be shown, regardless of the fact that the Colorado property might have been represented to be of a value greatly in excess of its actual market worth. The trial judge, after permitting an amended answer to be filed, announced that he did not consider that this amended answer stated any defense to the causes of action pleaded by the plaintiff on the notes, but allowed the defendants to introduce evidence as to what representations were actually made by the plaintiff. This evidence having been introduced, the court denied the defendants the right to introduce other offered evidence not going to the point mentioned, and ordered judgment for the plaintiff. The evident conclusion of the trial judge was that the facts shown in evidence did not establish a case where the defendants either relied upon, or were warranted in relying upon, statements made by their agent, that the latter were, as to the question of the value of the Colorado property, mere opinions, and that the defendants, having pursued an inquiry independent of that in which the plaintiff took a part, showed that they did not rely upon his statements, and hence the injury, if any, could not be attributed to the plaintiff. Upon an examination of the evidence we are inclined to agree with the trial judge upon this proposition. However, whether that question was correctly resolved or not, we find exhibited in the record an insurmountable obstacle to the defense claimed on the part of the defendants.

[2] Nowhere in the answer is there any allegation showing what the market value of the Riverside property owned by the defendants was; hence it is not made to appear by that pleading but that the Colorado property was worth as much, if not more, than the equity owned by the defendants in the Riverside property; the latter property having been exchanged subject to a large incumbrance by way of trust deed. We find in paragraph 1 of the answer, this clause:

> "That on said last-mentioned date said real property was of the reasonable exchange value of $60,000, subject to a lien of deed of trust thereon for the principal sum of $20,000. * * *"

This allegation referred to the Riverside property. It contains no statement at all of what the market value of that property or the equity was. In an alleged counterclaim set up in the answer the defendants seek to recoup damages in the sum of $35,663, which they allege as being "the difference between the value of said Colorado property as represented and the actual value of said property on or about the said 24th day of January, 1914." In the preliminary paragraphs of the alleged counterclaim the allegations of the answer, including that which we have quoted, are made a part thereof by reference. It will be at once discerned that there is nothing in the counterclaim, added to the allegations of the main answer, which shows what the value of the Riverside equity was; and the allegation as to the amount of damages does not help the case of defendants any, for, as we have stated hereinabove, if the value of the Colorado property equaled the value of the Riverside property, no damage would be shown for which recovery could be had against the agent. In point generally on this proposition are the cases of Baker v. Brown, 82 Cal. 64, 22 Pac. 879; Holton v. Noble, 83 Cal. 7, 23 Pac. 58; and London, etc., Fire Ins. Co. v. Liebes, 105 Cal. 203, 38 Pac. 691.

For the reasons given, we conclude that the appeal is without merit. At the time the order denying a new trial was made the law did not authorize an appeal to be taken therefrom. Hirsch v. All Persons, 173 Cal. 268, 159 Pac. 712. The questions sought to be raised thereby are all presented on the appeal from the judgment.

The appeal from the order denying defendants' motion for a new trial is dismissed. The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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41 Cal. App. 515

DOI v. McMURRY. (Civ. 1860.)

(District Court of Appeal, Third District, California. June 10, 1919. Rehearing Denied by Supreme Court Aug. 7, 1919.)

Landlord and Tenant 🔑49(1) — Care of Premises—Election of Remedies.

A lease provision, authorizing lessor to employ men to properly care for the premises, etc., is for lessor's benefit, and does not prevent a damage recovery against lessee for failure to maintain premises, nor does the lessor's employment of men constitute an election of remedies precluding recovery of damages from lessee.

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by M. Doi against J. B. McMurry. Judgment for defendant and plaintiff appeals. Affirmed.

Fred J. Harris, of Sacramento, for appellant.

Ben P. Tabor, of Auburn, for respondent.

CHIPMAN, P. J. Plaintiff leased from defendant a fruit orchard of about 20 acres for the term of three years from October 16, 1916, agreeing to pay as rental the an-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

nual sum of $1,000. The lease provided that "all of the fruit produced upon the premises hereby leased must be delivered to the Auburn Fruit Exchange in the name of the party of the first part (J. B. McMurry), all transactions, accounts, statements, account sales, and checks to be issued in the name of the party of the first part." The complaint alleged that the fruit crop of 1917 was so delivered, and the defendant received therefor the sum of $4,493.36, that a portion of this was paid to plaintiff, but that the defendant withheld the sum of $639.92, which, together with an unknown amount for rebate, is due the plaintiff. The prayer was for an accounting and a judgment for whatever amount was found due. The answer claimed that no amount was due plaintiff in consequence of certain services performed for him by defendant and his wife and by reason of damage done to the orchard through the want of proper care and attention on the part of plaintiff. Affirmative relief was, indeed, therein demanded, and the same matters were set up by way of cross-complaint, and therein it was sought to have the lease rescinded and defendant restored to the possession of the land, together with damages for said injury. However, it appeared at the trial that an agreement had been reached by the parties for the restoration of the premises, and that feature was consequently eliminated from the case. The court found that the value of the services performed for plaintiff as aforesaid and the amount of the damages suffered by defendant equaled the amount due plaintiff under said lease, and rendered judgment for defendant for costs. After an examination of the record, we may say that there is substantial support for the finding that said services were rendered as claimed and were of the value charged against the plaintiff. The doubtful proposition relates to the sum of $481.59, which was allowed as an offset for injuries done to the premises. While the answer refers to several particulars in which plaintiff failed to comply with his agreement as to the care of the place, it is quite apparent that said award was made principally for his failure to thin the growing fruit, and thereby allowing many limbs to be broken and the trees greatly injured.

When the case was first before us we gained the impression, and so decided, that because the lease provided that the lessor had the right to employ one or more men properly to care for the premises (which we assumed included the right to thin the fruit) and charge the expense to the lessee, the lessor was "thereby charged with the ultimate responsibility for the proper thinning of the fruit." This view was somewhat contributed to by the fact that the lessor had caused some thinning to be done, and had done some other work in the orchard, and that he seemed to be aware of the necessity for better thinning being done than the lessee was doing. Upon further reflection we think we were in error. This right of supervision to some extent and the right himself to assist in harvesting the crop or thinning the fruit was, we think, for the lessor's benefit, and was not intended to nor did it have the effect of relieving the lessee from the duty of performing his covenants, nor acquit him of liability for damages caused by his breach of the contract. While by an abandonment of the work by the lessee or by his doing the work in such a way as to cause great damage the lessor might for his protection have elected to do all the work, he was under no obligation to do so, and his failure to do it would not relieve the lessee from the performance of his contract obligations. Any other view would make it to the lessee's possible advantage to neglect his work, sit idly by while the lessor is performing the duties of the lessee, and at the same time claim the fruits of the lease, thus casting upon the lessor the entire burden of the lease.

Appellant thus states his position:

> "We do not mean to contend that there is not available an election of remedies to the injured party in proper cases, but we do say that an election, once made, binds the person making it to the exclusion of all others. Particularly is this the case when the election is made in conformity to the written terms of the lease to which he is a party. And where a party has an election of two remedies, each being inconsistent with the other, the plaintiff may elect which he will pursue, but he cannot have both."

As we understand, appellant's application of this statement is this: That in assuming to do some of the work in the orchard which he deemed necessary for its protection against damage respondent made an election of remedies open to him, and thereby released appellant from all claims for damages caused by appellant's breach of his contract.

That we may have a clear view of appellant's position we quote further from his brief:

> "By solemn agreement he (respondent) stipulated therein what the remedy for a breach of its terms would be. This remedy is exclusive of all others. If the premises were not being conducted according to the stipulations in the lease he was bound under it to take charge of the orchard, and if any damage resulted while he was in charge, the loss would be the result of his own negligence. If he elected not to take charge of the place, knowing that waste was being suffered or injury done thereto, then he waived his right and remedy under the lease, and cannot complain if he chose not to protect his interest."

The court found upon sufficient evidence, though not free from conflicting evidence, that the work done by respondent was at appellant's request and in the accounting respondent was given credit for it. The court also found, upon sufficient evidence, that, through the negligence of appellant to do certain work, which the contract provided he was to do, certain damages resulted to the trees. These damages arose partly from improper pruning, but chiefly from failure properly to thin the fruit, thus causing the limbs to break and to injure the trees and to diminish materially their productiveness. We do not think that because respondent, as he had the right to do, hired one or more boys for a short time to assist in thinning the fruit, he thereby elected to take the full responsibility of this branch of the work. He was all the time urging appellant to do this work, and at no time did he give appellant cause for assuming that he was relieved from his obligations in this regard.

In considering the evidence, conflicting as it was, as to the various matters the subject of the accounting, appellant's argument harks back to his construction of the lease, which we think is not warranted. We can discover no place for the application of the doctrine of election as was applied in Holt Mfg. Co. v. Ewing, 109 Cal. 353, 42 Pac. 435, and similar cases cited by appellant. In the Holt Case plaintiff made a conditional sale of a machine. The purchaser died, leaving the last payment unmade. Plaintiff filed a claim against the estate for the amount, and it was allowed by the administrator and the court, and thereby became in effect a judgment. Plaintiff subsequently brought an action to recover the machine for breach of the contract of sale. Said the court:

> "The so-called lease was in fact a conditional sale, under the terms of which the seller had either one of two remedies for the violation of the contract by the purchaser. It might, upon the default of the purchaser in meeting the stipulated payments, or any of them, have retaken the property or recovered its possession in an action of claim and delivery, or, on the other hand, treated the sale as an absolute one, and brought its action upon the notes to recover the contract price of the property sold. These remedies being inconsistent, the plaintiff could elect which he would pursue, but he could not have both. Parke v. White River Lumber Co., 101 Cal. 37 [35 Pac. 442] and cases there cited."

Obviously plaintiff could not have a judgment against the property of the deceased for the amount due him and also have the machine. No such inconsistency of remedies as was present in that case exists here. Indeed, according to appellant's view, as we understand it, respondent had no choice in the matter. If he took charge of the orchard he thereby relieved appellant of responsibility, and if he failed to do so he thereby waived all right to damages. In point of fact he made no election.

The case is by no means complicated. The fruit grown by appellant was marketed as the lease provided, and certain of the proceeds paid over to appellant, respondent withholding his rentals, also the amount due for services rendered, and also an amount claimed as damages to the premises. The court, upon the evidence submitted at the trial, found the balance due appellant in the accounting, and also found that the amount due respondent for services and the damages caused by appellant's failure to care for the orchard equaled the amount due to appellant and rendered judgment for respondent for costs.

We can discover no just ground for arriving at a different decision. The judgment is affirmed.

I concur: HART, J.

BURNETT, J. I concur. After more deliberate consideration, I am satisfied that the controlling principle is as stated by the presiding justice.

If the parties had intended to relieve the lessee from liability for any default in case the lessor with knowledge thereof failed to avail himself of the privilege of doing the work himself, it is fair to assume that they would have expressed such intention. We must gather their intention from the language of the instrument itself, and, so viewing the situation, it seems reasonable to hold that the lessor did not, by his inaction, waive his right to claim damages from the lessee. As a matter of equity it is to be remembered that the proposition involves the willful violation of his covenant on the part of the lessee and no more than the failure to exercise a privilege on the part of the lessor. It is therefore morally as well as legally right that the latter, on the showing made, should be permitted to recover the amount of the damage actually suffered by him.

41 Cal. App. 614

NORTON v. NORTON'S ESTATE.
(Civ. 2746.)

(District Court of Appeal, First District, Division 2, California. June 16, 1919. Rehearing Denied by Supreme Court, Aug. 14, 1919.)

1. EXECUTORS AND ADMINISTRATORS ⚷453(4) — ADMINISTRATRIX'S CLAIM AGAINST ESTATE—EFFECT OF JUDGMENT.

Where an administratrix's claim against the estate is reduced to judgment pursuant to Code Civ. Proc. § 1510, the judgment is not personal, but merely establishes a claim against the estate.

2. EXECUTORS AND ADMINISTRATORS ⚷202 (2)—CLAIMS AGAINST ESTATE—WHEN PROVABLE.

Under Code Civ. Proc. §§ 1493, 1494, making claims not due or contingent provable against a deceased's estate, a debt contingent upon the claimant living with decedent as his wife until his death became due upon decedent's death and provable against his estate.

3. EXECUTORS AND ADMINISTRATORS ⚷202 (1)—CLAIMS—CONTRACT.

A claim against an estate based upon an instrument executed with the formalities required of contracts may be enforced, although the instrument has been admitted to probate as a will; since a writing may be both a will and a contract.

4. WILLS ⚷792(4)—ELECTION OR ESTOPPEL BY PROBATE OF WILL.

The fact that an administratrix offered an alleged will for probate, as she was required to do by Code Civ. Proc. § 1298, did not constitute an estoppel or election precluding her from claiming the instrument gave her contractual rights against deceased's estate.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Frances E. Norton against the Estate of G. N. Norton, deceased. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Peirce Coombes, of San Francisco, for appellant.

W. W. Allen, of San Francisco, and J. W. Henderson, of Eureka, for respondent.

BRITTAIN, J. Frances E. Norton, the surviving widow of G. N. Norton, appeals from a judgment entered upon an order sustaining a demurrer to her complaint in a suit against the estate of G. N. Norton, upon a claim rejected by the judge sitting in probate.

The essential allegations of the complaint are summarized as follows:

On July 4, 1915, leaving an estate in excess of $10,000, G. N. Norton died testate and indebted to the plaintiff in the sum of $1,000 per year, in monthly installments of $83.33, commencing July 4, 1915, under a contract set forth as an exhibit to the claim, which by proper reference is made part of the complaint. July 21, 1915, the plaintiff was appointed and qualified as special administratrix of the estate, and served as such until September 17, 1915, when she was appointed, and since which time she was, and continued to be at the time of filing suit, the administratrix of the estate with the will annexed. On March 16, 1916, within the time required by, and in accordance with, sections 1493, 1494, and 1510 of the Code of Civil Procedure, the plaintiff filed her verified claim with the clerk of the court in which the probate proceedings on the estate were pending. No payments were made on the claim, allowance of which was opposed by the children of the decedent, and the claim was rejected. In the claim appended to the complaint it was averred that the contract on which the claim is based was written and signed by Norton in December, 1911, and thereupon delivered to the claimant; that it was executed because the claimant had obtained, after the appearance of her husband and trial, an interlocutory decree of divorce against him for cruelty, and he desired a reconciliation, and to induce her thereafter to live with him as his wife until his death, and in reliance upon the writing she did live with him as his wife until his death, and had her interlocutory decree of divorce set aside; that the writing was in her possession until December 30, 1912, when at Norton's request she gave it to him for the purpose of rewriting it; that he did rewrite it, after which he destroyed the original; that the rewritten document was continuously thereafter in her possession until it was filed by her as the will of the decedent; and that it has been admitted to probate as a will, and as such is on file in the office of the clerk of the court in which probate proceedings on the estate are pending. The document is in the words and figures following:

"This instrument made and dated at San Francisco, California, on the thirtieth day of December in the year of our Lord one thousand nine hundred and twelve by me the undersigned is intended to be not only a contract but also an irrevocable olographic will (the same being an instrument that is entirely written, dated and signed by the hand of myself) to the extent of the provisions thereof, it being my purpose by virtue of the provisions of this instrument to secure to my wife, Frances E. Norton, the payments hereinafter specified out of my estate for and during her natural life if she shall continue to be my wife and be living with me as such at the time of my death. Making reference to the foregoing I hereby promise, agree, undertake and guarantee that after my decease my personal representatives shall and will pay out of my estate to my wife, Frances E. Norton, for and during her natural life the sum of one thousand dollars ($1,000.00) per

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

year in monthly installments of eighty-three dollars and thirty-three cents ($83.33) each if she shall continue to be my wife and be living with me as such at the time of my death, but not otherwise. I hereby expressly provide that upon my death all of my estate of every name, nature, character and description and wheresoever situated shall stand charged for the payments aforesaid if my said wife shall then be entitled to such payments according to the provisions aforesaid.

"In witness whereof I have written, dated and signed the foregoing by my own hand as above stated. G. N. Norton."

Since the demurrer was sustained without leave to amend, the grounds of ambiguity and uncertainty may be disregarded. The other three grounds of demurrer were that the court had no jurisdiction of the subject-matter of the action, that there was a defect of the party defendant, and that facts sufficient to constitute a cause of action were not stated.

In the brief on behalf of the respondent the demurrer is sought to be sustained. No consideration can be given to statements of fact not shown by the complaint, but made in the brief. They may be pertinent, if proved, on a trial of the case, but upon the demurrer ruling the court is confined to the facts stated in the complaint.

[1] In regard to the claimed defect of parties, it is said: "There is no entity or being in the defendant, and respondent submits that the court could not render a judgment against respondent." The statute provides that if the administrator is a creditor of the decedent, his authenticated claim shall be filed with the clerk, who is required to present it to the judge, and if it is rejected, "action thereon may be had against the estate by the claimant, and summons must be served upon the judge, who may appoint an attorney, at the expense of the estate, to defend the action." Code Civ. Proc. § 1510. A judgment rendered for the plaintiff in such a case is not personal, but merely establishes the claim against the estate. Estate of More, 121 Cal. 635, 54 Pac. 148.

[2] The question of jurisdiction of the subject-matter and the sufficiency of the statement of facts appear to be merged in the respondent's brief. Reliance is placed on the application of sections of the old practice act to a claim upon a mortgage lien, in a case where it was held that the word "claims," as used in the act, referred only to such debts as might have been enforced against the decedent in his lifetime by a personal action for the recovery of money. Fallon v. Butler, 21 Cal. 32, 81 Am. Dec. 140. The present statute provides for claims not due or contingent. Code Civ. Proc. §§ 1493 and 1494; Verdier v. Roach, 96 Cal. 471, 31 Pac. 554; Crocker-Woolworth Nat. Bank v. Carle, 133 Cal. 409, 65 Pac. 951. The debt was contingent upon the performance of the condition to live with the decedent as his wife until his death. Civ. Code, § 1439. Upon the death, if the condition was performed by the plaintiff, the debt became due, and was provable as a claim.

[3, 4] The only other matter relied on by respondent is that the instrument on which the claim is based is a will and not a contract. Cases are cited in support of the rule "that where an instrument does not operate inter vivos, but is made to depend for its whole operation upon the event of the death of the maker to consummate it, then it can only take effect as testamentary." Carey v. Dennis, 13 Md. 1. The instrument under consideration here did operate inter vivos. In reliance upon it the plaintiff caused her interlocutory decree of divorce to be set aside and resumed marital relations with her husband, faithfully performing on her part all the obligations of the contract, and she seeks in this action to establish her right to receive the consideration for her performance. Such a contract is one favored by the law. Bowden v. Bowden, 175 Cal. 711, 167 Pac. 154, L. R. A. 1918A, 380. The instrument was admitted to probate as a will. The decedent in the writing declared it was "intended to be not only a contract but also an irrevocable olographic will * * * to the extent of the provisions thereof." A writing may be both a will and a contract. For the purpose of the present appeal it is immaterial whether it is operative for testamentary purposes or not. It is executed with all the formalities required in the execution of a contract, and suit may be maintained upon it without regard to its testamentary character. Adams v. Lansing, 17 Cal. 640. No question of election is presented by the demurrer, nor could it be determined on this appeal. As the custodian of the instrument, it was the duty of the plaintiff to present it for probate. Code Civ. Proc. § 1298. She could not attack the validity of the instrument on which she relied. Under such circumstances there is neither election nor estoppel thereafter to make her election to rest on her contractual rights. In re Gwin, 77 Cal. 313, 19 Pac. 527. In reaching the conclusion that the demurrer should have been overruled, the facts stated in the complaint are necessarily taken as true, and the law is declared upon that assumption. Nothing in this opinion is intended to determine any matter of fact upon which evidence may be adduced upon proper issues being framed in the trial court.

The judgment is reversed, with directions to the trial court to enter an order overruling the demurrer to the complaint, and for such further proceedings as are not inconsistent herewith.

We concur: LANGDON, P. J.; HAVEN, J.

41 Cal. App. 500

LA CHANCE v. BROWN et al. (Civ. 2828.)

(District Court of Appeal, Second District, Division 1, California. June 9, 1919.)

1. Vendor and Purchaser 🔑187—Time of Payment—Waiver.

Vendors' acceptance of payments while purchaser was in arrears *held* to constitute waiver of time as an essential condition for the payment of installments due under the contract.

2. Vendor and Purchaser 🔑95(2), 101—Forfeiture—Acceptance of Overdue Payments—Suspension of Right of Forfeiture.

Where contract provided for forfeiture of purchaser's rights thereunder upon failure to make payments when due, vendors' acceptance of payments while purchaser was in arrears created a temporary suspension of right of forfeiture, which could be restored only by a definite and specific notice of an intention to enforce it.

3. Vendor and Purchaser 🔑109, 203—Destruction of Improvements — Rights of Purchaser—Rescission of Contract.

Where there exists an executory contract for the sale and conveyance of real property, and improvements which constitute a material part of the consideration have been destroyed, the loss falls upon the vendor, and purchaser has the right to rescind the contract.

4. Vendor and Purchaser 🔑101—Forfeiture for Nonpayment—Waiver—Notice to Purchaser.

Vendors, after waiving right of forfeiture for purchaser's failure to make payments when due, could revive right only by giving purchaser reasonable time within which to make payments in compliance with contract.

5. Vendor and Purchaser 🔑101—Forfeiture — Waiver — Demand for Payment — Making of Repairs.

Where contract provided for forfeiture of payments upon purchaser's failure to pay installments when due, and required vendor to make repairs in case of fire, vendor, after having waived right of forfeiture by acceptance of overdue payments, and after having undertaken to repair building after partial destruction by fire, could not revive right of forfeiture by notice demanding payment before completion of repairs.

6. Vendor and Purchaser 🔑102—Sale by Vendor—Rescission.

Sale of premises by vendor to persons other than purchaser without purchaser's knowledge or consent does not constitute an attempt to rescind contract, since vendor may sell property subject to purchaser's rights under the contract.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by O. J. La Chance against C. D. Brown and another. Judgment for plaintiff, and defendants appeal. Reversed.

W. W. Kaye and Alfred Siemon, both of Bakersfield, for appellants.

N. E. Conklin, of Bakersfield, for respondent.

CONREY, P. J. Action to recover the sum of $1,071 paid by the plaintiff to the defendants on account of a contract for the purchase of real property, which contract it is alleged was abandoned by the defendants, and rescinded. From a judgment awarding to the plaintiff the sum of $411, the defendants appeal.

The complaint alleged that immediately after the signing of the contract the plaintiff and defendants entered into a supplemental agreement to the effect that a certain policy of insurance upon the improvements on the land was for the benefit of the plaintiff, and that in case of loss of the premises by fire any sum paid upon the insurance would be paid to the defendants, in case of total loss, and that the plaintiff was to be credited upon the purchase price of the property for whatever amount was recovered on the policy, and in case of a partial loss whatever money was paid by the insurance company so much of it as necessary was to be used to repair the damage by fire, and whatever remained over and above such expenditure would be credited to the plaintiff on the purchase price of the property; that after the fire by which the house was partially destroyed and after the repairs were completed there remained the sum of $850 paid by the insurance company, which sum the defendants retained to their own use and refused to pay over or credit to the plaintiff. No evidence was introduced in support of the foregoing allegations (all of which were denied), and no finding of fact was made thereon.

The contract price was $3,500, of which $400 was paid at the execution of the contract. The contract provided that the remainder of the purchase price should be paid as follows: $1,500 by assuming a mortgage indebtedness held by the Producers' Savings Bank against the property, which sum of $1,500, together with the interest thereon, it was agreed should be paid by the plaintiff. The remaining $1,600 was to be paid in certain monthly installments. The interest on the mortgage was payable quarterly. It was agreed that, if the plaintiff failed to make any of the payments provided within the time or according to the terms of the contract, the vendors should be released from all obligations in law or equity to convey the premises, and the purchaser should forfeit the same and his rights under the contract, and the vendors should be entitled to possession of the premises and to remove the vendee therefrom.

The court found that the fire occurred on the 15th day of February, 1912, and that the monthly average of payments theretofore made were up to and in accordance with the terms of the contract. These two findings are not sustained by the evidence. The fire occurred on the 15th day of January, 1912, and the payments theretofore made were several hundred dollars less in their aggregate amount and in their monthly average than the requirements of the contract.

[1, 2] The court found that the repairs, which the defendants made upon the property after the fire and without cost to the plaintiff, were completed on the 7th day of March, 1912; that the deviation in times and amounts of payments as made by the plaintiff were made with and by the consent of the defendants; that the defendants had waived time as an essential condition for the payment of the amounts provided by the terms of the contract; and that such failure to pay the amounts required by the contract at the times specified therein was with the consent of the defendants. Appellants claim that the evidence is insufficient to support these findings, but we do not agree with this contention. The evidence shows that the defendants accepted payments on account while the plaintiff was in arrears with respect to payments due, and also that at the same time defendants knew that the plaintiff had not paid any interest on the mortgage. This was sufficient to constitute waiver. It created "such a temporary suspension of the right of forfeiture as could only be restored by giving a definite and specific notice of an intention to enforce it." Stevinson v. Joy, 164 Cal. 279, 285, 128 Pac. 751, 753.

Appellants claim further that the evidence is insufficient to support the court's finding that the date of completion of the repairs after the fire was the 7th day of March, 1912. They claim that the repairs were completed on the 15th day of February, 1912. However, we find in the record testimony tending to show that some of the repair work was still going on after the 7th day of March. Immediately after the fire occurred it was orally agreed between the plaintiff and the defendants that the defendants should proceed to make repairs of the premises, and pursuant to that agreement the plaintiff removed therefrom. At that time neither party claimed that the contract was not in force, and by mutual consent they proceeded upon the theory that the removal of plaintiff was temporary, and that defendants would proceed and complete the repairs on the understanding that the contract remained in force. The court made the following finding of fact, the truth of which is not challenged:

> "That on the 16th day of February, 1912, the defendants demanded of plaintiff that he meet and perform every condition specified in said contract by the 25th day of February, 1912, at 12 o'clock noon, or defendants would immediately have all of plaintiff's interest forfeited to defendants without further notice, that on the 15th day of February, 1912, defendants demanded of plaintiff that he perform all of the conditions of said contract required of him to such date, and offered in writing to give the plaintiff ten days' time within which to comply with such demand, which were served on plaintiff on February 16, 1912, at 4:30 p. m., and promised and agreed in writing that, if said plaintiff should within ten days perform all of the terms of said contract by him to be performed to such date, they would reinstate the plaintiff under said contract, and allow him to enter in and upon the possession of the said property, but that the said plaintiff failed, refused, and neglected to pay any further or other sum to the defendants under said contract, or on account thereof."

Evidently this notice was intended to put an end to the temporary suspension of the right of forfeiture by giving "a definite and specific notice of an intention to enforce" such right of forfeiture. Stevinson v. Joy, supra. This the vendors were entitled to do, and the vendee's failure to comply with the demand would place him in default, unless such failure was excused by the fact that, when the time limit fixed by the notice expired, the repairs by which the house was being restored to a condition fit for occupancy had not been completed.

[3-5] When there exists an executory contract for the sale and conveyance of real property, and improvements which constituted a material part of the consideration have been destroyed, the loss falls upon the vendor, and the vendee has a right to rescind the contract. Conlin v. Osborn, 161 Cal. 659, 120 Pac. 755. Let it be assumed that the damage by fire to the house on the land covered by the contract was of such consequence that the vendee might have established his right to rescind. In fact, he elected that the contract remain in force, and concurrently the vendors agreed to restore the premises, and proceeded to the performance of their agreement. That they were proceeding in good faith is not denied. This being so, the obligation of the vendee to pay the installments named in the contract remained an obligation in force. Certain installments were due. The right of the vendors, by reason of their nonpayment, to insist upon forfeiture of the plaintiff's rights, was in suspension because of their acts of waiver. But this right they could revive at any time by giving notice and demanding payment. Under such circumstances, however, they could not demand instant payment, but must allow a reasonable time. They allowed nine days—a time which expired before the repairs of damage caused

by the fire had been completed. The court found that this was not a reasonable time. We are of the opinion that the court was justified in this finding or conclusion from the evidence. In view of the vendee's waiver of his right to rescind, which waiver was concurrent with the promise of the vendors to make the necessary repairs, it was not reasonable that the vendors should attempt to revive their right of forfeiture until first they completed those repairs. We conclude, therefore, that the contract remained in force until a time subsequent to the 25th day of February, and that the vendee never was in default.

[6] Early in March the defendants rented the premises to tenants selected by them, and thereafter sold the property to persons other than the plaintiff, all without plaintiff's knowledge or consent. Thereupon the plaintiff elected to treat these acts as an abandonment and repudiation by defendants of the contract of sale, and accepted the same as constituting a rescission. The fact that the defendants made such sale of the property was not alleged in the complaint. Assuming, however, that this fact had been alleged, or that evidence thereof was received without objection, and that the court was justified in finding as it did that after the 1st day of March, 1912, the defendants "sold said premises to persons other than plaintiff and without plaintiff's knowledge or consent," this fact alone did not constitute an attempt to rescind. The vendor may part with his title "subject to the rights of the vendees under the executory contract of sale, and thus not put it beyond his reasonable power to make title to his vendees under the executory contract of sale when in due time it may be demanded of him. * * * A pleading merely that during the life of such an executory contract of sale the vendor has parted with the title is not sufficient to put the vendor in default or to show an abandonment by him of the contract. It must further be pleaded that the vendor did this without reserving and protecting his vendee's rights under the executory contract." Brimmer v. Salisbury, 167 Cal. 522, 527, 140 Pac. 30, 32.

Applying the law, as thus declared, to the facts found in the present case, it appears that neither party was in default, and that the contract has not been abandoned or otherwise rescinded. Under such circumstances no cause of action exists entitling the vendee to recover the moneys which have been paid by him on account of said contract. Glock v. Howard, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

41 Cal. App. 683

CORMOND v. UNITED RAILROADS OF SAN FRANCISCO. (Civ. 2426.)

(District Court of Appeal, First District, Division 1, California. June 20, 1919. Rehearing Denied by Supreme Court Aug. 18, 1919.)

1. APPEAL AND ERROR ⚿502(4) — RECORD — NOTICE OF MOTION.

A copy of notice of intention to move for new trial incorporated in the transcript, but not made a part of the judgment roll or a part of the bill of exceptions, cannot be considered as a part of the record on appeal from order granting the motion.

2. APPEAL AND ERROR ⚿714(6) — BILL OF EXCEPTIONS—SUBSTITUTE.

Neither a stipulation as to the correctness of the transcript nor the certificate of the trial clerk that the papers in the transcript are true copies of the originals can supply what the law requires should be made to appear in the bill of exceptions.

3. NEW TRIAL ⚿128(5)—INSUFFICIENCY OF EVIDENCE—SPECIFICATION.

Plaintiff's specification of particulars in which the evidence was claimed to be insufficient to support verdict for defendant that there was no evidence to sustain the verdict was an insufficient specification under Code Civ. Proc. § 659, before its amendment in 1915.

4. NEW TRIAL ⚿139—DEFECT IN NOTICE OF INTENTION—WAIVER.

Where the bill of exceptions was made up and agreed to by the parties, and contained all the proceedings and material evidence and testimony, and stipulated that all the evidence was used and referred to at the hearing of plaintiff's motion for new trial, defendant waived the defect in the notice of intention to move for new trial that it insufficiently specified the particulars in which the evidence was claimed to be insufficient to sustain the verdict for defendant.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Francis Cormond against the United Railroads of San Francisco. From an order granting plaintiff's motion for new trial, defendant appeals. Affirmed.

Wm. M. Cannon and Wm. Abbott, both of San Francisco, for appellant.

Perry Evans, of San Francisco, for respondent.

WASTE, P. J. This is an appeal by defendant from an order granting plaintiff's motion for a new trial in an action for damages for personal injuries.

On the 10th of December, 1913, at about the hour of 2 o'clock in the afternoon of that day, an east-bound Sutter street car, operated by the defendant, collided with a wagon then being driven by plaintiff in a southerly direction across the intersection of Sutter and Franklin streets in the city of San Francisco. As a result of the collision plaintiff was thrown from the wagon and injured. He thereupon instituted this suit for damages, claiming that: (1) The car was operated by defendant at a negligently excessive rate of speed; and (2) that defendant failed to avail itself of a last clear chance to avoid the accident. The defendant, by its answer, set up the defenses of contributory negligence and the failure on plaintiff's own part to avail himself of a last clear chance.

Upon the issues thus framed the case was tried before a jury, which on July 3, 1915, returned its verdict in favor of defendant. Judgment being entered upon the verdict, plaintiff moved for and was granted a new trial upon one or other of the grounds set forth in his notice of intention.

Section 659 of the Code of Civil Procedure, prescribing the manner of making an application for a new trial, was amended in the year 1915, the amendment taking effect on August 8th of that year, as was also section 660, which provides, among other things, that unless a notice of intention to move for a new trial be determined within three months from the date of the verdict, it is deemed denied. In this case it is admitted that the notice of intention was served two days before the effective date of said amendment to section 659, but defendant claims that it was not filed until two days after such change in the law. The motion was not decided until five months after the verdict. Defendant for the first time in his reply brief contends that in order to initiate a proceeding for a new trial both the service and filing of the notice are essential, and accordingly that, the notice having been filed after the amendment referred to went into effect, the proceeding was governed by the law as amended, and, the motion not having been decided within three months from the rendition of the verdict, the order granting the new trial was void.

[1, 2] While an interesting question is thus presented as to whether or not the law as it existed before or after its amendment governs the present case, the condition of the record upon this point precludes us, we think, from considering it. Incorporated in the transcript is a copy of the notice, which purports to show, as claimed by defendant, that it was filed after said amendment went into effect; but this paper is not a part of the judgment roll, nor in the present case is it made a part of the bill of exceptions. It cannot, therefore, be considered as a part of the record on appeal from the order granting the motion. Carver v. San Joaquin Cigar Co., 16 Cal. App. 761, 765, 118 Pac. 92; Leonard v. Shaw, 114 Cal. 69, 45 Pac. 1012. The stipulation as to the correctness of the transcript is not signed by the parties; but, even if it were, neither it nor the certificate of the clerk that the papers in the transcript are true copies of the originals can supply what the law requires should be made to appear in the bill of exceptions. Carver v. San Joaquin Cigar Co., supra; Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419. From the bill of exceptions then, it not appearing when the notice of intention was filed, we will assume in support of the order of the trial court that it was filed prior to said amendment. This conclusion brings us to a consideration of the question argued at length in the briefs.

[3, 4] The motion for a new trial was made upon the minutes of the court and was based upon the insufficiency of the evidence to justify the verdict and upon errors of law occurring at the trial. The order granting the motion was in general terms. An examination of the record discloses that the court committed no error in the admission or rejection of evidence, nor in its instructions to the jury. Its order, therefore, must be sustained, if at all, upon the first ground stated. As to that ground, it appears from the record that plaintiff's only specification of particulars in which the evidence is claimed to be insufficient is the bald statement that "there is no evidence to sustain the verdict in favor of the defendant and against plaintiff"—admittedly an insufficient specification under section 659, Code of Civil Procedure, before its amendment. S. F.-O. Terminal Rys. v. Superior Court, 172 Cal. 541, 157 Pac. 604; Strange v. Strange, 23 Cal. App. 281, 137 Pac. 1104; Western Pac. Land Co. v. Wilson, 19 Cal. App. 338, 125 Pac. 1076. It is therefore argued by appellant that the order granting the new trial could not have been predicated upon the insufficiency of the evidence to support the verdict. But it is claimed by plaintiff—and we think with reason—that the defendant waived this defect. It appears that the bill of exceptions was made up and agreed to by the parties, and contains all the proceedings and material evidence and testimony in the case; and it further appears that such proceedings and evidence were used and referred to upon the hearing of the motion. The record clearly discloses that an examination of all the evidence in the case was unnecessary to a consideration of the claimed errors of law, and as all the evidence was incorporated in the bill of exceptions with defendant's consent, and with a stipulation by the parties that all the evidence was used and referred to at the hearing of the motion, and the bill fails to show any objection by appellant to the consideration of the claimed insufficiency of the evidence because of lack of specification of particulars, it would seem to necessarily follow that this point was presented to and passed upon by the trial court. The condition of the record and the manner in which it was

prepared sufficiently show that the appellant tacitly consented to the hearing of the motion on each of the grounds designated in the notice. Under these circumstances it must be held that the defect in the notice was waived by the appellant. In Christy v. S. V. Water Co., 68 Cal. 73, 8 Pac. 849, no objection that the notice of intention to move for a new trial was not in time was made at the settlement of the statement or at the hearing of the motion, referring to which situation the court said:

> "The motion was contested and submitted for decision without objecting or reserving any right to object that the notice of the motion was not made or given according to law. Such being the case, the attorney of the corporation defendant waived any supposable irregularity in the notice of the motion of which he now in this court for the first time seeks to avail himself."

See, also, Harrigan v. Lynch, 21 Mont. 36, 42, 52 Pac. 642; 1 Hayne N. T. & App. § 14.

The trial court then, being in a position where it could rightfully consider the question of whether the evidence was sufficient to support the verdict, granted the plaintiff's motion, and we cannot say that in so doing it abused the discretion vested in it.

The order is therefore affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

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41 Cal. App. 657

WEBSTER v. MOTOR PARCEL DELIVERY CO. (Civ. 2865.)

(District Court of Appeal, First District, Division 1, California. June 19, 1919.)

1. Municipal Corporations ⟹705(1)—Use of Streets—Duty of Automobile Driver—Parking of Machines.

Driver of automobile between sidewalk and center of street in which automobiles are parked has duty of proceeding with such reasonable speed, with such warnings, and in such reasonable distance from the rear ends of the parked machines as not to endanger the safety of persons exercising their right to pass from the place of parking to the sidewalk.

2. Municipal Corporations ⟹706(5)—Use of Streets—Negligent Driving of Automobile.

Where automobile driver had 18 feet within which to drive machine between sidewalk and parked automobiles in center of street, the driving of automobile within 2½ to 3 feet from rear ends of parked automobiles was sufficient from which to raise inference of negligence.

3. Municipal Corporations ⟹706(5)—Use of Streets—Automobile Accident—Negligence of Driver—Sufficiency of Evidence.

In action for injuries by plaintiff struck by automobile in street after having parked her automobile in center thereof, evidence *held* sufficient to sustain finding that defendant automobile driver was negligent.

4. Appeal and Error ⟹1010(1)—Review—Findings.

Court's finding as to negligence of automobile driver in personal injury action, where there is evidence to sustain it, will not be disturbed on appeal.

5. Municipal Corporations ⟹706(9)—Use of Streets—Findings—Negligence.

In an action for injuries sustained in being struck by automobile, court's finding *held* a sufficient finding of negligence on part of defendant automobile driver to sustain judgment for plaintiff.

6. Municipal Corporations ⟹705(10)—Use of Streets—Contributory Negligence.

Automobile driver who, having parked machine in center of street, stepped to the back of her machine with the intention of looking northerly past the rear end of next automobile to see if street was sufficiently clear to be crossed in a northwesterly direction, and was struck by automobile driven within 3 feet from rear ends of parked machines in southerly direction, was not contributorily negligent.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Patricia K. Webster against the Motor Parcel Delivery Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Fitzgerald, Abbott & Beardsley, of Oakland, for appellant.

Charles H. Keller, of San Francisco, and Donahue & Hynes, of Oakland, for respondent.

RICHARDS, J. This appeal is from a judgment in the plaintiff's favor for the sum is $1,530.74 damages for injuries alleged to have been received by the plaintiff through being struck by the defendant's automobile upon one of the streets of the city of Oakland while the said automobile was being operated by a servant of the defendant in a negligent manner.

A brief statement of the material facts in the case will serve to elucidate the several points urged by the appellant upon this appeal.

Clay street, in the city of Oakland, at the time of the plaintiff's injuries was one of the streets of said city wherein automobiles were to be parked in the center of the street in accordance with the traffic regulations adopted by the governing body of said city. On December 1, 1917, at about 8 o'clock in the evening, the plaintiff parked her automobile in the center of Clay street, between 14th and 15th streets, and having done so walked out from the rear of her machine westerly with the intention of crossing to the westerly side of Clay street, and was immediately, and when about 3 feet from the said westerly end of her machine, struck by an automobile of the defendant driven by one of its agents, who was proceeding southerly along said street on the westerly side thereof, from which impact the plaintiff sustained certain injuries from which she suffered severely, and by which she was prevented from engaging in her work of selling automobiles upon commission for several weeks. In her action for damages she sought to recover not only for her personal injuries, but also special damages for her loss of earnings during the period of her inability to pursue her vocation.

The appellant's first contention is that the evidence is insufficient to justify the finding of the trial court of negligence on the part of the defendant. We are unable to sustain this contention. The evidence showed that Clay street, in the vicinity of the place of the plaintiff's injuries, is a busy thoroughfare and is a business street, though not formally so declared to be or marked by signs as such by the civic authorities. The resolution of the city council providing for the parking of automobiles in the center of said street, while it does not so declare in terms, implies that persons so parking their machines in its center shall be entitled to cross to its sidewalks from the place of parking at any point along said street. The distance between the rear ends of machines parked in the center of Clay street in conformity with said regulation and the outer edge of the sidewalk is approximately 17 feet. Automobiles which are being driven along said street are required to proceed northerly on the easterly side of its center parking lines, and southerly on the westerly side thereof.

[1-4] The defendant's driver was proceeding southerly on the westerly side of said street, and was therefore, generally speaking, where he had a right to be and go, but that right was to be exercised by him with due regard to the facts that it was a busy street and that persons parking automobiles in its center were privileged to cross it at any point from the place of parking their machines to the sidewalk, and were likely to be exercising that privilege at any moment. He had approximately 18 feet within which to operate his machine, but his duty was to propel it within said space at such reasonable speed, with such warnings, and at such reasonable distance from the rear ends of parked machines as not to endanger the safety of persons exercising their right to pass from the place of parking to the sidewalk. There is evidence in the record that the defendant's agent was, prior to and at the moment of the accident, going over 25 miles an hour. There is also evidence that no warning of his approach was sounded. Upon both these points the evidence is conflicting, but that conflict the court had a right to resolve in favor of the plaintiff's side of the case. There is no conflict in the evidence as to the fact that the driver of the defendant's machine was proceeding within 2½ to 3 feet from the rear ends of the automobiles which were parked in the center of the street. With a space of almost 18 feet within which to operate his machine, it would seem that to do so within that short distance from the row of parked machines, from among which pedestrians were liable to emerge at any moment and any place along his route, would be a fact from which of itself the court might fairly infer negligence on the part of the defendant's driver, which, taken with the court's conclusion as to the rate at which he was traveling, without warning, would be amply sufficient to sustain its finding of negligence to be imputed to the defendant. Such finding, if made, we are not at liberty to disturb.

[5] The appellant, however, contends that the court has made no sufficient finding of negligence on the defendant's part. The court found that the plaintiff's injuries to her person and property were "caused solely by the negligence of the defendant"; and, dealing more specifically with the subject, also found that the plaintiff "was walking in a westerly direction from her automobile, and had proceeded approximately 3 feet from the westerly end of her automobile when an automobile operated by the defendant, by its servant Ray Estudillo, did carelessly and negligently collide with plaintiff with great force and violence," etc. We think the foregoing to be a sufficient finding of negligence on the part of the defendant to sustain the judgment of the court.

[6] The next contention of the appellant is that the evidence established conclusively that the plaintiff was herself guilty of contributory negligence, and hence was not entitled to recover. In support of this contention the appellant insists that the evidence shows that the plaintiff stepped out suddenly from behind her automobile directly in the path of the approaching machine without looking and when it was too near to be stopped in time to avoid a collision. The plaintiff's testimony, however, in that regard, is that after having parked her own machine she stepped to the back of her car with the intention of looking northerly past the rear end of another car parked next to her own to see what, if anything, was coming before essaying to cross the street in a northwesterly direction to the store to which she was going; that as she was taking the step or two out which she had to take in order to see around the adjoining car she was struck down by the defendant's automobile, which approached rapidly and without warning. If the trial court accepted

this statement of the plaintiff as true, we think its finding that the plaintiff was not guilty of contributory negligence would be sufficiently supported thereby.

The appellant's final contention is that the damages awarded to the plaintiff were excessive; but, without attempting to review the evidence upon this point, we are of the opinion that this contention is without merit.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

41 Cal. App. 552

BANK OF COMMERCE & TRUST CO. v. HUMPHREY et al. (Civ. 2909.)

(District Court of Appeal, Second District, Division 2, California. June 12, 1919.)

1. PARTIES ⟹76(5)—OBJECTIONS—CAPACITY OF ADMINISTRATOR TO SUE—DEMURRER.

That the complaint, in action by an administrator, fails to show capacity to sue, is not ground for demurrer, but such defect can be taken advantage of only by answer.

2. EXECUTORS AND ADMINISTRATORS ⟹29(4) —APPOINTMENT—COLLATERAL ATTACK—SUFFICIENCY OF OATH.

Where letters of administration in due form have been issued by order of a court having jurisdiction, the administrator's right to sue as such cannot be collaterally attacked on ground that his oath was not sufficient in form.

3. EXECUTORS AND ADMINISTRATORS ⟹29(2) — REGULARITY OF APPOINTMENT — CONCLUSIVENESS.

The issuance of letters of administration by a court having jurisdiction to make the order of appointment is conclusive of the regularity of the appointment when attacked collaterally.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by the Bank of Commerce & Trust Company, as administrator of the estate of Silas E. Gaskill, also known as S. E. Gaskill, deceased, against William Humphrey and others. Judgment for plaintiff, and the named defendant appeals. Affirmed.

Wm. Humphrey, of San Diego, in pro. per.
Ward, Ward & Ward, of San Diego, for respondent.

THOMAS, J. This is an appeal by the defendant Humphrey alone from a judgment of foreclosure entered in favor of plaintiff, a corporation, as administrator of the estate of Silas E. Gaskill, deceased, against all of the defendants, on March 1, 1916.

To affirm the judgment without further comment would, we believe, be highly proper. We shall, however, consider the appellant's contentions to such an extent that he will be deprived of the opportunity—unless he departs from the virtue we call truth—to say that this court has decided against him without reading the briefs.

The statement of the case is not borne out by the record. It has the earmarks of a willful attempt to mislead the court. We can hardly believe that the erroneous statements found therein are unintentional.

The first point made by appellant is that the court erred in overruling his demurrer to plaintiff's complaint, which, omitting the formal parts, is as follows:

> "(1) That the plaintiff has not stated facts sufficient to constitute a cause of action against said defendants; (2) that the plaintiff has not stated facts sufficient to constitute a right to bring said action as administrator; (3) that the complaint does not show the capacity of plaintiff to sue as administrator of the estate of Silas E. Gaskill, or as administrator at all; (4) that the complaint is ambiguous and uncertain in that it cannot be ascertained therefrom whether Silas E. Gaskill is dead or alive; (a) that it cannot be ascertained therefrom whether letters of administration have ever been issued to plaintiff, by any competent court, or at all."

In support of his contention on the demurrer appellant urges that "there is no evidence of qualification of appellant as administrator." (We assume that he means "respondent," rather than "appellant," in the sentence just quoted.) He then urges that an oath subscribed and sworn to by the assistant trust officer of the bank is the only evidence offered as to qualification of the plaintiff as such administrator. This is not a correct statement. Neither is it true, as clearly disclosed by the record. As a clincher to this alleged argument of appellant, it is urged that the plaintiff corporation, in case of Carter's (the assistant trust officer) failure to perform his duty, would not be liable. He then argues:

> "Whether construed to mean pecuniarily or criminally liable, that provision is unconstitutional. It has no possible relation to banking business as defined by the law, but relates wholly to the shifting of liabilities of trustees, etc., to employés. The subject is not included in the title of the Banking Act [St. 1909, p. 87], and if it was it is wholly foreign to the object of the act."

[1] The complaint is sufficient. Wise v. Hogan, 77 Cal. 184, 19 Pac. 278; Munro v. Dredging, etc., Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248. No good purpose could be served by quoting the complaint, or any part thereof. It is sufficient to say that the court properly overruled the demurrer. Halleck v.

Mixer, 16 Cal. 574. The other alleged grounds are without merit. Such defect, if it exists, can be taken advantage of only by answer. Miller v. Luco, 80 Cal. 257, 22 Pac. 195; Locke v. Klunker, 123 Cal. 231, 55 Pac. 993.

[2] Letters of administration, in due form, were issued by the clerk to respondent, and the court had jurisdiction to make the order directing the clerk to issue them. Assuming that the oath, a copy of which is indorsed on the letters, is not sufficient in form, nevertheless respondent's right to act as administrator cannot be thus collaterally attacked in this action. Respondent did not refuse to act. Nor did it decline to give any bond or make any oath. On the contrary, seeking to act as administrator of the estate, it caused to be made what its officers and the clerk of the court doubtless thought a sufficient qualifying oath in an attempted compliance with the statute. Thereupon the court, acting through its clerk, issued the letters of administration. It is this that differentiates the case from the Estate of Hamilton, 34 Cal. 464, and other cases cited by appellant.

An objection to the sufficiency of the administrator's oath does not raise a jurisdictional question. The authority of the court to appoint does not rest upon the oath or bond. That is a matter going only to the manner of qualifying after an appointment already made, and not to the validity of the appointment. If the clerk of court issues the letters in violation of the statute, without requiring the proper oath, any person interested may appear in the probate proceeding and ask to have the letters revoked. But to allow every person who may be sued to go behind the letters of administration and object to the oath as given, or to plead any other defect which does not go to the jurisdiction of the court making the appointment, would be to involve litigation in a hopeless confusion of collateral issues. Letters issued by the clerk upon the order of a court having jurisdiction should furnish ample protection to all parties dealing with an administrator as such; and no irregularity in the clerk's issuance of the letters, occurring after the order of the court directing their issue—the court having jurisdiction to make the order—should be taken advantage of in a collateral proceeding. Were the rule otherwise, no business depending on letters testamentary or of administration could be safely transacted. Payments made to executors or administrators, even after judgment, would be no protection. Even if the debtor litigated the precise point, and compelled the administrator to establish it by proof, the adjudication would avail him nothing should a subsequent administrator spring up and demand payment a second time. To allow the sufficiency of the executor's or administrator's oath to be thus collaterally questioned, on any and every occasion, and during all time would be destructive of all confidence. A large number of titles depend for their validity on decrees of foreclosure. Such decrees are often made in suits instituted by executors or administrators. Should these be subject to review at any period, however remote, on the nice question of the sufficiency of the qualifying oath of the executor or administrator—a question often difficult to decide where the facts are clear, and much more so where the facts are obscured by lapse of time and loss of documents—chaos, appalling in its possibilities, would confront the business community, and shake all confidence in titles based upon foreclosure decrees in actions brought by executors or administrators.

[3] The danger of the doctrine contended for by appellant impels us to the conclusion that, if the court has acquired jurisdiction to make the order appointing the executor or administrator, the issuance of letters testamentary or of administration should be deemed conclusive of the regularity of the appointment. Says the court in Dennis v. Bint, 122 Cal. 42, 54 Pac. 379, 68 Am. St. Rep. 17:

> "It is clear that the court had jurisdiction of the estate of the deceased, and to appoint the administratrix. Therefore, if the letters issued had been duly attested, it is unquestionable that, as against any collateral attack, they would have been *conclusive* evidence of her due qualification, and of her authority to act as administratrix." (The italics are ours.)

See, also, Abrook v. Ellis, 6 Cal. App. 451, 92 Pac. 396; Garthwaite v. Bank of Tulare, 134 Cal. 242, 66 Pac. 326; Plemmons v. Southern Ry. Co., 140 N. C. 286, 52 S. E. 953; Beresford v. American Coal Co., 124 Iowa, 34, 98 N. W. 902, 70 L. R. A. 256; Gallagher v. Holland, 20 Nev. 164, 18 Pac. 834.

Judgment affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

41 Cal. App. 630

FATTA et al. v. CATALANO. (Civ. 2130.)

(District Court of Appeal, Second District, Division 1, California. June 16, 1919.)

1. APPEAL AND ERROR ⟹1002 — REVIEW—VERDICT—CONFLICTING EVIDENCE.

Verdict is conclusive on appeal as to disputed facts, where evidence is conflicting.

2. APPEAL AND ERROR ⟹1005(3)—REVIEW—ORDER DENYING MOTION FOR NEW TRIAL.

Order denying motion for new trial is conclusive on appeal as to disputed facts, where evidence is conflicting.

3. TRIAL ⟹404(1) — FINDINGS — CONSTRUCTION.

Where contractors, suing owner for balance due, denied allegation of an account stated, but admitted one of the plaintiffs was indebted to owner upon note, finding that such plaintiff was indebted on note in amount alleged due from all contractors cannot be construed as a finding that there was an account stated growing out of construction of the building.

4. WORK AND LABOR ⟹14(1)—REPUDIATION OF BUILDING CONTRACT BY OWNER—REASONABLE VALUE OF SERVICES.

Where owner repudiated building contract, the contractors were entitled to sue for the reasonable value of their services.

5. APPEAL AND ERROR ⟹1039(13)—HARMLESS ERROR—VARIANCE.

Where owner repudiated building contract, contractors' failure to declare on the contract and repudiation thereof, in suit for reasonable value of services performed, was harmless, where evidence relating to contract and its repudiation was introduced without objection on the theory that existence of contract and its repudiation was an issue to be tried.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Santo Fatta and others against Joseph C. Catalano. From a judgment for plaintiffs and an order denying motion for a new trial, defendant appeals. Affirmed.

Edward R. Milliken, of Pasadena, N. P. Moerdyke, of Los Angeles, and Robert W. McDonald, of Pasadena, for appellant.

Bennett, Turnbull & Thompson, of Los Angeles, for respondents.

SHAW, J. In this action plaintiffs sued in quantum meruit to recover from defendant a balance for work and labor performed in constructing a house for him at his special instance and request. Defendant answered, denying the allegations of the complaint, and, by cross-complaint, alleged that after the house was completed there had been an account stated between himself and plaintiffs, wherein it was agreed that plaintiffs were indebted to him in the sum of $400, all of which allegations were denied by plaintiffs, who however, admitted that Angelo Fatta, one of the plaintiffs, was indebted to defendant in the sum of $400, for which defendant held the note of Angelo and a pledge of certain personal property deposited as security for the payment thereof.

The issues were tried by jury, which rendered a verdict in favor of plaintiffs for $350, and in favor of defendant and against Angelo Fatta for $400, from the whole of which judgment, and an order denying his motion for a new trial, defendant appeals.

[1, 2] As one ground for reversal the insufficiency of the evidence to justify the verdict is urged. The evidence is sharply conflicting, and while appellant concedes that plaintiffs' testimony clearly tended to establish the issues found in their favor by the jury, his counsel insist that their testimony is unworthy of credence because of the inconsistencies therein, and, moreover they were contradicted "by at least six unbiased witnesses." At most, the record discloses a substantial conflict of evidence touching the facts in dispute, as to which the verdict of the jury and order of the court denying defendant's motion for a new trial must be deemed conclusive.

[3] Appellant next contends that where there is an account stated, it is a bar to an action upon the original items thereof. The jury, however, by its verdict found against defendant upon this issue. The fact that it found in favor of defendant upon the note made to him by Angelo Fatta cannot be construed as a finding that there was an account stated between defendant and plaintiffs growing out of the transaction under which the house was constructed.

In the course of the trial, though the question was not an issue, it was made to appear from plaintiffs' testimony, in respect to which our attention is called to no objection interposed thereto, that it was agreed defendant should pay plaintiffs $450 in cash for constructing the house, which he was to sell, and, after deducting the cost thereof, the profits were to be equally divided between plaintiffs and defendant; that defendant repudiated this contract, the making of which on the trial he denied, and testified that plaintiffs were, for their work and labor, to receive $450, which sum he had paid to them. The court instructed the jury that if they believed that such contract was entered into between the parties, nevertheless if they found from the evidence that defendant had repudiated the contract and refused to carry out the same, plaintiffs were entitled to recover the reasonable value of the services rendered. If the jury believed plaintiffs' testimony the effect of the verdict was an implied finding that the contract so made between the parties had been repudiated by defendant, who refused to abide thereby.

[4, 5] Under these circumstances plaintiffs were entitled to sue for the reasonable value of the services performed; and conceding that they should have declared upon the original agreement, alleging the repudiation thereof by defendant (Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127), nevertheless evidence touching the same appears to have been introduced without objection, upon the theory that it, as well as the value of the services and the agreement as to a stated account, alleged by defendant to have been had, was an issue to be tried. In no event was defendant prejudiced by reason of the court's action.

The record shows the case to have been tried as presented by the parties to the action; that in constructing the house plaintiffs performed work and labor thereon of the reasonable value of $800, upon which they were paid $450, leaving a balance due plaintiffs of $350, for which they were given judgment and to which they were entitled, since there was, as found by the jury upon sufficient evidence, no account stated as alleged by defendant. Angelo Fatta individually was indebted to defendant, as evidenced by his note, in the sum of $400, for which cross-complainant was given judgment against the maker of the note. Upon the facts, we are unable to perceive that any miscarriage of justice resulted from any alleged technical error complained of. The record presented discloses no error in the ruling of the court in taxing and distributing the cost of the trial.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

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42 Cal. App. 32

MARX & RAWOLLE v. STANDARD SOAP CO. (Civ. 2813.)

(District Court of Appeal, First District, Division 1, California. June 30, 1919.)

SALES ⚷32 — CONTRACT — CORRESPONDENCE.

Letters and telegrams transmitted through brokers regarding proposed sale of glycerine *held* not to establish a completed contract between the parties, in view of the fact that their minds did not meet on terms of payment, and that both parties expected to reduce the understanding to a more formal writing.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Marx & Rawolle against the Standard Soap Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Adams & Adams, of San Francisco, and John D. Murphey, of Berkeley, for appellant.

Winfield Dorn and J. R. Pringle, both of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the defendant in an action instituted by the plaintiff to recover damages from the defendant for the alleged repudiation of a contract for the sale by the defendant to the plaintiff of 12 carloads of crude glycerine. The contract upon which plaintiff relies for a recovery was claimed by it to have been created through an interchange of telegrams and letters passing between the defendant and certain middlemen acting as brokers for the purpose of purchasing the product in question for the use and benefit of the plaintiff. These middlemen were the Zimmerman, Alderson, Carr Commission Company, having offices in Chicago and New York, the plaintiff being a business concern located in the latter city. The defense relied upon by the respondent on the trial and upon this appeal is that the letters and telegrams referred to did not amount to a completed written agreement for the sale of said product, and that the defendant withdrew from the negotiation before the parties had arrived at and consummated a final and binding contract in the premises. The trial court, upon the conclusion of all of the evidence presented on both sides of the case, granted the defendant's motion for a nonsuit, which had the effect of withdrawing the case from the jury, and which was followed by the judgment in the defendant's favor from which this appeal has been taken.

The evidence is in the main undisputed. The negotiations out of which the action arose were initiated by a letter sent on September 2, 1915, from the Chicago office of the above-named brokers to the defendant at its place of business in Berkeley, Cal., explaining the state of the glycerine market, and suggesting that the firm of brokers could sell some of the defendant's glycerine product at an indicated price. The defendant responded on September 17, 1915, with a telegram to the brokers to the effect that it would sell about 12 cars of crude glycerine for a price slightly above that indicated in the brokers' letter. Upon receipt of this message the brokers' Chicago office communicated its import by telegram to their New York office, which submitted the substance of the defendant's message to the plaintiff, who on the same day authorized the latter to instruct the Chicago office that the plaintiff would take 12 cars of glycerine at the indicated price shipside San Francisco. Certain details as to the disposition of the drums which were to contain the glycerine during shipment were included in this message, and upon its receipt the Chicago office at once sent to the defendant a telegram embodying the terms, to which the defendant responded on September 18th, by telegram in the following words:

> "Telegram received. O. K. If our usual terms 90 per cent. against documents satisfactory. Our option as to drums returnable or seven dollars to keep 12 drums one year or over."

The Chicago office immediately advised the New York office of the terms of this telegram, which replied in a brief dispatch, reading:

> "Calder confirms Standard crude terms specified excepting sellers must declare their intention regarding drums at once and not retain the option through delivery."

This message was amplified by the manager of the Chicago office into a longer telegram to the defendant, which embraced both the latter's offer and the buyer's qualified acceptance, and requesting a speedy reply. This message was sent on September 18th, and was followed by another brief dispatch on the following day, urging a quick reply, to which two messages the defendant, on September 20th, responded with a dispatch in the following words:

> "Will accept contract as outlined and sell drums at seven dollars. Give immediate shipping instructions as we will have a car to ship in a few days."

Upon receipt of this message by the brokers' Chicago office it at once telegraphed to the New York office:

> "Standard Soap confirms sale. Marx to pay seven dollars for drums also giving shipping instructions first car."

It is the contention of the appellant that the letters and telegrams above quoted or referred to constituted a completed contract in writing between the parties, upon the respondent's subsequent repudiation of which the present right of action arose.

There would be a certain degree of plausibility in this contention were it not for the fact, as disclosed by other evidence in the case, that the minds of the parties had not yet fully met upon one of the essential elements of the agreement to be consummated between them, and were it not also for the fact, as shown by the subsequent conduct of the parties, that a more formal writing was to be executed embracing their contract. One of the essential conditions of the defendant's entering into a contract for the sale of its product was that embraced in the dispatch of September 18th and contained in the clause "O K if our usual terms 90 per cent. against documents satisfactory." By this phrase the defendant wished to be understood as reserving the right to draw upon the buyer at sight for 90 per cent. of the purchase price as soon as the documents which evidenced shipment were forwarded. But it appears that this was not the buyer's understanding of the meaning of this clause in the seller's telegram, since it was understood to mean that the seller might draw upon the buyer at ten days sight for 90 per cent. of the invoice price of each shipment, the difference between these two constructions of this clause in the defendant's telegram being equivalent to a discount of 1 per cent. in the plaintiff's favor. Aside, however, from what the evidence discloses as to this divergent interpretation of the meaning of the phrase in question, there was another particular in respect to which apparently the minds of the parties had not met upon September 20, 1915, the date which the appellant fixes as that of the ripened agreement between the parties. This has reference to the quality of the drums which were to contain the glycerine, and for which the buyer of the product was to pay $7 each. On September 22, 1915, the plaintiff informed the brokers' New York office that—

> "In agreeing to accept drums at seven dollars apiece Marx & Rawolle are to receive A 1 stock."

This information, not embraced in any former correspondence, was conveyed by the New York office to the Chicago office of the brokers, and was by the latter forwarded by letter to the defendant on the date of its receipt by them. In this letter it was for the first time disclosed to the defendant the name of the prospective buyer of its product, although it was perfectly evident from the earlier messages which had passed between the brokers and this defendant that the former were merely acting in the capacity of middlemen. Two days after sending the letter above referred to in which the quality of the drums was for the first time mentioned, the brokers, through their Chicago office, prepared and forwarded to the defendant a formal contract covering the transaction. This document was drawn apparently upon a form customarily used in similar transactions, setting forth with considerable circumstance and detail the precise terms of the agreement to be entered into between the principals to it. Among other details it embraced a specific statement of the two matters above referred to respecting which the minds of the parties had not yet fully met. As to the first of these it expressed with unmistakable exactitude the understanding of the plaintiff herein as to the terms of payment of defendant's product, and understanding which was communicated by the plaintiff to the brokers before the formal contract was drawn and which, by reference to that document, will be seen to differ materially from the defendant's idea as to the meaning of the brief verbiage of its earlier telegram. As to the quality of the drums it is also quite precise in its specification that the glycerine was "to be shipped in No. 1–a grade drums." As to this latter detail the defendant does not seem to have regarded it as material, but as to the former it expressed its dissatisfaction with the terms of the formal contract in a letter sent to the brokers immediately upon receipt of the proposed contract.

It thus appears that neither of the parties to the transaction understood at the time that the communications which had passed through their intermediary up to and including September 20, 1915, constituted the final and binding contract between them. This being so, and the final form of contract sent to the defendant being found to vary materially from the terms apparently arrived at in their previous informal negotiations, the defendant was entirely within its rights, both in refusing to execute the same and in withdrawing from the transaction on October 6, 1915.

This being the conclusion of the trial court, it was within its rights in granting a nonsuit at the close of all of the evidence in the case.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

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41 Cal. App. 620

HIEATT v. GASSEN. (Civ. 2851.)

(District Court of Appeal, Second District, Division 1, California. June 16, 1919.)

1. VENDOR AND PURCHASER 🔑334(3) — RESCISSION—PARTIAL PAYMENTS.

Where the mutual abandonment or rescission of a real estate sale contract is unconnected with a new agreement, the purchaser may recover installments paid on the contract.

2. VENDOR AND PURCHASER 🔑334(3)—"NOVATION"—PARTIAL PAYMENTS.

Where the parties agreed to cancel a real estate sales contract, and plaintiff purchaser was given an option to purchase part of the premises covered by the old contract, there was in effect a "novation" as defined by Civ. Code, §§ 1530 and 1531, and plaintiff cannot recover partial payments made under the old contract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Novation.]

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by F. L. Hieatt against A. G. Gassen. Judgment for defendant, and plaintiff appeals. Affirmed.

J. M. Chatterson, L. E. Dadmun, and Hoff & Chatterson, all of San Diego, for appellant.

Sweet, Stearns & Forward, of San Diego, for respondent.

CONREY, P. J. Plaintiff brought this action to recover from defendant money which had been paid by plaintiff to defendant on account of a contract for the sale of real property, which contract the plaintiff alleged had been rescinded and abandoned by mutual consent. The plaintiff appeals from the judgment entered in favor of the defendant.

The contract was dated April 30, 1913. It provided for the payment of $7,500 on the execution of the contract, $2,500 on October 1, 1913, and $2,500 on the 1st day of each and every April and October thereafter until the full sum of $33,582.75 had been paid, interest at 6 per cent. per annum, payable quarterly, commencing on the 1st day of July, 1913. The findings show:

That the plaintiff paid the sum of $7,500 and the $2,500 due October 1, 1913, together with the interest then due. "That prior to the 1st day of April, 1914, the said plaintiff and said defendant did orally agree that they would by mutual consent cancel, rescind, and abandon the said written contract, and that the said plaintiff would in pursuance of said abandonment, cancellation, or rescission of said contract, and upon request of said defendant, sign, execute, and deliver unto said defendant his quitclaim deed to and for the property described in said written contract and agreement, upon the execution to plaintiff by defendant of an option for the purchase by plaintiff of a portion of said land. That after the 1st day of April, 1914, and on or about the 9th day of April, 1914, said original contract was by mutual consent abandoned, canceled, or rescinded, and said defendant released the said plaintiff from all his obligations under the said contract hereinbefore referred to, and from his said agreement to purchase the land in said contract described and pay the balance due on the purchase price thereof, and that in substitution for and in lieu of said contract defendant gave to said plaintiff an option in writing to purchase a part of the said lands described in said contract upon the terms and conditions set out in the said option, and that in consideration of the release of said plaintiff from his said obligations and covenants under said contract and of the giving of said option to him by the defendant, the plaintiff did execute and deliver to defendant a quit-claim deed of all his interest in said land, and released and discharged said defendant from all liabilities and obligations under or by virtue of said contract, which said release was indorsed upon the original of said contract and delivered therewith to defendant, and which said release was and is in the words and figures as follows, to wit: 'I, F. L. Hieatt, do hereby remise, release, and quitclaim to A. G. Gassen, all the land and property described in the foregoing contract and transfer to him all my rights under said contract and all my interest in said property, and this contract is hereby canceled. Dated April 9, 1914, F. L. Hieatt.' That prior to the filing of the complaint in said action, to wit, on the 19th day of February, 1915, the said plaintiff did demand of and from said defendant the return and repayment of the said sum of $11,136.22 paid to said defendant by said plaintiff under the terms of said written contract and agreement, but that he never made any other demand on defendant for the payment of said sum or any part of it, and that said defendant refused and still refuses to pay the said sum or any part thereof, and holds and retains the said money and the whole thereof. That it is not true that the said defendant holds and retains said money and the whole thereof to the plaintiff's damage in the sum of $11,136.22 or to his damage in any other sum or sums at all. That no other agreement or negotiations were had between plaintiff and defendant with reference to the rights of the parties in said sum of $11,136.22 than are contained or implied in said release indorsed upon said original contract."

As conclusions of law from the facts found, the court found that the option was given in substitution for and in lieu of the contract, and that the release indorsed upon the contract effected a complete settlement between the parties in regard to the contract and discharged and released defendant from any obligation to repay the plaintiff said sum of $11,136.22, or any part thereof, and that defendant was entitled to judgment that plaintiff take nothing by the action. Judgment was entered accordingly.

Appellant contends that the conclusions of law and the judgment are not consistent with or supported by the findings of fact, and that upon those findings the plaintiff is entitled to judgment in his favor.

[1, 2] Where a contract for the sale of real property has been mutually abandoned or rescinded by the parties thereto, and such abandonment or rescission is unconnected with any new contract or other agreement affecting the purchaser's rights in the premises, the purchaser is entitled to maintain an action in implied assumpsit as for money had and received, to recover the money which he has paid on account of such contract. To that extent we agree with the contentions of appellant with relation to this matter. But the case presented here is one wherein the release of the parties from the original contract was a part of and resulted from a new contract arising out of and connected with the abandonment of the original transaction. In lieu of defendant's obligation to convey the property upon the payment of the full contract price, the parties by agreement substituted therefor an obligation of the defendant to convey to the plaintiff a part of the property included in the original sale, and the plaintiff accepted this new agreement with the additional advantage that on his part the new agreement was only an option on which he would not be bound unless he elected to take the property under the option and upon the terms and conditions set out therein. What the terms and conditions of that option were we do not learn from the record, but it may reasonably be inferred that in agreeing upon those terms and conditions the parties took into consideration the fact that the plaintiff had made payments on account of the original contract. The new contract was in reality a novation whereby new obligations were substituted for those theretofore existing between the parties. Civ. Code, §§ 1530, 1531. When a novation has taken place the courts "have found no difficulty in declaring that the rights of parties to the agreement are to be governed by the new contract alone, and that a failure to perform does not, under any theory of rescission or revivor, operate to breathe new life into the dead and extinguished obligation." Beckwith v. Sheldon, 165 Cal. 319, 324, 131 Pac. 1049, 1051.

Equally well may it be said that when a novation has taken place the rights of the parties to the agreement are to be governed by the new contract alone, and that a party who has made payments under the original contract may not recover those moneys on the basis of a bare assumption that the terms of the new contract were not in any way affected by the situation existing under the original contract at the time when the new contract was made. The natural inference from such series of transactions runs the other way. When in this case the original contract "was by mutual consent abandoned, canceled, or rescinded," and in substitution therefor a new contract was made, it is evident that the new contract "was intended to effect a complete settlement in regard to the subject." In this respect the case is very similar to Winton v. Spring, 18 Cal. 451, where it was held that the vendee was not entitled to recover a partial payment which he had made on account of an agreement to purchase land.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

42 Cal. App. 63

McMANAMAN v. VICKERY. (Civ. 2655.)

(District Court of Appeal, Second District, Division 1, California. July 2, 1919. Rehearing Denied by Supreme Court Aug. 28, 1919.)

1. Appeal and Error 🔑782—Orders Appealable—Dismissal.

An appeal from an order denying a motion for new trial will be dismissed, when at the time the order was made there was no right of appeal from such order.

2. Corporations 🔑116 — Transfer of Stock—Options—Demand.

Testimony that plaintiff said to defendant, "I guess I will let you have that," was insufficient to show a demand by the plaintiff that defendant purchase corporate stock under a contract wherein defendant agreed to purchase it at a certain price at a certain time, if plaintiff so desired.

3. Corporations 🔑116 — Stock — Option to Sell—Reasonable Time.

Under an agreement to purchase corporate stock at the end of one year from date at a certain price, if owner then elected to sell, an election to sell and notification thereof made ten months after the expiration of the year was not made within a reasonable time.

4. Corporations 🔑121(5) — Stock — Option to Sell—Evidence.

In an action to enforce an option to sell corporate stock, plaintiff having the right to require defendant one year from date of an agreement to purchase the stock at a certain price, evidence *held* insufficient to show that defendant did anything to interfere with plaintiff's exercise of his option so as to justify a delay of ten months after the expiration of the year in giving notice of election to sell.

5. Corporations 🔑116 — Stock — Options—Time for Exercising.

A purchaser of corporate stock who has the option of requiring another person to buy it at the end of a year for a certain price must exercise the option within a reasonable time after the termination of the year.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by I. W. McManaman against B. L. Vickery, administrator with the will annexed of the estate of C. K. Ingersoll, deceased, substituted for C. K. Ingersoll. From a judgment for plaintiff and an order denying his motion for new trial, the defendant appeals. Appeal from the order dismissed, and judgment reversed.

Valentine & Newby, of Los Angeles, for appellant.

Henry P. Goodwin and Irving M. Walker, both of Los Angeles, for respondent.

CONREY, P. J. [1] The defendant appeals from the judgment and from an order denying his motion for a new trial. At the time when the last-named order was made there was no right of appeal from such an order. Hockerston v. Hockerston, 182 Pac. 325; Hirsch v. All Persons, 173 Cal. 268, 159 Pac. 712.

Prior to the 1st day of April, 1911, one Bonnard, as agent for the Colorado & Wyoming Coal Company, a corporation, solicited the plaintiff to buy certain stock of that corporation. Appellant's testator, C. K. Ingersoll, the original defendant in this action, had purchased stock of the corporation and recommended the stock to the plaintiff. As an inducement to aid in persuading plaintiff to buy such stock, Ingersoll gave Bonnard, for delivery to the plaintiff, an agreement in writing which was delivered to the plaintiff. This agreement, so far as necessary to the discussion here, reads as follows:

> "This is to certify that in the event that I. W. McManaman purchases $5,000 worth of preferred stock in the Colorado & Wyoming Coal Company, I will, after one year from date hereof, purchase the same from him at par value, plus 7 per cent. interest on all payments made to the Colorado & Wyoming Coal Company or its agent"—signed by C. K. Ingersoll, and dated Monrovia, Cal., April 1, 1911.

Without considering the debate of counsel concerning the extent to which the plaintiff relied upon this contract, as compared with his reliance upon the representations made by the agent of the corporation and upon other sources of information, we will assume that, as found by the court, the plaintiff, in agreeing to purchase and in purchasing the stock, did so in reliance upon the said agreement of Ingersoll. The plaintiff did purchase stock to the extent of $5,000, paying part in cash and giving his notes for the remainder. Afterwards the plaintiff was sued on said notes by an assignee thereof, and judgment was rendered against him; whereupon he did, on the 24th day of May, 1912, pay the amount of that judgment, and thereby paid in full for the stock purchased by him. A stock certificate therefor was delivered to him on or about the 27th day of September, 1912. The plaintiff claims that within due time he elected to sell the stock to defendant under the option given in that agreement, and demanded that defendant perform the contract according to its terms. Appellant claims that the attempted exercise of said right of option came too late.

[2] The court found that prior to April 1, 1912, plaintiff notified defendant that plaintiff required defendant to purchase from him said stock in accordance with said agreement; also that prior to September 24, 1912, plaintiff notified defendant that plaintiff required defendant to purchase said stock in accordance with said agreement. These two findings are not sustained by the evidence.

On the former finding the only evidence is that, as testified by plaintiff, he said to Mr. Ingersoll, referring to such stock, "I guess I will let you have that," to which it does not appear that Ingersoll made any reply. On the 19th day of March, 1913, McManaman sent to Ingersoll a letter in which the writer said:

> "I notified you verbally many months ago, and now I notify you in writing, that the Colorado-Wyoming Coal Company stock purchased at your request, and which you guaranteed to take, is still awaiting your fulfillment of the agreement. I have deposited these shares of stock in care of the First National Bank, Monrovia, and hope you will attend to this without further delay."

Prior to that letter, in a personal interview between the parties, the plaintiff said to defendant, "Mr. Ingersoll, you can have that stock," to which Ingersoll replied that he did not want the stock, and that McManaman could not get anything out of him. The plaintiff in his testimony fixes the date of that conversation at a time one month, a little more or less, before the writing of said letter. From this testimony, the effect of which is not changed by any other evidence in the case, it follows that the plaintiff did not declare his election to sell the stock to Ingersoll until at least as late as the 1st of February, 1913. Nevertheless, the court further found that within a reasonable time after April 1, 1912, plaintiff demanded that Ingersoll purchase said stock and pay therefor in accordance with the terms of said agreement, and offered to deliver the $5,000 worth of preferred stock, together with the common stock included as a bonus, and offered to do everything to be done by plaintiff in accordance with the terms of said agreement.

[3] Appellant contends that plaintiff's election was not made within a reasonable time after one year from the date of the option, and that for that reason his option to sell the stock to Ingersoll cannot be enforced. This would seem to be the principal question in the case, and it is the only question that we shall discuss, although other points are urged in support of the appeal. In Standard Box Co. v. Mutual Biscuit Co., 10 Cal. App. 746, 103 Pac. 938, it was held that the determination of what is a reasonable time is a question of law for the court, and that a notice of acceptance of an option to purchase personal property given ten months after the offer was not given within a reasonable time. In Roberts v. Evans, 43 Cal. 380, the court said:

> "An offer to sell, when no time is given, must be accepted at once, or within a reasonable time thereafter. A year, or even six months, must be held, as a matter of law, to be an unreasonable time."

If this is the rule under an option to sell or purchase ordinary merchandise, it applies with increasing force to an option to sell mining stock, which notoriously is property of uncertain and rapidly fluctuating value.

[4,5] There is evidence that prior to the letter of March 19, 1913, the plaintiff wrote two other letters to Ingersoll relating to this matter, but the record does not contain the contents of those letters, and the testimony of plaintiff's daughter, who wrote the letters for the plaintiff, is that both of them were written after the time of the conversation in which Ingersoll told the plaintiff that plaintiff could get nothing out of him, etc. Respondent insists as an excuse for his delay that Ingersoll urged him to defend the action against McManaman on the notes, and that therefore he was justified in waiting until after the determination of that litigation. But the plaintiff further testified that he had already made arrangements for his defense of that action, and therefore did not "go in" with Ingersoll, who offered to join him in fighting that action. There is nothing in the record tending to support a claim that Ingersoll did anything to interfere with the plaintiff's exercise of his option to sell the stock to Ingersoll or to delay the same. The plaintiff having failed to exercise the option within a reasonable time, he is not entitled to recover on the option agreement.

The appeal from the order is dismissed, and the judgment is reversed.

We concur: SHAW, J.; JAMES, J.

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41 Cal. App. 520

BOYD v. CITY OF SIERRA MADRE et al.
(Civ. 2910.)

(District Court of Appeal, Second District, Division 2, California. June 10, 1919.)

1. MUNICIPAL CORPORATIONS ⚷589—POLICE POWER—SCOPE.

Police power granted municipalities by Const. art. 11, § 11, is as broad as the power possessed by the Legislature itself, except that its exercise by city must be confined to the city, and must not conflict with the general laws of the state.

2. MUNICIPAL CORPORATIONS ⚷605—POLICE POWER—NUISANCES.

The exercise of police power by a city is not limited to the regulation of such things as already have become nuisances, or have been declared such by judgment of a court, but extends to everything expedient for the preservation of the safety, health, or comfort of the city's inhabitants.

3. MUNICIPAL CORPORATIONS ⚷605—POLICE POWER—MULES AND BURROS—CORRAL.

A municipality has power by ordinance to divide its territorial limits into business and residence districts, and to prohibit in the residence district the maintenance of any corrals wherein mules and burros are kept for hire; the keeping of such corrals in a populous city or town being a nuisance.

4. Municipal Corporations 🔑611—Regulation of Occupations—Noise—Offensive Odors.

Occupations which by the noise made in their pursuit or the odors they engender are offensive to the senses may be interdicted by law in the midst of populous communities on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interest of the community.

5. Municipal Corporations 🔑626 — Obnoxious Occupations — Residence District.

For the purpose of regulating occupations causing noise or offensive odors, city may divide its territorial limits into residence and business districts, and prohibit the obnoxious occupation within the former.

6. Municipal Corporations 🔑625—Validity of Ordinance—Livery Barn—Corral.

Ordinance, dividing city into residence and business districts, and prohibiting the keeping of a livery stable or corral for the keeping of horses, mules, etc., for hire, in residence district, and requiring a permit for maintenance thereof in business district, is not arbitrary.

7. Constitutional Law 🔑237—Ordinance—Maintenance of Corral in Business District—Discrimination.

Ordinance prohibiting maintenance of corral for mules and burros in business district without a permit does not impair any constitutional right in giving city authorities the power to grant permit to one person and deny it to another.

8. Municipal Corporations 🔑604—Police Power—Maintenance of Corral.

In action by keeper of burros and mules for hire to enjoin city from enforcing ordinance prohibiting maintenance of corral for mules and burros in residence district, and requiring permit for maintenance thereof in business district, it is not material that plaintiff may have kept his corral as clean as possible, and carried on his business in the most approved manner, or that it would be possible for one or more corrals to be maintained without an appreciable risk or peril to the health or safety of a community.

9. Municipal Corporations 🔑63(1)—Police Power—Regulation of Business—Review by Courts.

It is for the city's legislative body, clothed with police power by direct grant from the Constitution, to determine when and what regulations of a business are essential, and its determination will not be disturbed by the courts unless the regulation has no relation to the protection of health, safety, comfort, or well-being of the community, but is a clear invasion of personal or private rights under the guise of police regulation.

10. Municipal Corporations 🔑605 — Police Power—Nuisances.

Whenever a thing or act is of such a nature that it may become a nuisance, or may be injurious to the public health or obnoxious to the comfort of a community if not suppressed or regulated, the legislative body in the exercise of its police powers may make and enforce ordinances to regulate or prohibit it, although it may never have been obnoxious or injurious in the past.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by John Boyd against the City of Sierra Madre and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Rose & Scoville, of Los Angeles, for appellant.

Charles C. Montgomery, of Los Angeles, for respondents.

FINLAYSON, P. J. This is an action to enjoin the city of Sierra Madre from enforcing an ordinance that forbids, in the residence district of the city,—defined by the ordinance—any livery stable or corral for the keeping therein of horses, mules, jenneys, jacks, or burros for hire, and which likewise forbids, in the business district—defined in the ordinance—any such livery stable or corral without a permit from the city board of trustees, on written application specifying the number and kind of animals desired to be so kept, the period of time, and the place of keeping and the kind of business to be transacted. Plaintiff is engaged in the business of furnishing burros and mules for hire. For that purpose he has ten burros and four mules, keeping them in a corral within the residence district of the city.

The appeal is upon the judgment roll. The lower court found that appellant has kept and maintained his corral "in a cleanly, wholesome (sic), and sanitary manner," but that, prior to the passage of the ordinance, there were, in the vicinity of appellant's corral, two other corrals, wherein such animals were kept for hire, in which there was "an accumulation of manure and other filthy substances of various kinds, generating noxious odors and breeding and attracting flies and other vermin; that said corrals and the business conducted therein and thereupon were the source of many loud, disagreeable, and discordant noises from the braying of the animals, their footbeats on the street and sidewalk, the cries and loud talk of their attendants, and otherwise; and that said businesses were the cause of much dust, dirt, and discomfort to the inhabitants of the residential district described in the ordinance."

Appellant claims that the ordinance is unreasonable and unjustly discriminatory, and that its enforcement will deprive him of his constitutional rights.

[1, 2] In this state the Constitution itself makes a direct grant of police power to municipalities. Article 11, § 11, Cal. Const. The power so conferred is as broad as that possessed by the Legislature itself subject to the two exceptions that its exercise by any city must be confined to the municipality, and must not conflict with the general laws of the state. Odd Fellows' Cem. Ass'n v. San Francisco, 140 Cal. 226, 230, 73 Pac. 987. The exercise of this power is not limited to the regulation of such things as already have become nuisances or have been declared such by the judgment of a court. A city's power to prohibit or regulate not only includes nuisances, but extends to everything expedient for the preservation of the safety, health, or comfort of the city's inhabitants. Odd Fellows' Cem. Ass'n v. San Francisco, supra; Ex parte Quong Wo, 161 Cal. 220, 118 Pac. 714.

[3] A municipality has power, by ordinance, to divide its territorial limits into business and residence districts, and prohibit in the residence district the maintenance of any corral wherein mules and burros are kept for hire. It is a matter of common knowledge that such corrals, by reason of the excrement from the animals, the dropping of which to some extent is unavoidable, are not only rife with offensive, foul-smelling odors, but are breeding places for germ-laden, disease-bearing flies and pestilential vermin. Not only this, but we know of no heaven-sent maxim to invent a silencer for this brute, that one beholding him, neck outstretched and jaws distended wide, could persuade himself that he but heard from the depths of the beast's crimson-coated cavern

> "* * * a sound so fine there's nothing lives
> 'Twixt it and silence."

We fear that, until nature evolves the whispering burro or man invents some harmless but effective mule-muffler, we shall oft "in the dead and vast middle of the night," even in such corrals as appellant's, kept "in a cleanly, wholesome, and sanitary manner," hear the loud, discordant bray of this sociable but shrill-toned friend of man, filling the air "with barbarous dissonance," and drowning even that shout that

> "* * * tore Hell's concave, and beyond
> Frighted the reign of Chaos and old Night."

It should not be a matter of surprise, therefore, that the noisome smell from these animals and their loud, strident cacophonies bring the keeping of them in a populous city or town "within the legal notion of a nuisance." Ex parte Foote, 70 Ark. 12, 65 S. W. 706, 91 Am. St. Rep. 63. See, also, In re Linehan, 72 Cal. 114, 13 Pac. 170; Ex parte Lacey, 108 Cal. 326, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. Rep. 93; Ashbrook v. Commonwealth, 1 Bush (Ky.) 139, 89 Am. St. Rep. 616.

[4, 5] Occupations which, by the noise made in their pursuit, or the odors they engender, are offensive to the senses may be interdicted by law, in the midst of populous communities, on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interest of the community. For the purpose of regulating such occupations, a city has the power to divide its territorial limits into a residence and a business district, and prohibit the obnoxious occupation within the former. Ex parte Moynier, 65 Cal. 33, 2 Pac. 728; In re Hang Kie, 69 Cal. 149, 10 Pac. 327; Ex parte Quong Wo, supra; In re Montgomery, 163 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914A, 130; Ex parte Hadacheck, 165 Cal. 416, 132 Pac. 584, L. R. A. 1916B, 1248.

[6] The ordinance is not arbitrary nor unjustly discriminatory. It operates alike upon all persons similarly situated within the confines of the city. All have the same rights, and all are subject to the same burdens. It matters not that this particular ordinance is aimed only at those who keep such animals for hire. The record shows that there is another city ordinance that regulates the keeping of such animals for purposes other than hire. Moreover, there is a greater reason for regulating, or even prohibiting, in populous residential communities, the keeping of such animals for hire than there is for regulating or prohibiting their keeping for domestic use or for purposes other than hire. He who keeps a horse, mule, or burro for his own private use, if he does not keep it in a public corral or other place that is equally subject to the most stringent regulation, such as a livery stable, for instance, must keep it in a private stable or corral. But the owner of a private stable or corral, for his own comfort and welfare, has a strong and compelling motive for maintaining the place with due regard to his own, and thus indirectly his neighbors', health and well-being.

[7] The ordinance does not absolutely forbid the maintenance of a corral in the business district, but provides that no corral of the kind interdicted by it shall be maintained in the business section without a permit from the city trustees. Appellant claims that the ordinance does not merely regulate, but that, by requiring a permit for the maintenance of such a corral in the business district, it confers upon the trustees a power that is susceptible of abuse, that the applicant for a permit may be unfairly discriminated against, and that, therefore, in the practical application of the trustees' discriminatory

power, the right to maintain such a corral in any part of the city may be unjustly prohibited. We cannot subscribe to this criticism of the ordinance. The proposition that a man has a natural, innate, inviolate, common-law, or constitutional right to maintain, in a populous community, a place where foul-smelling, loud-braying animals are kept has no foundation in reason or authority. In re Flaherty, 105 Cal. 566, 38 Pac. 981, 27 L. R. A. 529. If, therefore, it is not a right that may not be entirely suppressed, it may be regulated as the law-making power may determine. The fact that permission to maintain, in the business district, a corral for horses, mules, or burros may be granted by the city trustees to one person and denied to another does not impair any constitutional right. Such discrimination might well be made where one person desired to keep 2 mules, or 2 burros, and another 50; or where one desired to establish a corral in the heart of the business section, and another nearer the confines of that section of the city; or where one may be known to keep his corral in a filthy condition, and another has established a reputation for good order and cleanliness. The question in each case is whether the establishing of a corral is likely, in the hands of the applicant, to be a nuisance to the neighborhood; and in the absence of any evidence to the contrary, we must assume that the discrimination will be made with due regard to the interests of the applicant and the public, and upon conditions that will accord with the health and comfort of the community. It has been held by some of the courts of this country to be contrary to the spirit of the American institutions to vest this dispensing power in the hands of a single individual; and by others that such authority cannot be delegated to the adjoining lot owners; but the power to delegate such discrimination to the town trustees, as in this case, or to a board appointed for that purpose, is sustained by the great weight of authority. Fischer v. St. Louis, 194 U. S. 361, 24 Sup. Ct. 673, 48 L. Ed. 1018; In re Flaherty, supra; Ex parte Fiske, 72 Cal. 125, 13 Pac. 310; City of Newton v. Joyce, 166 Mass. 83, 44 N. E. 116, 55 Am. St. Rep. 385; Quincy v. Kennard, 151 Mass. 563, 24 N. E. 860.

There is absolutely nothing to indicate that the ordinance was intended in any of its features to operate peculiarly against appellant or against any other particular person or persons or class of persons. It is fair on its face, applying equally and uniformly to all engaged in keeping, in corrals, horses, mules, or burros for hire; and it is not to be presumed that the trustees will exercise their power wantonly or for purposes of oppression, or accord permission to social or political favorites and deny it to others.

[8, 9] The fact that appellant may have kept his corral as clean as is possible in such cases, and has carried on his business in the most approved manner, is not material. City of Burlington v. Stockwell, 5 Kan. App. 569, 47 Pac. 988. Nor would it be of any consequence that it would be possible for one or more such corrals to be maintained without appreciable risk of peril to the health or safety of the community. It is almost unavoidable that some noxious odors shall emanate from, and some disease-bearing flies breed in, some, if not all, such places—to say nothing of the unconstrainable, raucus sounds. It is enough that there are offensive noises and odors intolerably obnoxious to the senses of hearing and smelling. Moreover, the fact that in two corrals, in the vicinity of appellant's, there was "an accumulation of manure and other filthy substances of various kinds, generating noxious odors and breeding and attracting flies and other vermin," was sufficient to justify the passage of such an ordinance as that in question here. The fact that appellant's corral was kept in a cleanly and sanitary manner affords no reason why he should be specially exempt from the provisions of an ordinance designed to regulate a business which, as conducted by some persons at least, is fraught with peril to the community's comfort, if not its very health. Primarily, it is for the city's legislative body, clothed with police power by direct grant from the Constitution, to determine when and what regulations are essential; and its determination in this regard, in view of its better knowledge of all the circumstances and the presumption that it is acting with due regard for the rights of all parties, will not be disturbed by the courts, unless it plainly can be seen that the regulation has no relation to the protection of the health, safety, comfort, or well-being of the community, but it is a clear invasion of personal or property rights under the guise of police regulation. Ex parte Quong Wo, supra; Ex parte Hadacheck, supra; Pierce Oil Corp. v. Hope, 248 U. S. 498, 39 Sup. Ct. 172, 63 L. Ed. 381.

[10] Whenever a thing or act is of such a nature that it may become a nuisance, or may be injurious to the public health or obnoxious to the comfort of a community, if not suppressed or regulated, the legislative body, in the exercise of its police powers, may make and enforce ordinances to regulate or prohibit such act or thing, although it may never have been obnoxious or injurious in the past. Odd Fellows' Cem. Ass'n v. San Francisco, supra.

We see no force in any of appellant's objections to the ordinance.

Judgment affirmed.

We concur: SLOANE, J.; THOMAS, J.

41 Cal. App. 543

HARTFORD ACCIDENT & INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 2948.)

(District Court of Appeal, First District, Division 1, California. June 12, 1919.)

1. MASTER AND SERVANT 🔑385(1)—WORKMEN'S COMPENSATION ACT—COMPENSATION—TIPS—"OTHER ADVANTAGES" RECEIVED BY EMPLOYÉ.

Tips received by employé are "other advantages received by the injured employé as part of his remuneration," within the meaning of Workmen's Compensation Act, § 17b, as amended by St. 1915, p. 1087, and should be considered in determining the "average weekly earnings" of the employé for the purpose of fixing compensation.

2. STATUTES 🔑226 — WORKMEN'S COMPENSATION ACT—CONSTRUCTION—ADOPTION OF FOREIGN STATUTE.

Compensation acts of this country being generally based upon the English Workmen's Compensation Act, the rulings of the commission and courts of England are persuasive, where the language of the statute is not materially dissimilar.

Proceedings by H. F. Weidemann under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by A. J. Wagner, the employer, and the Hartford Accident & Indemnity Company. There was an award of compensation, and the indemnity company applies for a writ of review. Award affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, for petitioner.

A. E. Graupner and Warren Pillsbury, both of San Francisco, and John R. Cronin, of Stockton, for respondents.

RICHARDS, J. This is an application for a writ of review. The petitioner was the insurer of one A. J. Wagner at the time of the injury for which compensation was sought by one H. F. Weidemann, an employé of said Wagner. Weidemann was a waiter employed in a hotel owned and operated by his employer in Stockton, Cal., on August 15, 1916, the date of his injuries. According to the findings of the Industrial Accident Commission he was at that time earning $45 per month in regular wages and his board, amounting to $30 per month. In addition to the foregoing earnings he received tips averaging $1.25 per day. The commission based its award not only upon the aforesaid regular wages and board of the applicant for compensation, but also upon the amount so being received by him in tips at the time of his injury. It is this portion of the award to which the petitioner herein objects in this proceeding, basing its objection upon the following two grounds: First, that the undisputed evidence showed that the applicant for compensation was paid the sum of $5 per month more than other waiters, which was to be in lieu of tips and which was included in his regular wages of $45 per month, for which allowance in his award was fully made; second, that under the Workmen's Compensation Act of California (St. 1913, p. 279) tips are not the proper subject of an allowance in the case of injured employés.

As to the first of the foregoing contentions, we do not find it is borne out by the evidence in the case. The applicant for compensation was one of the waiters in the establishment of his employer, but in addition to his regular duties as such he was required during a portion of his time to absent himself from the regular dining room in order to wait upon the officers and certain other employés of the hotel in their private dining room, and for this special service he received an extra $5 per month. It does not appear that this increase in wages was expressly to be in lieu of all the tips he would receive in the course of his regular duties. The findings of the commission, on the contrary, would seem to show that during such regular service he actually did receive a sum averaging $1.25 per day from that source, upon the basis of which the extra allowance was made which is objected to in this proceeding. The first point urged by the petitioner is therefore without merit.

[1, 2] As to the petitioner's second objection, viz. that tips are not to be made the basis of an allowance to an injured employé under our California statute, we are also unable to give our assent to the petitioner's contention. It is insisted first that under the terms of the Workmen's Compensation Act the remuneration received by the employé and which forms the basis of the award must come directly from the employer; second, that tips, not being included in the employer's pay roll, could not be considered in calculating an award; third, that the insurer's policy does not cover remuneration other than that which passes from employer to employé. The answer to these several contentions is contained in section 17b of the Workmen's Compensation Act as amended in 1915 (St. 1915, p. 1087), which reads as follows:

> "In determining such average weekly earnings, there shall be included the market value of board, lodging, fuel and other advantages received by the injured employé, as part of his remuneration and which can be estimated in money, but such average weekly earnings shall not include any sum which the employer paid to the injured employé to cover any special expenses entailed on him by the nature of his employment."

We are satisfied that the phrase "other advantages received by the injured employé as part of his remuneration and which can be estimated in money" is broad enough to permit the inclusion of tips in the "average weekly earnings" of such employé, upon which the amount of his award is to be calculated. There is nothing in the act which can be construed as restricting the earnings of the employé either to those which the employer directly pays to him in the form of wages, or to those which are embraced within the employer's pay roll. The Workmen's Compensation Acts of this country are, generally speaking, based upon the English Workmen's Compensation Act, and the rulings of the commission and courts of England are persuasive where the language of the statutes is not materially dissimilar. The question as to whether tips were to be considered in estimating the compensation of injured employés has been uniformly decided in favor of their inclusion under the English statute. Penn v. Speirs, etc. (1908) 1 K. B. 766, 4 B. W. C. C. 401; Skailes v. Blue Anchor Line (1911) 1 K. B. 360, 4 B. W. C. C. 16; Knott v. Tingle, etc., Co., 4 B. W. C. C. 55; Gt. Northern Ry. Co., 7 W. C. C. 177; Helps v. Gt. Western Ry., W. C. & Ins. Rep. 199.

The statutes of Massachusetts and New York, whose statutes are even less broad in their definition as to what earnings of the employé are to be made the basis of his award, have each followed the English rule as declared in the foregoing cases and proceedings. Hatchman v. New England Casualty Co., 2 Mass. I. A. B. 419; Sloate v. Rochester Taxi Co., 221 N. Y. 491, 116 N. E. 1076.

In the latter case the court quite aptly says:

> "The employé could not have received the tips if the employer had not put him in the way of getting them, and we may well conclude that the tips were an advantage received from the employer similar in effect to board, lodging or rent furnished in addition to the wages paid. * * * The usual tips have come to be considered as a part of the cost of entertainment at a hotel, upon a sleeper or public conveyance, and it is realized both by the person paying and receiving them that it is a part payment of the wages which the employer compels the persons served to pay. In effect, therefore, the employer and not the employé alone is benefited * * * by the patrons of the company. * * * The court should treat these tips in the same manner in which the employer and employé treat them, as a part of the compensation to be received by the employé for the services rendered the employer—a part of the wages, a part of the average annual earnings of the employé."

We are satisfied with the reasoning and conclusion of the foregoing authorities and with the action of the respondent herein, which was based thereon. We are also satisfied that the policy of the petitioner herein covers the entire liability imposed upon the employer by the terms of the California statute.

The award of the commission is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

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41 Cal. App. 534

DICKERSON v. SUPERIOR COURT IN AND FOR IMPERIAL COUNTY et al.

(Civ. 2675.)

(District Court of Appeal, Second District, Division 1, California. June 10, 1919.)

1. PROHIBITION 🔑10(2), 11 — ERROR IN COURSE OF TRIAL—REPUDIATION OF VERDICT—EXCESS OF JURISDICTION.

If, upon the assumption that an action is one of law, the court submits the case to a jury, and thereafter, upon rendition of verdict, concludes that issues are of an equitable character and repudiates the verdict, such ruling, like the denial of jury trial to one entitled thereto, is mere error committed in the course of trial, and not in excess of jurisdiction.

2. PROHIBITION 🔑3(2)—SETTING ASIDE VERDICT—ADEQUATE REMEDY BY APPEAL.

Where court set aside verdict for defendant and entered judgment for plaintiff, defendant's remedy is not by writ of prohibition, even though court acted without jurisdiction, he having had a plain, speedy, and adequate remedy by appeal from judgment rendered.

3. PROHIBITION 🔑3(5)—ADEQUACY OF REMEDY BY APPEAL—INABILITY TO FURNISH UNDERTAKING.

That petitioner for writ of prohibition is unable, by reason of his financial condition, to comply with the statute by giving undertaking giving him right to retain possession of property is immaterial, and does not affect the question of adequacy of remedy afforded by appeal.

Petition for prohibition by W. W. Dickerson against the Superior Court in and for the County of Imperial, State of California, and Franklin J. Cole, Judge of said court. Proceeding dismissed.

B. D. Noel, of El Centro, for petitioner.

Frank Thunen, of San Francisco, for respondents.

SHAW, J. Prohibition. The question involved is whether the alternative writ heretofore issued should be made peremptory or the proceeding therefor be dismissed.

The petition for the writ is founded upon facts as follows: The Southern Pacific Land Company instituted an action against petitioner in the Superior Court of Imperial county to recover possession of a tract of land occupied by petitioner, together with damages for the retention thereof, and to quiet its title thereto. The rights of the plaintiff, as asserted in the complaint, were put in issue by an answer filed by the petitioner, and the case was submitted to a jury called for the trial thereof. The jury brought in a verdict for defendant. Thereupon plaintiff, waiving all claim to damages for defendant's withholding possession of the property, immediately moved the court to set aside the verdict and, as to title to the property and right of possession thereof, render judgment in favor of plaintiff. This motion was granted, followed by findings made by the court upon which judgment was entered, from which defendant appealed. To this petition the respondents have interposed a general demurrer.

[1] The court had jurisdiction of both the subject of the action and the parties thereto; and petitioner, while claiming that he was rightfully entitled to a trial by jury, concedes that if the court in the first instance had denied him such right, the ruling would have been mere error to be corrected on appeal. Powelson v. Lockwood, 82 Cal. 613, 23 Pac. 143. He insists, however, that the action of the court in setting aside the verdict rendered presents a different case, and one wherein the court's action was in excess of its jurisdiction; that it could only act in the matter upon motion made for a new trial. We are unable to perceive the distinction suggested. In each case the ruling would constitute error in the course of the trial. If, upon the assumption that an action is one of law, the court submits the case to a jury and thereafter, upon the rendition of a verdict, concludes the issues are of an equitable character, repudiates the verdict, such ruling, like the denial of a jury trial to one entitled thereto, is mere error committed in the course of the trial, and not in excess of jurisdiction. As said in Clark v. Superior Court, 55 Cal. 199:

> "If, after acquiring jurisdiction of the parties and subject-matter of an action, a superior court should order judgment in favor of one of the parties without a trial, that judgment would neither be 'without or in excess of the jurisdiction of such tribunal,' although it might be erroneous."

[2] Moreover, conceding petitioner's claim that the court acted without jurisdiction, we are clearly of the opinion that he had a plain, speedy, and adequate remedy in the ordinary course of law by an appeal from the judgment rendered, which is a sufficient answer to the application made. By the taking of an appeal and giving of a sufficient undertaking, not only would he be accorded redress for any errors committed by the court in the trial of the case which resulted in the adverse judgment, but likewise protected in his right to the possession of the property pending the final determination of the case.

[3] That petitioner is unable, by reason of his financial condition, to comply with the statute by giving an undertaking entitling him to retain possession of the property, if true, is wholly immaterial, and does not affect the question as to adequacy of the remedy afforded by an appeal.

The proceeding is dismissed.

We concur: **CONREY, P. J.; JAMES, J.**

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41 Cal. App. 637

BARRIOS v. PACIFIC STATES TRADING CO. et al. (Civ. 2849.)

(District Court of Appeal, First District, Division 1, California. June 17, 1919. Rehearing Denied by Supreme Court Aug. 14, 1919.)

1. SALES ⚿261(4)—WARRANTIES.

Acceptance of order for "export cured" codfish amounted to a warranty that goods, when packed for shipment, should measure up, in regard to quality, to the full meaning of the term "export cured," although the word "warranty" was nowhere used.

2. SALES ⚿441(3)—WARRANTIES—BREACH—SUFFICIENCY OF EVIDENCE.

In action for damages for breach of a warranty to ship "export cured" codfish, evidence *held* sufficient to sustain a finding that codfish shipped was not "export cured."

3. APPEAL AND ERROR ⚿1050(3)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

It was not prejudicial error to admit improper evidence, which was merely cumulative of uncontradicted evidence on a point practically conceded.

4. SALES ⚿280—WARRANTIES—CONDITIONS.

In action for breach of warranty to ship "export cured codfish," it was not incumbent upon plaintiff in first instance to show that condition "Perishable, store away from boilers," stamped on the packages, had been complied with during the shipment; such condition forming no part of the contract between the parties, and being placed upon the outside of the packages by the packer without any knowledge on the part of the purchaser.

5. SALES ⚿288(2)—WARRANTIES—WAIVER.

A buyer was entitled to rely upon the assurances of packer of codfish that goods ordered would be of the quality warranted by the terms of their written agreement, and mere fact that an agent of buyer saw goods in process of preparation and expressed a doubt as to their being sufficiently dried cannot be held to either constitute a waiver of the warranty that the codfish would be "export cured," nor to have required a further inspection of the goods after they had been sealed and packed and delivered on shipboard for the place of their destination.

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by O. Barrios against the Pacific States Trading Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

McWilliams & Hatfield, of San Francisco, for appellants.

Wise & O'Connor and Richard S. Goldman, all of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in the plaintiff's favor in an action brought by him as the assignee of Lewis-Simas-Jones Company, a copartnership, to recover from certain stockholders of the Pacific Trading Company, a corporation, their proportionate share of the liability of said last-named corporation arising out of its alleged breach of warranty. The transaction out of which the cause of action arose was one in which the Lewis-Simas-Jones Company gave its written order to the Pacific States Trading Company for a certain quantity of "export cured boneless codfish" and for a certain further quantity of "export cured whole codfish," to be packed by the latter corporation in or near San Francisco, for shipment by the copartnership, the plaintiff's assignor, to Valparaiso, Chile, which order being accepted, the fish, in due course, were packed and delivered in hermetically sealed tins, cased for foreign shipment, to the steamship company at San Francisco consigned to said foreign port. Arriving there in December, 1915, they were on examination found to be spoiled and unfit for human consumption, and were destroyed by the public authorities. Thereafter the plaintiff, as assignee, commenced this action and recovered judgment against the several appellants herein upon their proportionate liability as stockholders of the said defendant corporation.

[1] The appellants urge several points against the judgment. The first of these is that there was no warranty as to the quality of the fish sold embraced in the written order and its acceptance out of which the cause of action arose. It is true that the word "warrant" is not to be found in the language of the written order or of its acceptance, but we do not think that this is necessary to the creation or existence of an express warranty of goods sold, where the terms of the agreement designate the particular quality of the article to be delivered in phrases which are well known to the trade in respect to the particular article purchased, and sold. The order in the instant case was for "export cured codfish." The evidence showed that these terms had a well-defined meaning as applicable to codfish, which were so prepared and packed through the extraction of all moisture as to be able to withstand the varying heat and other perils incident to a long sea-voyage across the equator to a distant country. We are of the opinion that the acceptance of the order expressly requiring the pack to be "export cured" codfish amounted to a warranty that the goods when packed for shipment should measure up in point of quality to the full meaning of the term "export cured." Coats v. Hord, 29 Cal. App. 115, 154 Pac. 491.

[2] The next contention of the appellants is that, conceding that the terms of the written order and of its acceptance amounted to a warranty that the goods packed and delivered thereunder would be "export cured codfish," there is no evidence of the breach of such warranty. But in this respect, also, we cannot concur in the appellant's contention. The evidence showed that there were two qualities of cured codfish known to this particular trade. One was "domestic cured codfish," intended for use in domestic trade. In packing this quality of codfish it was not required that all moisture should be dried out of the fish before being packed in tins; but as to the other quality, defined as export cured codfish, it was essential that all moisture should be extracted by the drying process in order that the sealed product might be able to withstand the extremes of climate incident to its shipment to foreign and, as in this instance, tropical lands. Upon the trial of the cause the plaintiff Barrios, who was one of the members of the copartnership and an experienced exporter, testified to having been present when a considerable number of the cases containing the hermetically sealed cans of the shipment in question were opened at Valparaiso, and when it was found that every can to the number of 80 or 100, selected at random from the general lot, contained a quantity of foul liquid, the codfish therein being entirely decomposed. The witness further testified that the codfish thus found to be in that condition was not "export dried codfish." We think this testimony, if believed by the court, would suffice to sustain its finding in that regard.

[3] In this same connection the appellants insist that the court committed reversible error in the admission in evidence of certain depositions given by several persons who also witnessed the opening of the tins containing the codfish in question at Valparaiso, and whose testimony was to the same effect as that given by the witness Barrios. It is practically conceded by the respondent that these depositions were not entitled to admission in evidence, and that the action of the trial court in their admission was an error. It does not follow, however, that it was a reversible error, since the condition in which the codfish was found to be when opened at Valparaiso was not a seriously controverted fact in the case; the testimony of the witness Barrios being uncontradicted by the

defendants, who offered no evidence whatever as to the condition of the goods upon their arrival at Valparaiso. It is a practically conceded fact in the case that the goods were spoiled in transit, and this being so, the evidence embraced in the depositions properly objected to by the defendants was merely cumulative of the uncontradicted evidence of the witness Barrios, and hence the defendants were in no wise prejudiced by its admission. It is, however, contended in this connection by the appellants that two of the witnesses whose depositions were thus erroneously admitted gave testimony in the nature of opinion evidence that the fish had not been export cured, and that in this respect their wrongly admitted testimony was prejudically injurious. Counsel for the appellants, however, are at pains to point out to the court that these particular witnesses were in no sense experts in the matter of what did or did not constitute "export cured codfish," and that their evidence in that respect was therefore of the weakest and most unsatisfactory character. If this be true, as the record seems to show it to be, an added reason is furnished why evidence of such flimsy and ineffectual quality should not be regarded as sufficiently prejudicial in its influence upon the mind of the trial court to justify a reversal of the case.

[4] The next contention of the appellants is that conceding the warranty upon which this action is predicated to have been embraced in the terms of the writings, it was a warranty subject to an express condition which was contained in the words stamped upon each package of codfish "Perishable, store away from boilers," and that no proof had been presented on the part of plaintiff that this condition had not been broken, or that the spoiled state in which the codfish upon its arrival at Valparaiso was found to be was not the result of its breach. The difficulty with this contention is that the words above quoted constituted no part of the contract between the parties; they were placed upon the outside of the packages which the packer had prepared without any knowledge on the part of the purchaser as to their presence there, and hence without any concurrence in or consent to their existence or effect as a limitation upon the warranty of the goods within. If the carrier disobeyed the instructions evidently intended for its guidance, its breach of duty in that regard cannot be charged to plaintiff's assignor, who was entirely ignorant of such a direction, and upon whom it was not incumbent, in the first instance, to show whether or not it had been disobeyed.

[5] The final contention of the appellants is that the plaintiff should have reduced his damages by a sale of the codfish in question at San Francisco prior to their shipment to their ultimate destination. This contention is based upon the claim of the defendants that the fact that the goods were not "export cured" was known to one of the buyers' authorized agents before the goods were fully packed. We do not think that the evidence sustains this contention, for while it is true that one of the buyer's agents visited the drying and packing grounds of the packer while the goods were being canned, and there expressed his doubts as to whether they were sufficiently dry for export shipment, the evidence also shows that he was assured by the more experienced representative of the packer that they were sufficiently dried to withstand a trip to South America. The buyer was entitled to rely upon the assurances of the packer that the goods shipped would be of the quality warranted by the terms of their written agreement with it, and the mere fact that an agent of the purchaser saw such foods in process of preparation and expressed a doubt as to their being sufficiently dried cannot be held to either constitute a waiver of such warranty, nor to have required a further inspection of the goods after they had been sealed and packed and delivered on shipboard at San Francisco for the place of their destination. Grace v. Levy, 30 Cal. App. 231, 156 Pac. 626; North Alaska S. Co. v. Hobbs, etc., Co., 159 Cal. 381, 113 Pac. 870, 120 Pac. 27, 35 L. R. A. (N. S.) 501. There is no merit, therefore, in the appellants' contention that the goods should have been examined at San Francisco, and if found defective in quality sold there in order to reduce the defendants' bill for damages. Krasilnikoff v. Dundon, 8 Cal. App. 406, 97 Pac. 172.

The judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

41 Cal. App. 624

HILLCREST CO. et al. v. SHRIER et al.
(Civ. 2639.)

(District Court of Appeal, Second District, Division 1, California. June 16, 1919.)

1. Mechanics' Liens 🔑264(1)—Directing Third Person to be a Party—Procedure.

In an action against owner of property for foreclosure of mechanic's lien, where a bonding company was made a party defendant in the complaints of some of the plaintiffs, and the owners in their answers in all of the actions asked that the bonding company be made a defendant, and that judgment be entered in their favor against the bonding company, and the bonding company made answer in the proceedings, the actions having been consolidated, raising issues on the facts necessary to a complete determination of the merits which were fully determined, the bonding company cannot complain that it was not properly before the court, it not appearing that the plaintiffs, who did not first make the bonding company a defendant, did not later join in the owners' request that it be made a defendant.

2. Mechanics' Liens 🔑264(1), 315—Foreclosure — Making Surety a Party Defendant.

In action to foreclose mechanics' liens, defendant owners who have paid contractor in full may call upon contractor's surety to pay as for the default of the contractor in such proceeding, although owners have not paid any of the claims against the property, and they may have the surety made a party defendant, and ask for judgment against him for any sums that might be rendered, in view of Code Civ. Proc. § 578.

3. Appeal and Error 🔑1039(13)—Harmless Error—Variance.

Surety cannot complain of variance increasing amount of recovery against principal, where indebtedness of principal, if increase were deducted, was more than penalty of bond.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Actions by the Hillcrest Company and others against Clara Shrier and Blanche L. Ehrenberg. On defendants' request the Commonwealth Bonding & Casualty Insurance Company was made a party defendant. From an adverse judgment, the latter appeals. Affirmed.

Hoff & Chatterson, of San Diego, for appellant.

Binnard & Weinberger and W. P. Cary, all of San Diego, for respondents.

CONREY, P. J. Several actions were brought for the foreclosure of numerous lien claims incurred during the performance of a contract between the defendants Blanche L. Ehrenberg and Clara Shrier, as owners, and defendant W. B. Johnson, as contractor, for the construction of a flat building and garage in the city of San Diego. The contractor, together with the appellant bonding company, executed to the owners an undertaking in the sum of $5,000, conditioned for the performance of the contract by the contractor, and that he would finish and deliver the work free from all liens and pay in full all the claims of any person performing labor or furnishing materials to be used in the work. Both contract and bond were dated on the 20th day of May, 1913. The bond further contained the terms provided for in section 1183 of the Code of Civil Procedure, as amended in 1911 (St. 1911, p. 1313.) It complied with the requirements of that section, with the exception that the bond was for only the sum of $5,000, which was less than 50 per cent. of the contract price.

The court found that the owners fully performed their part of the contract, and that they paid out for the construction of the building the full sum of $12,450, which was the contract price, and the further sum of $193 for additional work not provided for in the contract; that the contractor failed to pay the sum of $5,093.41, due to the several plaintiffs for materials used and labor done upon said building. The several actions having been consolidated prior to the trial, the court, pursuant to the findings made, rendered judgment in favor of the plaintiffs against the owners for the several sums claimed, amounting in the aggregate to more than $5,000, and for the foreclosure of their liens against the property of the defendant owners, and further rendered judgment in favor of the owners against the defendant bonding company in the sum of $5,000, with costs. From the judgment rendered against it the bonding company prosecutes this appeal.

The appeal is presented upon a record certified to contain a full copy of the judgment roll, except the pleadings relating to that portion of the action and judgment from which no appeal is taken, and that portion of the findings of fact which relates to that part of the judgment from which no appeal is taken.

Appellant urges upon this court the following reasons why the judgment is erroneous: (1) Because the order of court directing the bonding company to be made a party was made without any legal showing, and was not made in pursuance of any code provision or law. (2) That the pleading of the defendants, to which said bonding company was made a party and denominated an answer, was and is not a pleading known to the Code of Practice. That it did not in any way plead to the complaint of the plaintiff, but was directed toward one who was not a party to the action, and who was only conditionally liable to the party offering the pleading, and, that condition not being fulfilled, and no cause of action being stated in the said answer against the bonding company, the judgment based thereon was erroneous. (3) The defendant owners not having paid any of the claims against the property, they had no right in contract or law to call upon the guarantor to pay as for default of the contractor, until default was established, and the owners had been required to pay something by such default, until which time they had not been damaged. (4) The enforcement of the Fruer lien ignored the principle that the contract sued upon must be sustained by the proof; otherwise the variance is fatal. In this case the complaint made new contracts for Fruer, ignored his sworn lien claim, and enforced a contract not even alluded to in his claim of lien.

Will take up these points in the order above stated.

[1] 1. The only complaint contained in the transcript is the amended complaint of A. H. Busch Company, filed November 20, 1914. In that complaint the bonding company is one of the defendants against whom judgment is demanded. The order of consolidation of the actions was made pursuant to stipulation on the 8th day of June, 1914. The transcript shows that on May 4, 1914, according to minutes of the court of that date under the heading "Title of Court and Cause," the demurrer of the defendant "to plaintiff's complaint" was argued and submitted and overruled, and "the bonding company is ordered to be made party defendant and summons issued to bonding company and facts upon which it is claimed by defendant Shrier to be set forth in her answer. Defendant Shrier given ten days to comply with the above order of court." We may infer that in some one of the several and at that time separate actions pending the bonding company had not been made a party defendant. So far as appears from this record, it was a party defendant in the other actions. On April 13, 1914, the defendant owners had filed an answer in the Hillcrest Company case, setting out certain facts concerning the undertaking given by the bonding company, and demanding that the bonding company be made defendant in that action in order to litigate the rights and liabilities of all the parties and for the purpose of avoiding a multiplicity of suits. Presumably it was in response to that answer that the court made the order referred to as above stated, and presumably that is the case in which the bonding company had not been made a party by the plaintiff. It does not appear that the Hillcrest Company did not then or subsequently join in the request that the bonding company be made defendant in the action. By its answer filed in response to the several pleadings against it, the bonding company seems to have raised issues upon the facts necessary to a complete determination of the merits of the action, and, so far as appears, those merits were fully determined by the court in its decision. We are satisfied that appellant was properly before the court, and that it has suffered no prejudice by reason of the order of which it complains.

[2] 2 and 3. The answer of the defendant owners filed in the Hillcrest Company case on the 13th day of April, 1914, was followed by an amendment to said answer, filed May 11, 1914, in which amendment the undertaking made by appellant was set forth, together with the facts occurring subsequent to the execution of the undertaking, and then demanding that appellant be held liable on its bond as against said claims of lien to the full extent of $5,000. We do not agree with the contention of appellant that the defendant owners, not having paid any of the claims against the property, therefore had no right to call upon appellant to pay as for the default of the contractor until such default had been established by a separate judgment and the owners had been required to pay out moneys on account of such default. "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves." Code Civ. Proc., § 578. It appears to us that the judgment rendered against appellant appropriately determines the ultimate rights existing between appellant and defendant owners. The owners had fully performed their contract and paid the contractor in full for the building. Nevertheless, lien claims were being asserted against the property of the owners by reason of default on the part of the contractor for whom appellant had become surety. Upon enforcement of these liens the property of the owners would be sold, and they would have no recourse except against the contractor and upon the undertaking made by appellant. Appellant has been given every opportunity to defend against these claimed liens, but, nevertheless, the liens were legally established by this judgment. Every right which appellant could have in a separate action against it by the owners of the property to recover on the undertaking has been preserved to appellant in this action. Our attention has not been drawn to any decision by a court of this state determining this point. The case of Massachusetts Bonding & Insurance Co. v. Realty Trust Co., 137 Ga. 693, 73 S. E. 1053, cited by respondents here, appears to sustain their contention. It was there held by the Supreme Court of Georgia that for the purpose of avoiding vexatious delays and a multiplicity of suits where there are numerous lien claims arising out of a building contract, equity will take cognizance and settle all the matters in one proceeding, and the owner may have relief against the surety on the contractor's bond, without first discharging

the lien. "By bringing the lienors into the case their rights will be fixed as against the plaintiff, and at the same time the extent of liability of the surety and its principal will be fixed."

[3] 4. Assuming a variance between the Fruer claim of lien and the contract concerning the same as proved and found by the court, the effect of the court's error in making full allowance of that claim was not such as to increase the amount of the allowance more than $190 above the correct amount; but, after making this deduction, the total amount of the judgment for the lien claims against respondent owners (including interest and expense for filing liens) would be in excess of the sum of $5,000, the penalty named in the bond. Therefore this error, if there was any error in the amount allowed on the Fruer claim, is without importance to appellant.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

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41 Cal. App. 776

OPELT v. AL G. BARNES CO. (Civ. 2668.)

(District Court of Appeal, First District, Division 1, California. June 27, 1919.)

1. PLEADING 🔑35 — SURPLUSAGE — PERSONAL INJURY ACTION.

The complaint for personal injury from a leopard in a circus being predicated on the keeping of a vicious and dangerous animal, known to defendant to be such, would have been sufficient without allegation of negligence, so that any averment thereof may be treated as surplusage.

2. ANIMALS 🔑69 — KEEPING DANGEROUS ANIMALS—DUTY TO GUARD.

The owner of a leopard, knowing it was untamed, vicious, and dangerous, was bound to so guard it as absolutely to prevent occurrence of injury to others through such vicious acts as it would naturally be inclined to commit.

3. ANIMALS 🔑71 — PERSONAL INJURY — CONTRIBUTORY NEGLIGENCE.

If one injured by an animal, wild, vicious, and dangerous to the knowledge of its owner, imprudently or negligently placed himself in a position to be attacked, or by his own negligence contributed to his injury, the owner may be exonerated.

4. ANIMALS 🔑74(5) — INJURY FROM WILD ANIMAL—WANT OF CARE BY INFANT—EVIDENCE.

Evidence *held* to sustain finding that plaintiff, a boy of 10½ years, injured at a circus by a leopard reaching out a paw between bars of its cage, when he went within the guard rope, failed to use ordinary care.

5. APPEAL AND ERROR 🔑991 — REVIEW — QUESTION OF FACT.

What was the capacity of a child of tender years to exercise care in avoiding a particular danger, and whether he comported himself with the care and prudence due from one of his years and experience, is a question of fact for the triers thereof, and not for the court on appeal.

6. ANIMALS 🔑74(8) — CONTRIBUTORY NEGLIGENCE OF INFANT—AGE.

It cannot be said as matter of law at what age a boy would be possessed of such intelligence, foresight, and judgment as to be charged with negligence in getting inside the guard rope, close to the cage of a leopard in a circus.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by Luther Opelt against the Al G. Barnes Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Ostrander, Clark & Carey, of Oakland, for appellant.

Reed, Nusbaumer & Bingaman, of Oakland, for respondent.

WASTE, P. J. Plaintiff, by his guardian ad litem, brought this action against defendant for injuries, alleged to have been received by being scratched by a vicious leopard, one of a number of animals kept by defendant corporation in its circus. The animal was securely caged, and was not at large. Defendant had judgment and plaintiff appeals.

Plaintiff, at the time of the accident was a boy of 10½ years of age. On the day in question, having paid the price of admission, he entered the circus to view the animals, and witness the performance in the main tent. He first entered the tent in which the animals were kept in cages, arranged in a row around the circular walls of the inclosure. A guard rope, securely fastened to posts extended entirely along, and in front of, this row of animal cages, about 3 feet from the ground, and placed at such a distance that spectators could not approach within range of possible injury from the animals. This guard rope turned at a right angle from a post, near the passageway from the animal inclosure into the main tent, from which post, about 3 feet in height, it was carried across the end of the row of cages and fastened at a point about 7 feet in height, to a pole supporting the wall of the tent. In the cage nearest to the passageway, and just behind the slanting rope, was the leopard.

After viewing the animals, the plaintiff and his companion started to go into the main tent, the entrance to which they found barred by a rope. Many other people were crowding toward the same place. The boys decided to wait, and turned aside. Their view of the cages was cut off by the crowd, and, there being no obstruction to bar their way, other than the slanting rope referred to, in order to get a better view of the animals they walked under the rope, and into the space between the leopard cage and the side wall of the tent, which space appears to have been about 2 feet wide. While the plaintiff was in this position, the leopard reached his forearm, or paw, between the bars of the cage, which were perpendicular and about 3½ inches apart, and struck the boy's face, inflicting an injury to his right eye.

The court found that the plaintiff was injured solely because he willfully and knowingly, and without cause or excuse, placed himself within reach of the wild animal, which he knew to be ferocious and dangerous, and that the defendant, owner of the circus, was in no way guilty of negligence or lack of care in the premises, either in the keeping or exposing the leopard to view, and that the defendant did not omit to perform any duty in the premises.

[1] Appellant contends that defendant's answer fails to deny plaintiff's allegation of negligence, and that it does not set up any contributory negligence of plaintiff as a defense to the action. The complaint being predicated upon the keeping by defendant of a vicious and dangerous animal, known to defendant to be such, would have been sufficient without alleging negligence on the part of defendant. Congress, etc., Spring Co. v. Edgar, 99 U. S. 645, 25 L. Ed. 487; 3 Corpus Juris, par. 358. Such averment, if made, may properly be treated as surplusage. Corpus Juris, supra. The question of the owner's negligence is not in the case. Clowdis v. Fresno Flume, etc., Co., 118 Cal. at page 321, 50 Pac. 373, 62 Am. St. Rep. 238. However, the answer denies that the injury was caused by or through any negligence of the defendant, and specifically denies each fact which the plaintiff asserts, in his attempt to charge facts showing negligence. It contains certain affirmative allegations tending to negative any claim of negligence charged against defendant. The answer appears to be an express disclaimer of any negligence on the part of the defendant; and pleads that the injury occurred to the plaintiff solely by reason of the plaintiff's negligence, and want of care, in willfully placing himself within the guard rope, and behind the cage. The question of contributory negligence does not appear to have entered into, or to have been an issue of, the case. In other words, as counsel for respondents say in their brief, the defense is based "upon the proposition that the defendant was not negligent in any way, or manner, and that the injury occurred solely by reason of the fault and trespass of the plaintiff."

[2] The answer admits that defendant, and its employés, knew "that the leopard was a wild, untamed animal, of fierce, dangerous, vicious, ferocious character, nature, and disposition." By this admission, defendant charged itself with the duty toward the plaintiff, as well as all other persons, to guard the leopard in such manner as to absolutely prevent the occurrence of an injury to others through such vicious acts of the animal as it would naturally be inclined to commit. Gooding v. Chutes Co., 155 Cal. 620, 102 Pac. 819, 23 L. R. A. (N. S.) 1071, 18 Ann. Cas. 671; Parker v. Cushman, 195 Fed. 715, 117 C. C. A. 71; 3 Corpus Juris, par. 315, and cases cited. The liability of the owner is absolute, in such cases, and he is bound to keep the animal secure, or he must suffer the penalty for his failure to do so, in making compensation for the mischief done, unless it can be shown that the person injured voluntarily, or consciously, did something to bring about the injury. Molloy v. Starin, 191 N. Y. 21, 83 N. E. 588, 16 L. R. A. (N. S.) 445, 14 Ann. Cas. 57. The gist of the action is not the manner of keeping the vicious animal, but the keeping him at all with knowledge of the vicious propensities. Hammond v. Melton, 42 Ill. App. 186. In such instances the owner is an insurer against the acts of the animal, to one who is injured without fault, and the question of the owner's negligence is not in the case. Laverone v. Mangianti, 41 Cal. 138, 10 Am. Rep. 269; Clowdis v. Fresno Flume, etc., Co., supra.

[3] While the burden of the duty to exercise the highest degree of care rested upon defendant, it appears from the above authorities, and many others, to be equally as well established in this class of cases that, if the injured party imprudently, or negligently, places himself in a position to be attacked, or by his own negligence contributes to his injury, the owner of the wild beast may be exonerated from liability. 3 Corpus Juris, par. 315, and cases cited.

[4] In the present case, the court found that the injury to the plaintiff resulted solely by reason of his own fault; that the plaintiff "was a bright, intelligent and alert boy, and was as well able to care for himself as an adult person of average intelligence; that he knew that the leopard was a wild, untamed animal, of fierce, dangerous, vicious, ferocious character, nature, and disposition; that he knew the guard rope was there, and knew its purpose was to prevent spectators from approaching within range of possible injury from the leopard; that he knew that the leopard could reach its paws out through the 3½-inch space between the iron bars composing the cage, in which it was confined; and that he willfully and knowingly placed himself within reach of the animal." If this finding shall be allowed to stand it will be sufficient to support the judgment in the case.

On the stand, the boy testified that he knew that the leopard was dangerous and ferocious, and that the guard rope was placed to keep people away from the animals, because they were dangerous; that he knew the safe place from which to look at the animals would have been on the outside of the rope. He further testified "there was such a crowd of people, that I could not see the animals, so I walked back of the cage." He further testified that he did not know how close to the cage he was when the leopard hit him: that he thought he was far enough from the cage, so that the leopard would not touch him. The boy's companion said to him while they were standing between the wall of the tent and the leopard cage, "Don't go too close." There was evidence, also, that the manager of the show, and the superintendent, were standing about 30 feet away from the leopard cage. They saw the boys go under the rope "and hollered to them." Before they had time to do more than start to get the boys out of the dangerous place, the plaintiff had been hurt. No other guards, or attendants, appear to have been near the scene of the accident. Signs reading: "Danger. Keep Away"—were placed on all of the animal cages.

In view of the testimony in the case, we are of the opinion that we cannot go behind the findings of the court, to the effect that the plaintiff failed to use ordinary care. "Youth is ever the time of heedlessness, of impulsiveness, and of forgetfulness" (Guyer v. Sterling Steam Laundry Co., 171 Cal. 761, 154 Pac. 1057), but the law imposes upon minors the duty of giving such attention to their surroundings, and care to avoid danger, as may fairly and reasonably be expected from persons of their age and capacity. Studer v. Southern Pacific Co., 121 Cal. 400, 53 Pac. 942, 66 Am. St. Rep. 39.

[5, 6] Whether a minor of tender years comports himself with the care and prudence due from one of his years and experience is strictly a question to be determined on the evidence. The question as to the capacity of a particular child at a particular time to exercise care in avoiding a particular danger is one of fact, falling within the province of a jury (or court) to determine. Mayne v. San Diego Electric Ry. Co. (Sup.) 175 Pac. 690, citing Cahill v. Stone & Co., 153 Cal. 571, 96 Pac. 84, 19 L. R. A. (N. S.) 1094, and Consolidated, etc., Ry. Co. v. Carlson, 58 Kan. 66, 48 Pac. 635. We cannot say, as a matter of law, at what age a boy would be possessed of such intelligence, foresight, and judgment as to charge him with negligence in a case like the present. Biggs v. Consolidated, etc., Wire Co., 60 Kan. 223, 56 Pac. 4, 44 L. R. A. 655. The care which a child is required to exercise in such matters is to be determined from the circumstances of the particular case in which his conduct is involved, and under the evidence there presented. Mayne v. San Diego Electric Ry. Co., supra.

We cannot say, as matter of law, that the plaintiff entered into the forbidden space, between the leopard's cage and the wall of the tent, without a full appreciation of the dangers and risk, and without sufficient judgment to know how to avoid them. These matters, and the further question whether or not he duly exercised such judgment as he possessed, were considerations of fact. Foley v. California Horseshoe Co., 115 Cal. 184, 47 Pac. 42, 56 Am. St. Rep. 87. We do not consider the present case such an exceptional one as to present the questions to us as unmixed questions of law to be determined by the court.

Just how far to apply the rule of accountability to a bright, 10 year old boy, at a circus, with the allurement and excitement attendant thereto, and keeping in mind the propensity to curiosity every normal boy possesses, was, no doubt, a matter of grave concern to the trial court, as it has been to us. The court below, having before it all the facts, and witnesses in the case, and particularly having an opportunity to hear the testimony, observe the actions, and determine the intelligence of the injured boy, has determined and announced its conclusion, which we do not feel we may properly reject.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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41 Cal. App. 667

METROPOLITAN LIFE INS. CO. v. DEASY, Auditor, et al. (Civ. 2973.)

(District Court of Appeal, First District, Division 1, California. June 19, 1919. Rehearing Denied by Supreme Court Aug. 18, 1919.)

1. Municipal Corporations 🔑889—Funds—Budget—Judgments.

San Francisco Charter, art. 3, c. 1, §§ 1–5, providing for a budget of amounts estimated to be required for expenses of conducting the public business of the city and county for the ensuing fiscal year, and providing the time of making a tax levy therefor, does not apply to or embrace obligations in form of final judgments.

2. Municipal Corporations 🔑865(2)—Limitations on Indebtedness—Judgments—Constitutional Provisions.

Judgments obtained against municipalities for torts constitute liabilities not within Const. art. 11, § 18, prohibiting cities from incurring liability in excess of the annual income without the assent of two-thirds of the voters.

3. Municipal Corporations 🔑865(2)—Limitation of Indebtedness—Judgments—Levying of Taxes—Validity of Statutes.

St. 1901, p. 794, providing for the payment of final judgments against municipalities, must be construed as constitutional and as applying to judgments not within the provisions of Const.

art. 11, § 18, prohibiting cities from incurring liability in excess of annual income.

4. MUNICIPAL CORPORATIONS ⟹1038 — ENFORCEMENT OF JUDGMENT—COMPLEMENTARY STATUTES.

St. 1901, p. 274, relating to procedure for collection of final judgments against municipalities, is not in conflict with San Francisco Charter, art. 3, c. 11, §§ 1-3, providing for payment of judgments from the surplus fund, the two acts being in effect complementary, so that a judgment may be collected under the former, where the city does not choose to pay it under the latter. Const. art. 11, § 6.

Original petition by the Metropolitan Life Insurance Company, for mandamus to compel Cornelius J. Deasy, as Auditor of the City and County of San Francisco, and others, to certify to the treasurer of said city and county the amount of a certain judgment, interest, and cost obtained by the petitioner against the municipality and remaining unpaid, and have the same included in the budget of expenses and taxes levied for its payment. Writ granted.

Samuel Knight and F. E. Boland, both of San Francisco, for petitioner.

Maurice T. Dooling, Jr., Asst. City Atty., of San Francisco, for respondents.

RICHARDS, J. Application for a writ of mandate directed to the auditor of the city and county of San Francisco, and also to the persons constituting the board of supervisors of said city and county and to the mayor thereof, by the terms of which writ the said auditor shall be commanded to certify to the treasurer of said city and county the fact and amount of a certain judgment for the sum of $29,808.94, and interest and costs, obtained by the petitioner herein against said municipality and remaining unpaid; and by the terms of which writ the said mayor and board of supervisors shall be required to include within the budget of estimated expenses and required finances of said municipality for the ensuing year the amount due upon said judgment, and to levy a tax for the payment of the same, as required by law.

The respondents have appeared to oppose the issuance of said writ upon several grounds to be hereinafter considered.

The facts upon which the petitioner predicates its demand for the issuance of said writ of mandate are undisputed, and are briefly these: On the 1st day of December, 1917, the petitioner herein recovered a judgment against the said city and county of San Francisco for the sum of $29,808.94, together with costs amounting to $112, in an action instituted by it against said municipality for damages arising out of certain alleged injuries to its land and the buildings thereon, occasioned by and during the excavation of a certain tunnel under and along the line of Stockton street therein; the said petitioner not being a party to the proceedings for the construction of such tunnel. This judgment has since the rendition thereof remained unpaid, and was at the time of the application for this writ and still is an existing and unsatisfied judgment in favor of said petitioner and against said municipality. The demands of the petitioner upon the several officials of said city and county named as respondents herein for the taking of the steps alleged by it to be necessary to the levy of a special tax for the liquidation of such judgment have been refused, whereupon it seeks this writ.

[1] The respondents interpose several obstacles to the issuance of the writ. The first of these, standing upon the threshold, is that the application for the writ comes too late for action on the part of the municipal officials during the current year, for the reason that under the provisions of the San Francisco Charter (sections 1 to 5, c. 1, art. 3 thereof) the board of supervisors must, prior to the first Monday of June in each year, make "a budget of the amounts estimated to be required to pay the expenses of conducting the public business of the city and county for the next ensuing fiscal year"; that the time has gone by for the inclusion of the amount of the petitioner's judgment in such budget, and hence that by the express terms of section 5 of said chapter and article of said charter its amount cannot be embraced in the tax levy which, under another section of said charter, is to be made on or before the third Monday of September of each year.

We do not think this objection a valid one against the issuance of this writ. The budget provided for by the provisions of the charter above referred to was evidently not intended to apply to or embrace those obligations of the municipality which are of the nature of stated obligations or liabilities by reason of being either established by law or of being fixed in the form of final judgments. By the very terms of the section providing for said budget the matters to be included therein are the "estimated expenses of conducting the public business of the city and county for the next ensuing fiscal year." Clearly, this refers to those expenditures of the several departments of the municipality which are yet to be made in the course of their current operation, and which require the process of estimation in order to determine the probable cost of conducting the business of the municipality as a going concern. It has no reference to liabilities which do not require estimation and which could not in their nature be affected by the fact that they were or were not included in the budget of the fiscal year. For example, the municipality could not evade its liability to pay the stated salaries of its officials by failing to include these in its budget, or even by failing to embrace them in its tax levy. Lewes v. Widber, 99 Cal. 412, 33 Pac. 1128. The same reasoning applies to those liabilities of the municipality which have ripened into final judgments and which are not otherwise of a nature which would bring them within the prohibition of section 18 of article 11 of the state Constitution as to the fund available for their payment.

[2] This brings us to the next contention of the respondents, which is that the judgment upon which petitioner bases its demand for the issuance of the writ of mandate herein is one which comes within the prohibition of the above section and article of the state Constitution. This contention was, however, disposed of by the Supreme Court in the recent case of City of Long Beach v. Leisenby (Sup.) 179 Pac. 198, wherein it was held that judgments obtained against municipalities for torts constituted liabilities which were not within the contemplation, purpose, or meaning of section 18 of article 11 of the state Constitution.

[3] Having disposed of these two contentions, we approach the main obstacle which the respondents urge against the issuance of this writ, which is, in substance, that in the matter of the payment of whatever judgments may be obtained against the city and county of San Francisco its charter has provided a means for their liquidation which is exclusive, and that, the petitioner herein not being able by proper averment or proof to show that the means thus provided is available for the satisfaction of its judgment, it has no other present remedy. In support of this contention we are directed to the provisions of sections 1, 2, and 3 of chapter 11 of article 3 of the San Francisco charter, which provide for the apportionment of the revenues of the municipality into separate funds, which are to be drawn upon for the payment of its various sorts of liabilities. Among these is the "surplus fund," which shall consist of the moneys remaining at the end of any fiscal year in any other of these funds after all valid demands against said other funds incurred within the fiscal year have been paid and discharged. Section 3 of said article and chapter then provides as follows:

> "The surplus fund shall be used for the purposes and in the order following:
>
> "1. In the payment of any final judgment against the city and county.
>
> "2. In liquidation and extinguishment under such regulations as the supervisors may adopt of any outstanding funded debt of the city and county;
>
> "3. To be carried over and apportioned among the funds and used in the ensuing fiscal year as part of the income and revenue thereof."

It appears from the record herein that there are and have been since the rendition of the petitioner's judgment herein no money in the surplus fund of the city and county of San Francisco; and, this being so, the respondents claim that the petitioner has by law no other means by which its judgment can be paid.

In answer to this contention the petitioner falls back upon the provisions of an act of the Legislature approved March 23, 1901, entitled, "An act to provide for the payment of judgments against counties, cities, cities and counties and towns." Stats. 1901, p. 794. Said act provides that all final judgments then existing or thereafter obtained against any of the enumerated municipalities shall be paid by the treasurer thereof in the following manner: The clerk thereof shall file with the auditor and furnish the board of supervisors or other governing body of such municipality authorized by law to levy taxes a complete list of all final judgments against such municipality of record in his office at least 15 days before the day on which the tax levy must by law be made; the auditor shall examine and audit the judgments so reported by the clerk, and certify the amount of the same to the treasurer within five days after the list of such judgments has been filed by the clerk with him, and thereupon the board of supervisors or other governing body of the municipality authorized by law to levy taxes must include in the tax levy for the next fiscal year a rate or sum sufficient to pay such final judgments as are thus found to exist against the said municipality. The act permits the tax-levying body to spread the payment of such judgments over a series of years, not exceeding ten, by providing for an aliquot or fractional part of the amounts due upon such judgments to be levied, collected, and paid thereon each year for that period of time. It is upon the provisions of this statute that the petitioner herein places its main reliance for its right to the writ, and has framed its application herein accordingly.

The respondents, on the other hand, urge several reasons why the terms of this statute cannot be availed of by the petitioner in furtherance of its demand for a writ of mandate herein. It is claimed by the respondents that the statute is unconstitutional because, being general in its terms, it is in contravention of section 18 of article 11 of the Constitution in so far as it might be held to include judgments against municipalities which are based upon contracts the liability upon which must be payable and paid out of the funds of the fiscal year in which the obligation was incurred. We fail to perceive, however, upon what theory the respondents can be heard to urge this contention, since the judgment to the payment of which the object is not the class coming within the prohibitive terms of said article and section of the Constitution. We must assume that the Legislature, in the adoption of the act of 1901 above referred to.

had in mind the said provision of the state Constitution, and intended the operation of the act to be confined to such final judgments against municipalities as were legally payable out of the revenues of succeeding years; and we do not understand that the case of Arthur v. City of Petaluma, 175 Cal. 216, 165 Pac. 698, contains anything which militates against this view.

[4] The next contention of the respondents is that, even if the statute in question is not obnoxious to the foregoing provision of the state Constitution, it has no application to the city and county of San Francisco because it is in conflict with the provisions of its charter above set forth, providing for the creation of the "surplus fund" out of which final judgments against said city and county shall be paid. In making this contention the respondents apparently rely upon the provisions of article 11, section 6, of the Constitution, which declares that in respect to municipal affairs the charters of municipalities shall prevail, and that as to such matters they shall not be subject to or controlled by general laws. Conceding, for the sake of the argument, although not deciding, that the subject of the payment of final judgments against municipalities is a municipal affair, we are still of the opinion that the clauses of the charter of the city and county of San Francisco providing for the creation of a "surplus fund" out of which final judgments obtained against said municipality shall be payable, are not in conflict with the provisions of the statute of 1901 so as to prevent us from making application of its terms and requirements to the instant case. We are aided in reaching this conclusion by the reasoning of the Supreme Court in the case of City of Long Beach v. Leisenby, supra. In that case the court had under consideration the question whether the statute of 1897 (St. 1897, p. 75), as amended by an act of the Legislature approved March 12, 1901 (Stats. 1901, p. 274), was repealed by the passage during the same session of the Legislature of the later act approved March 23, 1901, which is the act in question in the instant case. The earlier act provided for the funding of judgments obtained against certain municipalities through the voluntary action of the governing bodies of such municipalities in providing for the issuance of long term bonds for the eventual payment of such judgments. The later act provided, as we have seen, for the compulsory payment of such judgments through the levy of special taxes. In comparing these two acts the Supreme Court pointed out that they were not in conflict, for the reason that by the former act the governing bodies of the municipalities affected by it were invested with a discretion as to whether or not they would adopt the funding plan of paying the outstanding indebtedness of such municipalities, the exercise of which discretion could not be compelled by the judgment creditor, while the later act was compulsory in its nature, and imposed upon the official body invested with the power to levy taxes the duty of making a special tax levy to pay judgments against the municipality, the performance of which duty the judgment creditor could compel by an appropriate writ. These two acts were thus stated to be "in effect complementary in providing a twofold means by which municipalities may elect, or if they do not do so, may be compelled to pay such of their debts as are payable out of revenues other than those of the year in which the obligation was incurred." This reasoning applies in our opinion to the situation presented in the instant case. The city charter, through its provisions as to the "surplus fund" as the source from which judgments obtained against the municipality may be paid, leaves the matter of creating or replenishing such a fund entirely in the discretion of its various boards and officials in charge of the replenishment and disbursement of the revenues of the municipality distributed among its other funds. If they do not choose to have left on hand a surplus which would flow into the surplus fund, the judgment creditor is remediless, in so far as the charter is concerned, to compel the creation or replenishment of the only fund from which his judgment might be satisfied. The statute in question steps in at this point to provide a means by which municipalities may be compelled to liquidate their just debts. The view that the charter and statute are not in conflict is one which is in accord with the principle of justice and fair dealing which imposes upon municipalities the same moral and legal duty which rests upon individuals to pay their just obligations either voluntarily or upon compulsion. This equal duty was well exemplified in the early case of McCracken v. City of San Francisco, 16 Cal. 591, in which Mr. Justice Field, in dealing with certain restrictive provisions of the charter of San Francisco then in operation, says:

> "In addition to this we are clear that the provision refers only to the acts or contracts of the city, and not to liabilities which the law may cast upon her. It was intended to restrain extravagant expenditures of the public moneys; not to justify the detention of the property of her citizens which she may have unlawfully obtained. The plaintiff claims that the city has got his money without any consideration—by mistake—and has appropriated it to municipal purposes, and he insists that she is responsible to him for it, because the law—not her contract or permission—renders her liable. Her liability in this respect is independent of the restraining clauses of the charter; it arises from the obligation to do justice—to restore what belongs to others—which rests upon all per-

sons, whether natural or artificial. And it may well be doubted whether it would be competent for the Legislature to exempt the city, any more than private individuals, from liability under circumstances of this character. Suppose, for example, that the city should recover judgment against an individual for $100,000, and collect the money upon execution, and upon appeal the judgment should be reversed; would it be pretended that the money could not afterwards be recovered? * * * Suppose, again, the city should neglect to keep the streets in repair, and an individual should be injured in consequence—should break his leg or be otherwise crippled—could she allege her insolvency against his claim for damages? Would her pecuniary condition be an answer for the neglect of every duty, legal and moral? If this were so, she would be the most irresponsible corporation on earth, and her treasury in many instances but a receptacle for others' property without possibility of restitution. The truth is there is no such exemption from liability on her part. The same obligations to do justice rest upon her as rest upon individuals. She cannot appropriate to her own use the property of others and screen herself from responsibility upon any pretense of excessive indebtedness. The law casts upon her the legal liability and the moral duty to make restitution. Admitting that the charter restricts her power to incur liabilities by her own acts—though, as already shown, its provision in this respect is merely directory—it still leaves her liable according to the general law. The restriction can in any event only apply to liabilities dependent for their creation upon the volition of the common council, and hence does not include the liabilities arising from torts, or trespasses or mistakes."

Our conclusion upon this branch of the case is therefore that the provisions of the statute of 1901 upon which the petitioner relies are not in conflict with the provisions of the San Francisco charter with relation to liquidation of judgments out of the surplus fund; nor, for the same or still better reasons, do we think they are in conflict with those other provisions of the charter to which we are referred by the respondents and which relate to the auditing and payment of demands against the treasury, these provisions having reference, in our opinion, only to such obligations and demands as the officials charged with the approval thereof have the power to create, or the discretion to audit, approve and allow.

It follows from the foregoing discussion that the petitioner herein is entitled to the issuance of a writ of mandate conformable to the prayer of its petition and to the terms of the statute upon which its application for such writ is predicated. Let the writ issue accordingly.

We concur: WASTE, P. J.; KERRIGAN, J.

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41 Cal. App. 688

CHAPUIS v. PESANTE. (Civ. 2787.)

(District Court of Appeal, First District, Division 2, California. June 21, 1919.)

Appeal and Error 🔑422—Notice of Appeal—Motion to Amend.

Where plaintiff's notice of appeal conformed precisely to the requirements of Code Civ. Proc. § 941b, and required no amendment, her motion to amend the notice to embody a notice to the clerk, requesting the transcript of the testimony required by section 953a, under which plaintiff had intended to perfect her appeal, was properly denied.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by Marie Chapuis against Peter Pesante. From an order denying plaintiff's motion to amend her notice of appeal, she appeals. Order affirmed.

Brun, Fairchild & Shields, of San Francisco, for appellant.

Zabala & Sargent, of Salinas, for respondent.

LANGDON, P. J. This is an appeal from an order of the superior court for the county of Monterey denying plaintiff's motion to amend her notice of appeal. Judgment was entered for the defendant on December 11, 1917. A notice of appeal was filed with the clerk on January 3, 1918. It appears that the plaintiff and appellant intended to perfect her appeal in accordance with the provisions of section 953a, Code of Civil Procedure, but neglected to file, within the required time, the notice to the clerk requesting the transcript of the testimony, etc., as required by that section. Appellant contends that she should have been permitted to amend her notice of appeal so that it would embody this notice to the clerk requesting the transcript.

We cannot see how the motion of the plaintiff could have been granted. The notice of appeal in the record conforms precisely to the requirements of section 941b, Code of Civil Procedure, and required no amendment whatsoever. It could not be amended to include something entirely disconnected from it. It has been decided in the case of Lang v. Lilley & Thurston Co., 161 Cal. 295, 119 Pac. 100, that the notice of appeal is not connected with sections 953a, 953b, or 953c of the Code of Civil Procedure, and that these sections are entirely independent of sections 941a, 941b, and 941c, Code of Civil Procedure. See, also, opinion of Supreme Court upon denying rehearing in the case of Smith v. Jaccard, 20 Cal. App. 280, 287, 128 Pac. 1023, 1026; Garner v. Meizel, 22 Cal. App. 256, 257, 133 Pac. 1165.

As pointed out by the respondent, the affidavit filed by the plaintiff in support of her motion does not relate to reasons for amending the notice of appeal, but is merely an explanation of why a request to the clerk for the transcript was not filed in time.

The order appealed from is affirmed.

We concur: HAVEN, J.; BRITTAIN, J.

41 Cal. App. 652

McCLURE v. SOUTHERN PAC. CO.

(Civ. 2636.)

(District Court of Appeal, Second District, Division 1, California. June 18, 1919.)

1. Railroads 🔑348(4) — Crossing Accident—Sufficiency of Evidence—Negligence of Railroad.

In action for death of an occupant of an automobile struck by a train, pushed around a curve without the warning signals required by Civ. Code, § 486, and without attaching the air brakes, evidence *held* to warrant a finding that railroad was negligent.

2. Railroads 🔑350(17) — Crossing Accident—Questions for Jury—Failure to Stop, Look, and Listen — Contributory Negligence.

Where a railroad track was obscured because it was constructed in a narrow cut and was covered with dirt at the crossing, and the position of crossing sign was such that it could not be seen by the occupants of an automobile, who were strangers unaware of railroad's existence, the question whether their failure to stop, look, and listen, constituted contributory negligence was for the jury.

3. Appeal and Error 🔑999(1)—Review—Verdict.

Jury's conclusion upon jury question cannot be disturbed by Court of Appeal.

4. Negligence 🔑74—Contributory Negligence—Effort to Rescue Person from Peril.

One is not guilty of contributory negligence in attempting to rescue another placed in peril by the negligent act of third person, unless he acts with a recklessness unwarranted by the judgment of a prudent man.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Charles B. McClure as administrator of the estate of Robert W. Guard, deceased, against the Southern Pacific Company. From judgment for plaintiff and from order denying motion for new trial, defendant appeals. Affirmed.

Henry T. Gage, W. I. Foley, W. I. Gilbert, and C. F. Cable, all of Los Angeles, for appellant.

John E. Biby, of Los Angeles, for respondent.

SHAW, J. In this action plaintiff, as administrator, sought to recover damages for the death of his intestate, Robert W. Guard, which is alleged to have been caused by the negligence of defendant in the maintenance of a railway track over which it at the time carelessly and negligently operated a train which collided with the deceased and an automobile in which he was traveling. In addition to denials, the answer alleged contributory negligence on the part of deceased.

A jury before which the case was tried rendered a verdict in favor of plaintiff, in whose favor judgment was entered, and from which, and an order denying defendant's motion for a new trial, this appeal is prosecuted.

The sole contention made in appellant's brief is that the evidence is insufficient to justify the verdict of the jury.

The accident occurred at a point in that part of the city of Los Angeles known as San Pedro, where defendant's railway track crosses Fourteenth street at its intersection with a highway extending north and south known as Beacon street. The railway track, following the line of a curve and over an elevation, enters Beacon street on the east side thereof at a point north of Fourteenth street and south of Thirteenth street, the roadbed being in a cut of considerable depth, and Fourteenth street crosses the track in a like cut, down to which the surface of the roadway of Beacon street leads, and from which last-mentioned street the railway track was not visible to one traveling on Beacon street parallel to the track. There were no telegraph poles or other structures, other than a crossing sign placed on a high bank, which stood some 25 feet above the surface of the crossing, to indicate the presence of the railway track to those unacquainted with the fact. Fourteenth street was rough and broken, due to work thereon, and recent rains had washed the mud and dirt down upon and covered the track, not often used, at the crossing. On the day in question the deceased, with a Mr. Scherrer, the latter's wife and three others, as guests of Mr. Scott, who was driving the automobile in which they were traveling, were out sight-seeing. All of them were strangers in the vicinity. Scott upon reaching Thirteenth street, turned east thereon to Beacon street, along which he drove south to Fourteenth street, at which point, without stopping to look or listen, he turned east across the intersecting cut in which defendant's railway track was constructed. The top of the automobile was up, and, due to its height above the roadway, he did not see the crossing sign, and, owing to the fact that the cut was narrow, the banks high, and the track covered with mud, neither he nor any of the party were made aware of the railway track until he stopped his car thereon with a view of ascertaining the condition of the road and going back. At the point where he stopped, the railway track, the existence of which they then for the first time discovered, was, to the north, visible for 180 or 200 feet, and no cars were in sight, and nothing to indicate their approach. Immediately thereafter, attracted by the cries of some men to get off the track, they looked to the north, and saw the front car of a train, composed of 18 flat cars, backing down upon them at a speed of four or five miles per hour. Two men, who were in the front car, yelled to them to get off the track, and at the same time signaled the engineer to stop the train. Scott attempted to start his auto, but by some misdirected effort killed the engine, whereupon, saying his engine was dead, he told the members of his party to jump, which advice all of them, except Mrs. Scherrer, an elderly, stout woman, immediately acted upon. In attempting to get Mrs. Scherrer out of the car, Guard was struck by the approaching flat car, and both he and Mrs. Scherrer received injuries alleged to have caused their death. Owing to the curved track and hill over which the train was being pushed, the engine was not at that point in sight of the two men on the approaching flat car, and in order to reach the engineer the signals given by them to stop the train had to be relayed by a man some five or six cars in front of the engine. No warning by bell or whistle was given, as required by section 486, Civil Code, and, although the train was equipped with air brakes, they were not attached. Nevertheless, the engineer testified he could and did stop the train within 15 or 20 feet after receiving the signal so to do. There is evidence that the man whose duty it was under the circumstances to receive and transmit the signals, was sitting down, looking to the west, and hence did not get the signals so frantically given by the men on the front car, some 480 feet distant from him. But the engineer acted upon signals from a bystander near the track, who witnessed the dangerous situation of the auto party, and stopped the train some 30 feet beyond the point where it collided with the automobile.

[1] From all the circumstances surrounding the case and the foregoing facts which the evidence tended to establish the jury might very properly have concluded that defendant was chargeable with negligence; indeed, counsel for appellant omit any serious discussion of this point, but insist that, for the reason that the railway track in itself was a warning of danger (Chrissinger v. Southern Pacific Co., 169 Cal. 619, 149 Pac. 175), and that proceeding to cross the same without stopping to look and listen constituted negligence not only on the part of Scott, the driver of the automobile, but also of deceased. Loftus v. Pacific Electric Ry. Co., 166 Cal. 464, 137 Pac. 34. Conceding that it was the duty of Guard, notwithstanding the fact that he, as a guest of Scott, was a passenger in the automobile, to exercise reasonable care for his own safety (Herbert v. Southern Pacific Co., 121 Cal. 227, 53 Pac. 651; Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 134 Pac. 709; Mittelsdorfer v. West Jersey, etc., R. Co., 77 N. J. Law, 698, 73 Atl. 538.), we are of the opinion that, under the circumstances shown, both deceased and the driver were excusable for not complying with the rule. They were all strangers in the vicinity and unaware of the existence of the railway. There was nothing to indicate its presence at the crossing. The position of the crossing sign was such that it could not be seen by members of the party. The track, constructed within the banks of a narrow cut, was, by reason of the manner of its construction and maintenance, covered with dirt and mud so that it was not visible. No warning by bell or whistle was given, and no train at the time was in sight.

[2, 3] Upon these facts and the inferences to be drawn therefrom, the question as to whether neglect to "stop and look and listen" constituted contributory negligence was clearly one for the determination of the jury, and its conclusion thereon cannot be disturbed by this court on review. It cannot be said as a matter of law that a stranger traveling upon a highway over which, unknown to him, a railway track crosses, is, by reason of his failure to stop and look and listen, guilty of negligence, where such track is obscured and there is nothing to indicate its presence or warn him of its existence.

[4] While concededly deceased could have escaped except for his efforts to save the life of Mrs. Scherrer, it is not claimed that he acted with a recklessness unwarranted by the judgment of a prudent man, and it is only in such case that one, in attempting to rescue another placed in peril by the negligent act of a third person, can be said to be guilty of contributory negligence. Saylor v. Parsons, 122 Iowa, 679, 98 N. W. 500, 64 L. R. A. 542, 101 Am. St. Rep. 283; Becker v. L. & N. Ry. Co., 110 Ky. 474, 61 S. W. 997, 53 L. R. A. 267, 96 Am. St. Rep. 459.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

41 Cal. App. 793

SCHERRER v. SOUTHERN PAC. CO.

(Civ. 2637.)

(District Court of Appeal, Second District, Division 1, California. June 18, 1919.)

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Jacob Scherrer against the Southern Pacific Company. From judgment rendered and from order denying motion for new trial defendant appeals. Affirmed.

Henry T. Gage, W. I. Foley, W. I. Gilbert, and C. F. Cable, all of Los Angeles, for appellant.

John E. Biby, of Los Angeles, for respondent.

PER CURIAM. Appeal by defendant from a judgment and from an order denying a motion for new trial.

The plaintiff sued to recover damages for the death of Leontine Scherrer, his wife, which he alleged was caused through the negligent acts of defendant. The wife was riding in an automobile which was struck by moving cars on a track of the defendant railway company, by reason of which collision she suffered injuries which caused her death. The questions argued in the briefs in this case are the same as those presented in McClure v. Southern Pacific Co., Civ. No. 2636, 183 Pac. 248, which was an action for damages growing out of the same accident. It will be unnecessary to here repeat the discussion of those questions, and upon the authority of the conclusions expressed in the McClure Case, the judgment and order herein appealed from are affirmed.

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41 Cal. App. 770

RYAN v. INYO CERRO GORDO MINING & POWER CO. et al. (Civ. 2594.)

(District Court of Appeal, First District, Division 2, California. June 26, 1919.)

1. CORPORATIONS ⚷52—RESIDENCE.

The residence of a corporation is in the state under whose laws it is incorporated.

2. CORPORATIONS ⚷666 — "RESIDENCE" OF FOREIGN CORPORATION—VENUE.

A foreign corporation doing business in California, after complying with Civ. Code, § 408, does not establish a "residence" in any particular county, such as is contemplated by the provisions of Code Civ. Proc. relating to the place of trial.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Residence.]

3. CORPORATIONS ⚷666—ACTIONS AGAINST NONRESIDENTS—STATUTE.

A foreign corporation, a nonresident of the state, is not entitled to have an action against it for personal injuries tried in the county where the injury occurred; Code Civ. Proc. § 395, in so far as pertinent, not applying to nonresidents, and not limiting the rights of plaintiffs against nonresidents.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by H. S. Ryan against the Inyo Cerro Gordo Mining & Power Company, the Cerro Gordo Mines Company, and another. From an order denying a motion of the Cerro Gordo Mines Company for change of venue, it appeals. Affirmed.

See, also, 183 Pac. 251.

F. J. Hambly, of San Jose, S. E. Vermilyea, of Los Angeles, and A. H. Swallow, of Bishop, for appellant.

Louis Oneal, of San Jose, for respondent.

LANGDON, P. J. This is an appeal from an order of the superior court of the state of California, in and for the county of Santa Clara, denying the motion of the defendant Cerro Gordo Mines Company for a change of venue from Santa Clara to Inyo county.

The action was one to recover damages for personal injuries alleged to have been sustained by the plaintiff arising out of an alleged accident occurring at the mining properties of the defendant in Inyo county, Cal. Appellant's motion was made upon the grounds that it was a resident of Inyo county and entitled to be sued in said county, and that the cause of action arose in Inyo county; also upon the ground that the defendant Edward Campbell was a resident of Inyo county. Prior to the hearing of the motion, the plaintiff dismissed the action as to the defendant Campbell, and the record presents but one question for our determination: Has the appellant, a corporation organized and existing under the laws of the state of Arizona, acquired a residence in the county of Inyo, state of California? It is urged by appellant that by reason of having complied with the provisions of section 408, Civil Code (in force at the time of the alleged injury and at the time of the motion), requiring a foreign corporation to file a certified copy of its articles of incorporation with the secretary of state and with the county clerk of the county where its principal place of business is located and where it owns property, appellant became a resident of Inyo county, the county where its principal place of business in this state is located, so as to be entitled to have this action transferred to that county for trial.

[1, 2] The residence of a corporation is in the state under whose laws it is incorporated. 1 Cook on Corporations (7th Ed.) § 1, p. 3; section 757, Id.; Boyer v. Northern Pac. Ry. Co., 8 Idaho, 74, 66 Pac. 826, at page 827, 70 L. R. A. 691; Thomas v. Placerville G. Q. M. Co., 65 Cal. 600, 4 Pac. 641; Rains v. Diamond Match Co., 171 Cal. 326, 153 Pac. 239; Waechter v. Atchison, etc., Ry. Co., 10 Cal. App. 70, 101 Pac. 41; St. L. & S. F. Ry. Co. v. James, 161 U. S. 545, 16 Sup. Ct.

621, 40 L. Ed. 802. A foreign corporation doing business in this state does not establish a residence in any particular county, such as is contemplated by the provisions of the Code of Civil Procedure relating to the place of trial. Thomas v. Placerville G. Q. M. Co., supra; Waechter v. Atchison, T. & S. F. Ry. Co., supra; Rains v. Diamond Match Co., 171 Cal. 326, 153 Pac. 239.

Compliance with section 408, Civil Code, does not give a foreign corporation a residence in this state, or give it the rights of a domestic corporation in regard to the place of trial of actions. Waechter v. Atchison, etc., Ry. Co., 10 Cal. App. at page 74, 101 Pac. 41. Although the language with reference to this question in the last-cited case is dictum, the reasoning in the other decisions cited herein clearly applies to this question. In the case of Boyer v. Northern Pac. Ry. Co., supra, the Supreme Court of Idaho considered almost precisely the same question. In that case the corporation designated an agent for the service of process and its principal place of business in the state, under a statute requiring such designation, and claimed that it thereby acquired a residence at such principal place of business entitling it to be sued at the place of its residence under a statute similar to our statute covering the same matter. The court held that both upon principle and authority private corporations are residents of the state in which they are created; that they have, and can have, but one domicile, the state of their birth, which is fixed by their articles of incorporation. They may migrate into other countries and jurisdictions for the purpose of business, yet so far as jurisdiction of courts is concerned, they are treated, both by our federal courts and by our state courts, as residents of the state in which they are created and nonresidents of other states.

In the case of Jenkins v. Cal. Stage Co., 22 Cal. 538, one of the cases relied upon by appellant, it does not appear from the opinion whether the court was considering a domestic or a foreign corporation. The case of C. S. R. R. Co. v. S. P. R. R. Co., 65 Cal. 394, 4 Pac. 344, which overruled the Jenkins Case, also does not state whether the question under consideration related to domestic or foreign corporations, but the language in that case is sufficiently broad to embrace both classes of corporations. However, the case of Cohn v. Cen. Pac. R. R. Co., 71 Cal. 488, 12 Pac. 498, also cited by appellant, and which it urges reaffirmed the Jenkins Case, certainly only reaffirms that case in so far as it applies to domestic corporations. For in the Cohn Case, it is said that the question whether a domestic corporation had any place of residence in the state where it was entitled, as a matter of right, to a trial of a suit brought against it in another county, did not necessarily arise in the case of C. S. R. R. Co. v. S. P. R. R. Co., supra, and therefore that case does not overrule the Jenkins Case, and that therefore the Cohn Case is decided upon the authority of the Jenkins Case. It is apparent, then, that the court in construing the Jenkins Case, and in reaffirming it, limited the application of this rule to domestic corporations.

As stated in C. S. R. R. Co. v. S. P. R. R. Co., supra, there is no statute in this state defining the place of residence of a corporation. A line of judicial decisions seems to have settled the matter, however, in regard to domestic corporations. With respect to foreign corporations, we find no authority for extending to them the rule applied to domestic corporations.

[3] Our conclusion, as above stated, also settles the contention of appellant that it is entitled to have the action tried in Inyo county because such county is the place where the injury occurred. If the appellant is a nonresident, this contention is without merit, because the case of Rains v. Diamond Match Co., 171 Cal. 326, 153 Pac. 239, holds that the portion of section 395, Code of Civil Procedure, relied upon by appellant, does not apply to nonresidents, and does not limit the rights of a plaintiff against a nonresident.

The order appealed from is affirmed.

We concur: HAVEN, J.; BRITTAIN, J.

41 Cal. App. 758

RYAN v. INYO CERRO GORDO MINING & POWER CO. et al. (Civ. 2882.)

(District Court of Appeal, First District, Division 2, California. June 26, 1919.)

1. Venue 🔑52(1) — Change — Convenience of Witnesses—Discretion of Court.

In a woman's action for personal injuries against two mining companies and an individual, denial of the motion of one mining company for change of venue on account of convenience of witnesses and the ends of justice *held* not an abuse of the discretion of the trial court.

2. Appeal and Error 🔑965—Change of Venue—Convenience of Witnesses—Discretion of Court.

The granting or denial of motion for change of venue for convenience of witnesses will be disturbed only when an abuse of discretion is clear.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by H. S. Ryan against the Inyo Cerro Gordo Mining & Power Company, the Cerro Gordo Mines Company, and another. From an order denying the motion of the

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Cerro Gordo Mines Company for change of venue, it appeals. Affirmed.

See, also, 183 Pac. 250.

F. J. Hambly, of San Jose, S. E. Vermilyea, of Los Angeles, and A. H. Swallow, of Bishop, for appellant.

Louis Oneal, of San Jose, for respondent.

LANGDON, P. J. This is an appeal from an order of the superior court of the state of California, in and for the county of Santa Clara, denying the motion of defendant Cerro Gordo Mines Company for a change of venue from the county of Santa Clara to the county of Inyo. Said motion was made while an appeal was pending from an order denying a similar motion of the present appellant based upon other grounds. The action was brought to recover damages for personal injuries alleged to have been sustained by plaintiff arising out of an alleged accident occurring at the mining properties of the defendant Cerro Gordo Mines Company, in Inyo county, Cal., on July 22, 1916. Defendant's motion was made upon the ground that the convenience of witnesses and the ends of justice would be promoted by such change in the place of trial.

The evidence contained in the bill of exceptions consists of the complaint and answer and affidavits and counter affidavits. The complaint alleges that at all the times mentioned therein the defendant companies were in possession of certain real property situated in the county of Inyo, state of California, which property said companies worked and operated for mining purposes; that at all times material to this action the defendants had and maintained on said property, for the purpose of carrying and transporting ore from said defendants' slag dumps to their ore bins, what is known as a jig back, consisting of two wire cables, 1 inch in diameter, stretched over and laid upon supports about 15 feet from the ground between said slag dumps and ore bins; that said wire cables are parallel and formed a track about 30 inches in width, upon and over which said defendants ran and operated a car for the purpose of carrying ore from said slag dumps to said ore bins; that said car is pulled and propelled by means of a ½-inch wire cable, one end of which is attached to said car and the other end to the drum of a gasoline engine belonging to said defendants; that said jig back or cable track crosses over and above the public highway running between the towns of Keeler and Cerro Gordo, in said county of Inyo, which road or highway is the only public highway between said towns, and said ore car is operated upon said track where same crosses said highway; that on July 22, 1916, plaintiff was riding on a burro and traveling on said public road and it was necessary for plaintiff to pass and travel over said road where said cable track or jig back crossed said road as aforesaid; that while plaintiff was traveling over said road at the point where same was crossed by said cable track, and while said defendant John Doe was in charge of the engine which propelled the ore car, said defendants carelessly and negligently operated said engine and the drum thereof, so that the ½-inch cable which was attached to and pulled said ore car became slack and dropped from the level of said track down upon plaintiff with great force and violence causing serious injury to her. The answer denies all the material allegations of the complaint, and alleges that if any injuries were suffered by plaintiff such injuries were caused by her failure to exercise ordinary care. It thus appears that some of the important issues are as to the ownership of the machinery or appliances causing the alleged injury, the character of the place where the alleged injury occurred, the negligence of the plaintiff, the negligence of the defendants in operating the said machinery and appliances, and the nature and character of the injuries to plaintiff.

Defendant and appellant sets out in its affidavit the names of 33 witnesses, who it alleges are material and necessary witnesses, all of whom reside in Inyo county, the place where the cause of action arose, and alleges that if the trial is had in said county said witnesses will be produced by the defendant and appellant; that if the action is tried in Santa Clara county said witnesses would have to travel over 500 miles for the trial, and the loss of time and expense incident to said journey would preclude their attendance; that said witnesses cannot and will not attend the trial if had in Santa Clara county, and the defendant, in the event of a trial in Santa Clara county, would be compelled to take depositions of such witnesses, and defendant cannot have a fair trial under such circumstances; that there are no other witnesses residing outside of Inyo county by whom the defendant can prove the same facts which can be proven by said witnesses. Defendant sets out in detail the facts it expects to prove by said witnesses, which evidence relates to the ownership of the machinery alleged to have caused the injury; that the accident did not occur upon any public road or crossing; that the machinery and appliances were being carefully and properly operated at the time of the alleged accident; that said machinery and apparatus were properly constructed and were in good working condition at the time of the alleged accident; that the jig back was perfectly visible to plaintiff at the time of the accident, and that said plaintiff stopped under said machine at a place where there was no highway or road and at a point more than 200 feet from where the plaintiff alleges in her complaint the accident occurred; that the cable mentioned in the complaint did not drop upon or strike plaintiff or drag her from her burro; that various persons saw plaintiff immediately after the accident and observed her closely and saw no marks, bruises, lacerations, or other signs of injury upon her person; that certain persons saw plaintiff daily between July 29, 1916, and August 11, 1916, and knew her physical condition, and knew that there were no marks or bruises upon her body during that time; that the physician who examined plaintiff on the afternoon of the alleged accident found no marks, bruises, or contusions on her body nor any evidences of injury whatsoever; that another physician examined plaintiff about ten days after the accident and found no evidences of injuries; that in furtherance of justice it is necessary for the jury and court to view the place of the alleged accident, together with the jig back and appliances, in order that they may have a complete understanding of the surrounding circumstances; that the place of alleged accident is but a short distance from Independence, the county seat of Inyo county, where said trial would take place if defendant's motion were granted, and that the trip of the jury and court to said place could be made at slight expense and in a single day.

Plaintiff, in her counter affidavit, denied that convenience of witnesses and the furtherance of justice demanded the change of place of trial, and alleged that a large number of the witnesses named in the affidavit of the defendant are employés of the defendant company and the wives of such employés; that defendant has a capital stock of $2,000,000, fully subscribed for and paid, and is well able to bear the expense of bringing said witnesses from Inyo to Santa Clara county; that the president and leading counsel of defendant company reside in and have their offices in San Jose, county of Santa Clara, and that the ownership of the machinery and apparatus may be proven by such officers; and then plaintiff names 20 witnesses, who she alleges are material and necessary witnesses for the trial of said action, asserting that 16 of said witnesses reside in Santa Clara county and that the other witnesses named will be able to attend the trial if held in Santa Clara county but not if held in Inyo county; that plaintiff will be unable to secure the attendance of any of these witnesses if the trial is had in Inyo county and will be obliged at great expense to take their depositions, and that she cannot have a fair trial if compelled to produce her evidence in this form; that plaintiff has not the financial means either to take her witnesses to Inyo county or to take the depositions of said witnesses; that there are no other witnesses outside of Santa Clara county by whom plaintiff can prove the same facts which can be proven by said witnesses; that plaintiff expects to prove by certain of said witnesses that the place where the accident occurred was at the time a public road and has been so used for many years prior to the date of the accident; that the plaintiff was on said highway at the time of the accident; that certain of said witnesses will testify as to the serious injuries sustained by plaintiff, having seen her immediately after said accident and for a number of days following said accident; that one of said witnesses is over the age of 70 years and is not physically strong enough to go to Inyo county, and that such witness will testify that the place where the accident occurred has been a public highway to her own knowledge from 1878 to 1914, and that during all of said time the said road was used as a public highway by the defendant and its predecessors in interest; that certain other witnesses named will testify as to the previous negligent operation of said machinery, etc.; that it will not be proper nor in furtherance of justice for the jury and court to view the place where the accident occurred, because of the fact that since said accident occurred said defendants have obstructed said highway and have moved said jig back and have erected a large store building across said road, and a view of said premises as they now stand would not be of any assistance to said court and jury; and, furthermore, that the place where the accident occurred is over 35 miles from the county seat of Inyo county, and that it would take said court and jury two days to make the trip thereto. Plaintiff later filed a supplemental affidavit giving the names of about 25 other witnesses, who it is alleged are material and necessary witnesses and who are residents of Santa Clara county; and it is alleged that some of these witnesses will testify to the fact that the place where the injury occurred was for many years immediately prior to the accident a public road and was used for the defendant companies and by all of the residents of the town of Cerro Gordo during said time as a public road, and that the other witnesses will testify as to the injuries of the plaintiff.

[1, 2] Without going into a detailed discussion of the materiality and admissibility of the evidence alleged by each party to this controversy to be proper and available in support of the respective allegations of the complaint and answer, it would appear from the foregoing broad outline of the contents of the affidavits that the equities of the parties in regard to the convenience of witnesses are probably rather closely balanced. This certainly cannot be said to be a case where the trial court has exceeded the bounds of reason, all the circumstances before it being considered, which is the definition given by our Supreme Court in the case of Sharon v. Sharon, 75 Cal. 1, 48, 16 Pac. 345, of an abuse of legal discretion. The granting of a motion for a change of venue upon the ground of the convenience of witnesses rests largely in the discretion of the trial judge, and orders

upon such motions will only be disturbed when the abuse of discretion is clear. Pascoe v. Baker, 158 Cal. 232, at 235, 110 Pac. 815; Tait v. Midway Field Oil Co., 28 Cal. App. 107, 109, 151 Pac. 378; Bird v. Utica Gold Mining Co., 2 Cal. App. 672, 86 Pac. 509.

The order appealed from is affirmed.

We concur: HAVEN, J.; BRITTAIN, J.

41 Cal. App. 679

WALBERG v. UNDERWOOD et al.

(Civ. 2914.)

(District Court of Appeal, Second District, Division 2, California. June 20, 1919.)

1. EVIDENCE ⚷135(1)—SIMILAR SUBSEQUENT TRANSACTION.

In an action in equity by a stockholder to enjoin execution and set aside a judgment in favor of an individual defendant against the company, the judgment being claimed to have been obtained by fraud and collusion between the individual defendants and the directors of the company, having been obtained by one individual defendant as assignee of a claim of salary of the other, a director and the president of the company, evidence of a subsequent transaction whereby the directors of the company fraudulently endeavored to profit by a sale of the company's property on execution *held* inadmissible to show fraud in the transactions leading up to the judgment.

2. EVIDENCE ⚷135(1) — SURROUNDING AND SUBSEQUENT CIRCUMSTANCES.

The surrounding facts and circumstances may be liberally used in determining fraud, and subsequent conduct and declarations of the parties may be shown in evidence of antecedent fraud if they are such as are related to the principal transaction so that a logical and legal inference may be drawn.

3. APPEAL AND ERROR ⚷757(3)—BRIEFS—EXPLORATION OF TRANSCRIPT.

Under the rule of Code Civ. Proc. § 953c, where an appeal is taken under the alternative method with a typewritten transcript of 289 pages, the District Court of Appeal should not be expected to explore, unaided by a statement in the briefs, such a volume of evidence to determine whether a finding of fact by the trial court was supported by evidence.

Appeal from Superior Court, Kern County; M. T. Farmer, Judge.

Action by Carl A. Walberg, suing in behalf of himself and for all other stockholders and creditors of the corporation defendant, against Charles D. Underwood, the Valley View Mines Company, a corporation, and others. From judgment for defendants, plaintiff appeals. Affirmed.

See, also, 180 Pac. 55.

Charles J. Kelly, of Los Angeles, for appellant.

Stahl & Sayles, of Los Angeles, and Kaye & Siemon, Boyce R. Fitzgerald, and Erwin W. Owen, all of Bakersfield, for respondent Underwood.

SLOANE, J. This is an action in equity brought by the plaintiff, a stockholder in the Valley View Mines Company, to enjoin execution and set aside a judgment in favor of defendant Underwood against said company. The judgment is claimed to have been obtained by fraud and collusion on the part of and between the defendants Underwood and Brown and the directors of said defendant company. The judgment was obtained by Underwood as assignee of a claim of salary of Brown, who was a director and the president of defendant company.

On the trial of the case in the superior court of Kern county the court found against all of the allegations of fraud, collusion, and unfairness in the matters on which the action was predicated, and denied the relief demanded by plaintiff.

There is no question raised as to the sufficiency of the evidence admitted on the trial to support the findings and judgment. The only error assigned on this appeal is the action of the court in sustaining objections, and denying plaintiff's offer to produce certain evidence.

[1] The purport of the proposed evidence, as nearly as we can gather from the general discussion between court and counsel, appearing in the record, was to show that subsequent to the entry of the judgment in question some sort of a collusive arrangement was entered into between the defendant Brown and other directors of the judgment debtor corporation to sell the property of the corporation, which was subject to levy under the judgment, in such a manner and for such a price that the directors would participate in the proceeds of the sale. It is conceded that this alleged transaction was entirely subsequent to the cause of action sued on, which was charged as a fraudulent combination of the plaintiff and the directors in obtaining the judgment which the action seeks to vacate for the fraud. But appellant's contention, in offering this evidence, was that the evidence of a participation by the directors in a subsequent fraudulent effort to profit by a sale of the property of the corporation would tend to prove that their connection with the transactions leading up to the judgment was also fraudulent. The court properly sustained objections to certain questions propounded to plaintiff's witness on this point, on the ground that they called for hearsay testimony, and denied the general offer of proof on the theory outlined, on the ground that the transaction referred to was

entirely independent of, and subsequent and irrelevant to, the attack on the judgment itself.

Stated in its strongest light, the offer made by appellant may be put in the following words:

> "We offer to show that after this judgment, which we allege was fraudulently procured was entered, Brown, the assignor of the claim on which the judgment was predicated, attempted to make a sale of the property of the corporation through the directors. We will show that Brown was the agent for this purpose. When Mr. Baldwin discovered that the sale was going through, and that the directors, or some of them, were profiting to the extent of $100,000—reporting a sale for $50,000, whereas it was in fact made for $150,000—that he then stopped the sale; that the sale was stopped, and the defendant Brown said he had this judgment up here and that he could go up and sell the property under the judgment, and then would have the sale of the property that he had made under the contract."

Counsel for appellant stated that this offer of proof of subsequent acts of defendants was made as tending to support the allegations of fraud and collusion in the procurement of the judgment in question.

The court sustained the objection to the offer on the ground that the transactions referred to were immaterial and independent matters, occurring subsequent to the judgment in controversy, and having no connection with the judgment or the claim on which it was obtained. We think the trial judge was right in this ruling.

There was nothing in the offer tending in any way to connect the subsequent alleged attempts of Brown and other directors of the corporation to sell the corporation's property, with this judgment. If it appeared that such action on the part of the directors was in any way necessary to the collection of the judgment, it might be assumed that Brown still had some interest in the claim he had assigned to Underwood, and that he and other directors of the corporation were conniving to convert it into cash. But Underwood (and Brown, if he was still interested in it) had this judgment, and could proceed to sell at execution sale, and if the property was worth $150,000, or even $50,000, would have no difficulty in realizing the amount of the claim. In fact, it would appear from appellant's statement that this subsequent transaction was entirely independent of the judgment. It was only after it had been blocked in some way by the witness Raymond that Brown is claimed to have referred to the judgment by the declaration that he could sell under the judgment and then could make the sale that had been agreed to under the alleged contract.

Assuming the proof offered was to have been such as is for the first time specifically indicated by appellant's reply brief, namely, a contract between Brown and Gordon, two of the directors of the mining corporation, to sell the mining claims of the corporation to a Mrs. Eaton for $50,000, and a contract between Brown and Mrs. Eaton and a third party not named in this action, whereby the profits of a resale of the same property for $150,000 was to be divided between them, it does not appear in any way how such transaction could be in aid of or grow out of the transaction culminating in the alleged fraudulent judgment. In other words, this subsequent transaction could have been just as well carried out entirely without reference to the judgment, and the judgment just as well collected without the contract of sale. Neither is it, if the facts indicated were proved, a fraud of such a similar character as would raise a presumption of fraudulent intent of the parties in the matter leading up to the judgment.

[2] Appellant correctly states the rule that the surrounding facts and circumstances may be liberally used in determining fraud, and that subsequent conduct and declarations of the parties may be shown in evidence of antecedent fraud. Butler v. Collins, 12 Cal. 457. But the circumstances must be such as are related to the principal transaction, and from which a logical and legal inference may be drawn as to the nature and quality of the act under investigation. A defendant cannot be convicted of two independent offenses, even though occurring against the same person and at approximately the same time, by proving him guilty of one, and inferring his guilt as to the other. This would be equivalent to offering evidence of his bad reputation for honesty and integrity as proof that he had committed some specific wrong. Under no circumstances would it be permissible to establish fraud in a prior transaction, which was honest on its face, by showing fraud in subsequent transactions. At best, such evidence could only be used in corroboration after a reasonable foundation had been laid.

[3] The court here found from the evidence before it that the transaction complained of was regular and free from fraud or collusion on the part of defendants; and there is no record in the printed briefs to show what, if any, evidence was before the court to raise even a presumption of fraud. This appeal was taken under the alternative method, with a typewritten transcript of 289 pages. Under the rule of section 953c, Code of Civil Procedure, we should not be expected to explore, unaided by counsel, such a volume of evidence for the material necessary for a decision. But, independent of this consideration, we do not think the evidence offered was relevant or competent.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

(42 Cal. App. 24)

TRADERS' BANK OF LOS ANGELES v. WILCOX. (Civ. 2137.)

(District Court of Appeal, Second District, Division 2, California. June 28, 1919.)

1. Pledges 🔑56(1) — Sale by Pledgee—Statute—Waiver.

The provisions of Civ. Code, § 3006, as to a sale of securities by the pledgee, were designed for the benefit of the pledgor, and may be waived by him.

2. Pledges 🔑56 (1)—Collection of Collateral—Decree of Sale.

The pledgee of commercial paper pledged as collateral is bound to collect, and, if necessary, to sue upon it as and when it falls due, and apply it on the debt secured; and, in the absence of compelling reasons, a court of equity will not decree the sale of such pledged collateral before its maturity; the right to collect the debt pledged when it falls due and to sue therefor, if necessary, being an adequate legal remedy.

3. Pledges 🔑56(1)—Evidences of Debt — Sale—Statutes.

Both under the common law and Civ. Code, §§ 3006, 3011, where personal evidences of indebtedness are pledged as collateral security, no right is created in the pledgee, in the absence of express agreement, to personally cause a sale of the security, and he is entitled to equitable relief and an order for judicial sale only when there are special conditions shown not in the contemplation of the parties when the contract was made, and imposing additional hardship on the pledgee if required to rely on collection at maturity.

4. Pledges 🔑55—Action by Pledgee—Recovery of Debt.

A pledgee may bring an action at law and recover the amount of his debt from his debtor by independent suit for personal judgment without selling or foreclosing the pledge, and is entitled to the same relief where he has sought to procure a sale of the pledge by judicial process, but has failed because the pledge is commercial paper and not salable.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the Traders' Bank of Los Angeles, a corporation, against W. W. Wilcox. From the judgment, plaintiff appeals. Reversed, and trial court directed to enter judgment for plaintiff.

J. W. McKinley, of Los Angeles, for appellant.

Barstow, Beach & Rohe, of Los Angeles, for respondent.

THOMAS, J. This is an action brought to foreclose defendant's equity of redemption in a note, copy of which is set out in plaintiff's complaint, which was pledged by defendant to plaintiff as security for the payment of defendant's note for $2,000, which is also set out in plaintiff's complaint, and upon which default was made by defendant in payment according to its terms. The appeal is taken by plaintiff from the judgment, upon the judgment roll alone.

By the briefs on file in this case in this court it is made to appear that the only question here is as to whether plaintiff is entitled to foreclose against defendant and procure a judicial sale of the note pledged with it, or is obliged to wait the maturity of the pledged note and then collect the same from the makers.

Counsel for respondent contend, and the court found, that appellant held said collateral note under the terms of section 3006 of the Civil Code, and, it being so held, that appellant was not entitled to foreclose against respondent and procure a judicial sale of the note pledged with it; while appellant insists that the provisions of section 3006 of the Civil Code only apply to sale by the pledgee himself, and in no way affects the general rule that appellant is entitled to enforce an obligation in accordance with its terms, and to procure a decree of foreclosure of the equity of redemption of any property which has been placed in its hands as security. Appellant further insists that the provision of section 3011 of the Civil Code is not to be given the strict construction contended for by respondent, and is not only applicable to cases in which the pledgee would have the right, without court procedure, to make a sale of the pledged property, but is intended to apply to all cases in which property is pledged; that this is the plain and reasonable interpretation of the section by itself; that in the absence of any provision of the Civil Code upon the subject the plaintiff would have, as it still has, an equitable right to foreclose the security given by defendants for the performance of the express obligations of his note, the payment of which was, at the time of the commencement of this action, ever since has been, and now is, in default; that section 3011 is apparently applicable to any pledge, and simply recognizes the right of any pledgee to foreclose the right of redemption by judicial sale; that the court has always had this power, from the very earliest time, as shown by the sections in the Practice Act and decisions by the courts in two different cases under that section; and that the Code has not changed this power of the court by section 3006 of the Civil Code, which refers to another matter, but, on the contrary, that section 3011 of the same Code expressly gives the court this power. In other words, appellant's contention, briefly put, is that the remedy provided by the latter section is cumulative, and that it is not limited to the remedy provided by section 3006; but, while it may use that, it can also invoke the procedure provided by section 3011, supra.

[1] We are not able to agree with appellant's contention here. Section 3006, supra, in our judgment settles this phase of the case. The provisions of this section were designed, we think, for the benefit of the pledgor, and may be waived by him. We find nothing, however, in the record here showing any such waiver. The pledgor being himself the respondent here, appellant, we think, is bound to a strict compliance with the terms of this section.

[2] There can, we think, be no doubt that, prior to the Codes, where the contract did not expressly give the pledgee the right to sell or foreclose commercial paper pledged as collateral, a court of equity would not order a judicial sale of the security save under special circumstances. Such security has no market value. It is presumed to be not readily marketable, and generally must be sold at a sacrifice. Hence its sale, whether by the pledgee or by the sheriff under judgment of a court, may not bring a fair price. The general rule is that the pledgee is bound to collect, and, if necessary, sue upon, the collateral as and when it falls due, and apply it upon the debt secured. Jones on Collateral Securities, § 651. There is therefore ordinarily no reason why the pledgor should be compelled to suffer the loss consequent upon a sale of the collateral at a sacrifice. In our opinion, the most compelling reason why a court of equity will not decree the sale of such collateral, in the absence of special circumstances, is that, ordinarily, the pledgee or principal debtor has an adequate remedy at law. That is to say, the principal debtor may, and, indeed, is in duty bound to, collect the debt pledged as collateral as and when it falls due, and bring suit therefor if necessary. This right to collect the debt pledged as security affords, as a rule, a complete and adequate legal remedy; and for this reason there is no reason for the interposition of equity. Whitteker v. Charleston Gas Co., 16 W. Va. 717, 722. See, also, Richardson v. Ashby, 132 Mo. 238, 33 S. W. 806; Cleghorn v. Minnesota Title, etc., Co., 57 Minn. 341, 59 N. W. 320, 47 Am. St. Rep. 615; Donohoe v. Gamble, 38 Cal. 354, 99 Am. Dec. 399. Special circumstances such as will be held sufficient to take a case out of the general rule and justify the interposition of a court of equity to decree a judicial sale of notes or other evidence of indebtedness pledged as collateral security, exist where the pledgor is insolvent and the collateral note has many years to run after the maturity of the principal debt (Cleghorn v. Minnesota Title, etc., Co., supra), or where the principal debtor is a nonresident and has no property within the jurisdiction of the forum (Donohoe v. Gamble, supra). No circumstance of a special or peculiar nature, such as would justify a court of equity in ordering a judicial sale, has been pleaded or shown in this action.

[3] We think, therefore, that the correct interpretation of the rule, both under the common law and the Code, is that, where personal evidences of indebtedness are pledged as collateral security, no right is created in the pledgee, in the absence of express agreement, to personally cause a sale of the securities; and that he is only entitled to equitable relief and an order for judicial sale when there are special conditions shown which were not in the contemplation of the parties when the contract was made, and which would impose additional hardships on the pledgee if he was required to rely upon the collection of the collateral debts at their maturity.

Sections 3000–3005 of the Civil Code provide that when the performance of an act for which a pledge is given is due, the pledgee may collect the same by a sale of the property pledged, "subject to the rules and exceptions thereinafter prescribed," and further direct the manner and conditions under which such sale shall be made. Section 3006 states what is excepted from the right to sell, as follows:

> "A pledgee cannot sell any evidence of debt pledged to him except the obligations of governments, states, or corporations; but he may collect the same when due."

This is conclusive of the whole matter, unless section 3011 enlarges the pledgee's remedy with regard to this class of securities. It provides that—

> "Instead of selling property pledged, as hereinbefore provided, a pledgee may foreclose the right of redemption by a judicial sale under the direction of a competent court."

There are two reasons within the terms of the statute itself why we think the section last cited does not apply to ordinary commercial paper. First, section 3006, in forbidding such sale by the pledgee, goes on to point out how he may realize on his security by the clause, "but he may collect the same when due"; and, second, section 3011, in authorizing equitable foreclosure and judicial sale of property pledged "as hereinbefore provided," limits its application to the character of pledges which are thereinbefore, by the sections above cited, permitted to be sold. In other words, it provides an alternative method of selling pledges other than evidences of indebtedness. It may be conceded that this latter reference is not conclusive, as the section, so far as its wording is concerned, might be open to the construction contended for by appellant; but, in our opinion, there is no legal escape from the conclusion that the denial of right to sell such securities in section 3006, coupled with the provision, "but he may collect the same when due," was intended to provide an exclusive remedy, in the absence of some special claim to equitable relief such as might arise under any contract. Although there has been no direct judicial construction of these Code provisions in this state, as to this limitation of section 3011, the interpretation here presented seems to be suggested by practically every reference we have found to section 3006 in the California decisions. In McArthur v. Magee, 114 Cal. 126, 45 Pac. 1068, the court says:

> "It need only be pointed out that by section 3006 of the Civil Code a pledgee is forbidden to sell any evidence of debt pledged to him, but his right is limited to collecting the same when due"

—and to the same effect in other decisions. Gault v. Wiens, 32 Cal. App. 1, 161 Pac. 996; Woolf v. Clark, 17 Cal. App. 696, 121 Pac. 407; Frese v. Mutual Life Insurance Co., 11 Cal. App. 387, 105 Pac. 265; Hunt v. Glassell, 30 Cal. App. 676, 159 Pac. 227; Kelly v. Matlock, 85 Cal. 122, 24 Pac. 642.

We find the same limitation recognized generally, whether under statutory provisions or the common-law rule governing pledges of this character. The commonly accepted rule is stated in Jones on Collateral Securities, § 651, as follows:

> "A pledgee of commercial paper as collateral security cannot, in the absence of special authority for that purpose, sell it upon the nonpayment of the debt upon notice to the pledgor, either at public or private sale, but he is bound to hold and collect the same when it falls due, and apply the money to the payment of the debt secured." Wheeler v. Newbould, 16 N. Y. 396; White v. Phelps, 14 Minn. 27 (Gil. 21), 100 Am. Dec. 190; Union Trust Co. v. Rigdon, 93 Ill. 458; Zimpleman v. Veeder, 98 Ill. 613; Stone v. Dickinson, 89 Mass. (7 Allen) 26; Miller v. Horton (Okl.) 170 Pac. 509, L. R. A. 1918C, 625; Keeble v. Jones, 187 Ala. 207, 65 South. 384.

The only decisions cited, or which we have been able to find, that recognize the right of a pledgee to go into a court of equity to obtain an order of sale of this class of collateral security, including Donohoe v. Gamble, supra, were clearly influenced, at least, by the existence of special circumstances creating equitable claims of the pledgee not entering into the original pledge transaction. It is true that most of the decisions denying the right of sale of this class of securities arise on attempted sales by the pledgee, but in nearly every instance this negation of the right of sale is coupled with the statement that the pledgee is "bound to look to the collection of the collateral debt for his security," without making reference to any possible recourse to a court of equity. Yet the right to an equitable foreclosure and sale of all pledges that are subject to sale is universally recognized, and was formerly the sole method of procedure. In two cases that we have found, the right of resort to a court of equity for an order of sale of commercial paper is, however, presented and expressly denied. In Whitteker v. Charleston Gas Co., supra—which was a proceeding in chancery to obtain an order of sale—it is held that where a chose in action is pledged as collateral security, the pledgee has no right to sell such pledge unless a power of sale is added to the agreement, "and a court of equity has no jurisdiction to sell such order on the application of the creditor." In Richardson v. Ashby, 132 Mo. 238, 33 S. W. 806, the Supreme Court of Missouri says:

> "The right of disposition by sale of the notes held as collateral is not one incident to the delivery and hypothecation of same. Although there is some conflict in the courts of our country on the last proposition, we think the great weight of authority, as well as the reason of the rule, sustains the proposition that the holder of commercial paper as collateral for the payment of a debt cannot, in the absence of special power for that purpose, sell the security so pledged upon default of payment of the debt at public or private sale, with or without notice, as in the case of ordinary property, on timely notice, nor by order of court dispose of same. He is bound to hold and collect the security as it becomes due, and apply the proceeds to the payment of his debt."

The opinion above cited, however, refers to the rule that equity may, under special circumstances, order a sale. The court on this point further says:

> "Some of the courts of our country, however, hold to the rule that where great inconvenience and loss are threatened by reason of the long delay in the maturity of the collateral, the court on proper showing may order the collateral sold and its proceeds immediately applied to the payment of the original indebtedness."

If such a rule prevails, as it justly should, it is not a right inherent in any implied condition of the pledge contract, but arises from general principles of equity jurisdiction, and depends upon circumstances extraneous to the pledge contract.

No such conditions are pleaded here, or appear from the record, other than the mere fact that the collateral note in question is payable in monthly installments of $50 each, and that it would take a period of 28 months from the date this action was commenced to collect on the collateral the balance of $1,400 then due on the principal obligation. As this action was commenced September 4, 1915, and the findings show that the makers of the collateral note were entirely solvent, and one of them a director of the plaintiff bank, it is probable that the entire debt is paid off long before this. But in any event, the parties to the pledge contract entered into the agreement with full knowledge of the time and manner in which the collateral note was payable, and with presumptive knowledge of the law relating thereto; and there has nothing arisen subsequently to in any way jeopardize the value of the security.

We do not see that there is anything controlling in the point raised here, and referred to by the Supreme Court in Donohoe v. Gamble, supra, that commercial paper may, under the statutory law of California, be seized and sold under execution, or a sale may be ordered on foreclosure of chattel mortgage of the same. In the instances cited, the Code of California permits the sale; in the matter of a pledge it forbids it. We are satisfied that plaintiff is not entitled to an order directing the sale of this collateral note.

[4] But there is another question which we think should have our consideration, and that is the fact that the learned trial judge denied appellant all relief—not only a judgment foreclosing the collateral security, but even a personal judgment upon respondent's personal liability as maker of the principal note. We think that appellant was entitled to a personal judgment against respondent. There certainly can be no doubt but that a pledgee may bring an action at law and recover the amount of his debt from his debtor by an independent suit for a personal judgment, without selling or foreclosing the pledge. Commercial Savings Bank v. Hornberger, 140 Cal. 16, 73 Pac. 625. Is there any reason why he should not be entitled to the same relief where, as here, the pledgee has sought to procure a sale of the pledge by judicial process, even although we assume that he is not entitled to relief by foreclosure? We think not.

The judgment is reversed, and the trial court directed to enter judgment in favor of plaintiff for the amount due on the principal obligation.

We concur: FINLAYSON, P. J.; SLOANE, J.

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41 Cal. App. 701

SHATTUCK v. PALMER et al. (Civ. 2850.)

(District Court of Appeal, Second District, Division 1, California. June 23, 1919.)

1. APPEAL AND ERROR ⚷916(4)—SUBSTITUTION OF COPY FOR ORIGINAL—PRESUMPTION.

Though the complaint in the judgment roll offered by plaintiff in evidence is in printed form containing a printed verification, the presumption should prevail on appeal that the court had for good cause permitted a copy of the complaint to be substituted for the original as allowed by Code Civ. Proc. § 1045, in view of the recitations of regularity in the order for publication of summons and the judgment in proper form.

2. JUDGMENT ⚷632(1) — CONCLUSIVENESS — PERSONS BOUND—GRANTEE OF PARTY.

In ejectment defendants cannot attack, on the ground of fraud, a judgment rendered against their grantor in a prior suit by plaintiff to quiet title.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge

Action by J. E. Shattuck against Lillian Pray Palmer and another. Judgment for defendants, and plaintiff appeals. Reversed, with directions.

Luce & Luce, of San Diego, for appellant.
Wright, Winnek & McKee, of San Diego, for respondents.

JAMES, J. Plaintiff brought this action in ejectment; the complaint being in the ordinary form appropriate to such a suit. Defendants in their answer first denied that plaintiff was the owner of and entitled to the possession of the real estate in controversy, and alleged that they (defendants) were the owners and in possession and were entitled to have the property. As a separate defense, they alleged that prior thereto plaintiff had obtained a judgment quieting title against their grantor, which judgment was based upon service of summons by publication and mailing; they particularly alleged that the order for the publication of summons was obtained by fraud, in that by the verified complaint filed by the plaintiff and his proof by affidavit made in support of the order a false statement was made as to the ownership and title to the property being in the plaintiff in that suit, who is also the plaintiff here. On the ground that the judgment quieting title against their predecessor in interest was obtained by fraud, they asked judgment, and upon a recitation of the same alleged facts embraced within a cross-complaint, asked for an affirmative decree in their favor. The plaintiff demurred to the several parts of the answer and cross-complaint on the general and on special grounds, and, his demurrer being overruled, made answer to the cross-complaint wherein he admitted the commencement of the quiet-title suit and the filing of the verified complaint and affidavit, and denied that any fraud was committed or that any false statements were made therein. This cause came on for trial and resulted in a verdict of the jury being returned in favor of the defendants, which verdict was rendered under express instructions of the trial judge. The appeal is from the judgment.

There is a purported appeal from the order denying a motion for a new trial, but, as no appeal was permissible at the time of the making of the order on that motion, it should be, and hereby is, dismissed. Hirsch v. All Persons, 173 Cal. 268, 159 Pac. 712. All of the questions which might properly be included formally under the appeal from an order denying a motion for a new trial are reviewable on this appeal from the judgment.

A further statement of admitted facts may briefly be made in order to illustrate the contentions argued on this appeal. The action to quiet title to the real property in controversy was brought by this plaintiff against the grantor of defendants by the filing of a complaint on June 30, 1906. In March, 1907, after affidavit filed, an order was made for the publication of summons, and the publication was completed on the 23d day of May, 1907; the mailing having been made of summons and complaint to defendant in that action on the 28th day of March of the same year. On the 15th day of September, 1907, defendants acquired such title to the property as the defendant in the quiet-title suit had to confer, and in June, 1909, a decree was entered against defendants' grantor in the quiet-title suit in favor of this plaintiff. This action was commenced on June 19, 1912, more than three years after the entry of the judgment last referred to. It appears from the bill of exceptions that during the trial of this case the plaintiff offered in evidence the judgment roll in the quiet-title suit against defendants' grantor, to which defendants objected, basing their objection on the ground that the judgment rendered in the quiet-title action was void because it had not been made to appear by the oath of any person that the plaintiff had a good cause of action, that, such a showing having been omitted, the court had no legal right to make an order for the publication of summons, and that subsequent proceedings based thereon were null. The court sustained the objection. The entire judgment roll which was offered in evidence is set forth in the bill of exceptions, but we are not able to determine what other evidence may have been before the court at that time, for nothing appears other than the matters composing the judgment roll which the court refused to allow to be considered by the jury. As the defendants acquired whatever title they had to the property before judgment was entered in the quiet-title suit, it may have been important to a consideration of the question of the relevancy of the offered evidence that it also be shown or offered to be shown that, upon the filing of the suit to quiet title and before defendants obtained their deed, a lis pendens had been filed with the county recorder. However, the questions are argued apparently upon the agreed state of mind of counsel on both sides that the record evidence was relevant and material, unless, as pointed out by counsel for defendants, the judgment was void because of an insufficient statement of the facts in the affidavit used to procure the order for publication of summons. The case is to be considered, then, without incumbering the question with anything more than is included in the argument of counsel. In the opening brief filed by appellant it was urged that upon the face of the cross-complaint the right to relief for the alleged fraudulent procurement of the order for publication of summons was barred by the laches of the defendants, in support of which contention appellant cited, among others, the case of Lady Washington Co. v. Wood, 113 Cal. 486, 45 Pac. 809, which appears to be in point. Appellant also contended that the legal proposition was not to be gainsaid that a grantee, such as defendants here are, has no right to attack a judgment rendered against his grantor on the ground of fraud. A number of decisions were also cited in support of this proposition. Respondents in their reply brief make no argument against either of these contentions of appellant, and seem to concede that both propositions are well founded in law. They assert, however, that the first judgment is not sustainable, because they contend that its void character appears by an inspection of the judgment roll, and that they were entitled to make the objection and have it sustained whenever the record of the judgment was presented. Upon the concessions made by respondents, therefore, there is but the one question last mentioned to be considered as being the subject of serious debate. Examining the offered judgment roll in the quiet-title suit, we find, first, a complaint setting forth, in substance, sufficient facts to constitute a good cause of action to quiet title, an affidavit for publication of summons made by an agent of the there plaintiff, an order for publication of summons, due proof of publication and mailing and the entry of default, together with a judgment in proper form. In the affidavit made upon the application for an order for publication of summons it was not asserted, except by reference to the complaint on file, that a good cause of action existed in favor of the there plaintiff against defendants' grantor. Respondents concede that the complaint in its statement of facts was sufficient, but contend that it was not verified. Color for this contention is given by the fact, as shown in the bill of exceptions, that when the judgment roll was examined the complaint in in printed form was found therein, this printed form containing also an attached printed verification, with the signatures of affiant and the notary public all printed, as was the body of the complaint. The trial judge held that such a complaint did not show at the time the order for publication of summons was made that the court had before it any verified pleading, and that it should not be concluded that the printed complaint was a copy which had been for good cause substituted in lieu of the original. The order for publication of summons contained the following recitation:

> "It further appearing from the verified complaint on file herein that a good cause of action exists in favor of the plaintiff and against each and all of said defendants. * * *"

The judgment entered recited that the defendants had been "duly and regularly summoned to appear and answer plaintiff's complaint," and had made their default, which had been regularly entered, and that documentary evidence was considered. Section

1045, Code of Civil Procedure, provides as follows:

> "If an original pleading or paper be lost, the court may authorize a copy thereof to be filed and used instead of the original."

[1] It seems to us very plain that the printed document appearing in the judgment roll is a complaint purporting on its face to be a copy of some original. It had attached the names of counsel, an affidavit of verification in due form, and the name and style of the notary public who apparently attested the same. This being true, we think the presumption should prevail by reason of the recitations of regularity in the order for publication of summons and in the judgment, that the trial court in the quiet-title suit had for good cause permitted a copy of the complaint filed therein to be substituted in lieu and place of the original, and that the burden of proof was upon the respondents to show the contrary. This conclusion, we think, is fully sustained by the case of Sichler v. Look, 93 Cal. 600, 29 Pac. 220. Without restating in detail the facts of that case, it may be said that the question considered was parallel to that presented here, and the conclusion reached by the court in that case fully supports plaintiff's position. And it may further be observed that in that case the attack upon the default judgment was directly made by appeal therefrom, while here, considering, as before mentioned, that respondents stated no cause of action in their cross-complaint or alleged special defense for fraud, the attack is collateral.

[2] Our conclusion is that the trial judge was in error on the main question last considered, and from what has been first stated he was also in error in holding, when considering the demurrer of plaintiff to the further defense of fraud set up in the amended answer and cross-complaint, that such defense was available to defendants as grantees of the defendant in the quiet-title action.

The judgment is reversed with direction to the trial court to sustain the demurrer of plaintiff to the fourth and separate defense alleged in the amended answer of defendants and to the cross-complaint of said defendants.

We concur: CONREY, P. J.; SHAW, J.

(42 Cal. App. 7)

WRIGHT v. ALLEN et al. (Civ. 2288.)

(District Court of Appeal, Second District, Division 1, California. June 27, 1919.)

1. Limitation of Actions ⚷53(1) — Four-Year Statute—Open Book Account—Last Item.

The limitation of four years upon a cause of action on book account under Code Civ. Proc. §§ 337, 344, applies from the date of the last item charged.

2. Limitation of Actions ⚷197(1)—Statute of Limitations—Book Account—Last Entry—Evidence.

In an executrix's action on open book account to recover for legal services rendered by her decedent, evidence *held* to justify the trial court's finding that the last charge against defendants was entered in the books of plaintiff's decedent not later than March 27, 1911, so that the cause of action was barred by the limitation of four years, under Code Civ. Proc. §§ 337, 344.

3. Limitation of Actions ⚷183(1)—Statute of Limitations—Pleading.

In an executrix's action on open book account to recover for legal services rendered by her decedent, answer *held* to have presented an issue of the statute of limitations on the cause of action first set forth in the amended complaint, properly presenting an issue covering the date on which the original complaint was filed.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Bernice Wright, executrix of the last will and testament of W. S. Wright, deceased, against William H. Allen, Jr., and J. S. Torrance. From judgment for defendants, plaintiff appeals. Affirmed.

V. L. Ward, of Pasadena, and Howard W. Wright, of Los Angeles, for appellant.

Charles H. Brock, of Los Angeles, for respondents.

PER CURIAM. Appeal by plaintiff from an adverse judgment.

W. S. Wright, Esq., now deceased, was an attorney at law practicing his profession in this state. He was employed by these defendants and some 16 other persons and corporations to represent them in protecting large interests which involve the matter of bonds and lien claims affecting the Wentworth Hotel at Pasadena. The engagement of Wright was made by a writing to which were attached various signatures of his employers, including those of the defendants here. That the employment was so made, and that valuable services were rendered to the defendants, no question is made or suggested in this suit. Neither are the following facts in any wise disputed: After completion of the legal services, Wright mailed a detailed statement to all of the persons employing him, apportioning the total sum agreed to be paid, which was $10,000, among his debtors. Practically all of these debtors, except these defendants, responded, and Wright received $8,482.37 on the account. The statement of account was sent out on the 8th day of June, 1911. Wright was unable, notwithstanding his importunities in that regard, to obtain any money from these de-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

fendants upon their admitted indebtedness, and under date of February 13, 1912, more than six months after this statement had been sent out, he wrote to one of these respondents as follows:

> "February 13, 1912.
>
> "Mr. Wm. H. Allen, Title Insurance & Trust Company, Los Angeles, California.—My Dear Mr. Allen: Isn't it a shame, after I did all that work in the Wentworth matter, defending bonds, and in the matter of the liens, that neither of my three good friends—Wm. H. Allen, Sydney Torrance, and Gen. Wentworth—pays his share of the bill? You know when I employ the Title Insurance & Trust Company, as I have for twenty years, and it sends its bill, it is always paid. It really shocks me to think that, though I have sent you a bill several times, you have not even answered it. I cannot afford to do the work without pay. I do not quite know what to think about it. Of course, in the case of Gen. Wentworth, I can understand, because—just because.
>
> "Yours truly, W. S. Wright."

He received a response to this letter which in substance was that the writer had some understanding with Mr. Torrance, the codefendant here, that he was to take care of the debt. At the trial Mr. Allen admitted that his contract with Wright contained no hint that another person was to pay his debt, but stated that, through an individual arrangement between himself and Torrance, Torrance had guaranteed to take care of it. Mr. Torrance, on his side, testified that, in some conversation with Wright when payment of the account was requested, he had stated that his understanding was that Mr. Allen had charge of the matter of arranging for payment. And so, to speak colloquially in the expressive slang of the street, "the buck was passed." This testimony, of course, furnished no defense to the claim, and it is not pretended anywhere by counsel in his argument that respondents had any defense which involved the merits of the claim, either on the ground that they had not received full value in the time and labor of Mr. Wright, or that the amount charged was improper or in any wise different from what they had agreed to pay. The sole and only defense urged against this suit of the executrix to collect the money due is that the statute of limitations had run against the claim. This defense was pleaded under all of the statutes that might be deemed applicable, and was allowed by the trial court and is urged here insistently in defense of the judgment, and this defense, by reason of the evidence and the law, we are compelled to sustain.

[1, 2] The cause of action pleaded was as upon an open book account, under which the limitation of four years (Mr. Wright having died in May, 1915) would apply from the date of the last item charged. Sections 337, 344, Code Civ. Proc. The ledger kept in Mr. Wright's office was produced before the court, and the young woman who was familiar with the keeping of the accounts was asked to testify as to the date when the total $10,000 charge had been entered therein; that charge appearing to be the item last in date. Just above this charge, under the year date of 1909, had appeared several items, including one (the last) of February 17th. A new year date then appeared, that of 1911, and immediately under this date were the words and figures, "March 27. To services in the matter of defending bonds and the liens, 10,000." It was noted that a line had been drawn through the word and figures "March 27," and the witness' attention was called to that fact, and she was asked to explain the reason for the apparent cancellation. She replied:

> "I could only—I couldn't say accurately—it must have been after February of that year. I see I have written 'March' and for some reason crossed that out; so presumably it was shortly after that previous date."

The previous date, as we have noted, was the date of February 17th, but it was in the year 1909. The court had no other evidence than the testimony of this witness and an inspection of the original ledger to guide it in making findings, and the finding was that the entry was made "not later than the 27th day of March, 1911." Respondents insist that, this action having been commenced on September 28, 1915, applying the limitation period of the statute of four years and six months, the cause of action would, as the court found, have been completely barred before commencement of suit. Counsel for appellant admits that that conclusion follows if the fact is correctly determined as to the date of the entry of the item, but insists that the evidence was not sufficient to warrant the court in finding that the item was entered not later than March 27th. We think that the court, having before it the original book, with whatever aid the testimony of the young woman witness afforded, was justified in making the finding as it did. There was no other evidence tending in any way to show that the entry was made at a later date.

[3] The further contention is advanced by appellant that the plea of the statute of limitations as against the book account was insufficiently stated, in that defendants in their answer referred to the amended complaint only, and did not properly present an issue which would cover the date upon which the original complaint was filed. We have read carefully the allegation of the answer, and think that it must be held to have presented an issue upon the cause of action first set forth in plaintiff's amended complaint. The allegation is quoted in full:

> "Defendant further states that the first cause of action set forth in plaintiff's complaint constitutes a new and different cause of action from that contained and set forth in plaintiff's

first amended complaint, that the said second amended complaint herein was filed more than four years and six months after the entry, if any, upon the book of accounts of W. S. Wright, deceased, and more than four years and six months after the last service rendered by the said W. S. Wright, deceased, in and about the litigation mentioned in plaintiff's second amended complaint, and that therefore plaintiff's first cause of action is also barred under the provisions of subdivision 2 of section 337 and section 353 of the Code of Civil Procedure, in that the said action, purporting to be upon an open book account, was not commenced within a period of four years and six months from the time that the said open book account, if any, was created, or from the time that the said last services of W. S. Wright, deceased, were rendered to the defendant in said action."

Having determined these questions adversely to appellant's contention, it is unnecessary to enter into any further discussion of the argument presented. It may be remarked, however, in emphasis of what has been stated earlier in this opinion, that in further answering the argument of appellant defendants have insisted that, as the account had never been disputed, its correctness was admitted, and that a shorter statute of limitation (which was pleaded), to wit, that upon a stated account, should be applied in the event that the first plea to the open account was not held good. For obvious reasons it is unnecessary to consider the argument of authorities presented under this head.

The judgment appealed from is affirmed.

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41 Cal. App. 646

ROSSI et al. v. SCOTT, MAGNER & MILLER. (Civ. 2795.)

(District Court of Appeal, First District, Division 2, California. June 18, 1919. Rehearing Denied by Supreme Court Aug. 16, 1919.)

1. EXCEPTIONS, BILL OF 🔑43(2) — LATE SETTLEMENT OF EXCEPTIONS — CONSIDERATION.

Where bill of exceptions was settled on a date beyond the time allowed by law, and appellant failed to incorporate any matter which might excuse its delay, the bill, though settled, cannot be considered on appeal.

2. APPEAL AND ERROR 🔑801(4) — RULING ON MOTION FOR DISMISSAL—EFFECT.

Ruling of the Supreme Court denying respondent's motion for dismissal of the appeal on the ground the transcript was not filed within the time prescribed by Supreme Court Rule 2 (176 Pac. vi), because it appeared the transcript was filed within 40 days after actual settlement of the bill of exceptions, cannot be considered as determinative of the merits of the appeal or the right of the appellate court to consider the bill of exceptions on final hearing; there being a question as to whether it was properly settled.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Maria Rossi and Luigi Rossi against Scott, Magner & Miller, a corporation. From judgment for plaintiffs, defendant appeals. Affirmed.

A. A. Sanderson and Sterling Carr, both of San Francisco, for appellant.

James A. Bacigalupi, Sylvester Andriano, F. M. Andreani and Harry G. McKannay, all of San Francisco, for respondents.

HAVEN, J. Defendant appeals from a judgment entered against it upon verdict of a jury in an action for damages for personal injuries, basing its appeal upon the judgment roll and a bill of exceptions. Respondents make the preliminary objection that the bill of exceptions cannot be considered upon the appeal for the reason that it was not prepared and settled within the time prescribed by law. The record, as it appears from the recitals in the bill of exceptions, is as follows: A motion for a new trial was made by the appellant, which was denied. Written notice of the denial of said motion was served upon appellant's attorneys on January 30, 1918. The proposed bill of exceptions was served upon respondents' attorneys on April 4, 1918. At the time of such service respondents' attorneys reserved their objection thereto upon the ground that said bill had not been prepared or served within the time allowed by law, or any extension thereof. Thereafter, and within the time allowed by law, respondents prepared and served upon appellant's attorneys their proposed amendments to said bill of exceptions, and in submitting such amendments again objected and excepted to the settlement of the bill, and reserved all rights to object to the settlement thereof, upon the same ground as above stated. The objection thus reserved was urged by respondents upon the judge of the trial court when the bill was presented to him for settlement; but such objection was overruled and disallowed, and said bill was settled and allowed on August 6, 1918.

Under section 650 of the Code of Civil Procedure, the time for the preparation and service of the proposed bill of exceptions expired in 10 days after the service of respondents' notice of the denial of the motion for a new trial, or on February 9, 1918. Such time could not be extended by the court for more than 30 days without the consent of the adverse party. Code Civ. Proc. § 1054. The actual service of the bill was on April 4, 1918, or nearly one month beyond the date to which the court could lawfully grant an extension of the time therefor. The record discloses no evidence of any extension of time by stipulation.

In Higgins v. Mahoney, 50 Cal. 444, 445, it is said:

> "The right of the appellant to present a bill of exceptions after the entry of judgment is limited in point of time to the period of 30 days. After the expiration of that period, unless further time had been in the meantime obtained, the right to present the bill of exceptions for settlement is taken away. If, therefore, the respondents, objecting to the settlement of the bill of exceptions, rely upon the lapse of the period limited by the statute, it becomes the duty of the appellant, in answer to the objection, to incorporate into the bill the matter, if any, going to excuse his apparent delay; otherwise the exceptions, though settled, cannot be considered here."

The above rule has been followed in many subsequent cases, of which the following are illustrative: Connor v. Southern Cal. Motor Road Co., 101 Cal. 429, 431, 35 Pac. 990, Wheeler v. Karnes, 125 Cal. 51, 53, 57 Pac. 893; Cameron v. Arcata, etc., R. R. Co., 129 Cal. 279, 280, 61 Pac. 955; Estate of Kruger, 130 Cal. 621, 625, 63 Pac. 31.

[1] In this case respondents complied with rule 15 of the Supreme Court (176 Pac. x) by serving upon the attorneys for appellant an exception to the record on appeal and an objection to the consideration of the bill of exceptions, upon the ground that the same was not prepared or served within the time allowed by law. No additional showing has been made by the appellant in response to such notice.

It appears, therefore, upon the face of the bill of exceptions, that timely objection was reserved by the respondents to the failure of appellant to prepare and serve its bill within proper time, and that such objection had been consistently urged by the respondents, both before the judge of the lower court and upon appeal. As the date upon which the bill was settled was beyond the time allowed by law, and appellant has failed to incorporate in the bill any matter which might excuse such delay, we are compelled to hold that the bill of exceptions, although settled by the trial court, cannot be considered upon this appeal.

[2] Appellant contends that the Supreme Court has decided otherwise in denying respondents' motion for dismissal of this appeal. That motion was made upon the ground that the transcript on appeal was not filed within the time prescribed by rule 2 of the Supreme Court (176 Pac. vi). The court denied the motion, for the reason that it appeared that the transcript on appeal was filed within 40 days after the actual settlement of the bill of exceptions, and declined to pass upon the question of whether or not the bill of exceptions was properly settled. This ruling cannot be considered as determinative of the right of the appellate court to consider the bill of exceptions upon final hearing of the appeal. The denial of such a motion is not a determination of the merits of the appeal, nor of the sufficiency of all parts of the record. Fish v. Benson, 71 Cal. 428, 430, 12 Pac. 454; Estate of Scott, 124 Cal. 671, 673, 57 Pac. 654.

This elimination of the bill of exceptions leaves the appeal dependent upon the judgment roll alone, from which no error appears. The conclusion which the law compels in this case is arrived at the more willingly for the reason that an examination of the briefs of the respective parties convinces us that no different result would have been reached had we been permitted under the law to consider the bill of exceptions.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

SHAW, J., not participating.

42 Cal. App. 1

VOLLMER et al. v. WHEELER. (Civ. 2650.)

(District Court of Appeal, Second District, Division 1, California. June 27, 1919. Rehearing Denied by Supreme Court Aug. 25, 1919.)

1. LIMITATION OF ACTIONS 🔑179(2)—STATUTE OF LIMITATION—FRAUD OR MISTAKE —COMPLAINT.

Under Code Civ. Proc. § 338, enumerating the kind of actions which must be commenced within three years, subdivision 4, specifying an action for relief on the ground of fraud or mistake, the cause of action not accruing until discovery of the facts, where a complaint for partition was silent as to when the fraud or mistake on account of which it was sought to reform the contract between the parties was discovered, since it failed to show such discovery within three years prior to the bringing of the action, it was obnoxious to demurrer.

2. CONTRACTS 🔑152—CONSTRUCTION.

A contract, whether construed according to its terms or in the light of circumstances surrounding its making, should be interpreted in accordance with the plain import of the language used.

3. TENANCY IN COMMON 🔑28(1)—RIGHT TO RENTS AND PROFITS.

Where defendant in partition by conveyance from the parties' predecessor was the owner of a quarter interest in the property, subject only to payment to plaintiffs of $10,200 derived from the proceeds of the sale of the whole property, in the absence of any provisions transferring his right, defendant was entitled to his proportionate share of rents and profits derived from the property up to sale thereof.

4. PARTITION 🔑77(2)—SALE—CONTRACT OF PARTIES.

Though the agreement between plaintiffs and defendant in partition, joint owners of land, provided a sale should only be made by all of the parties uniting in a joint transfer, under Code Civ. Proc. § 752, the court could order a sale for purposes of division of proceeds; it appearing that a partition could not be made without great prejudice to the joint owners.

Appeal from Superior Court, San Luis Obispo County; Thomas A. Norton, Judge.

Action by August Vollmer and others against Alfred A. Wheeler, resulting in an interlocutory decree for plaintiffs. From an order denying defendant's motion for new trial, he appeals. Judgment affirmed in part, and reversed and new trial ordered in part.

W. H. Spencer and C. P. Kaetzel, both of San Luis Obispo, for appellant.

Wm. Shipsey and S. V. Wright, both of San Luis Obispo, and Chas. F. Blackstock, of Oxnard, for respondents.

SHAW, J. In this action plaintiffs sought a decree for the partition by sale of certain real estate described in the complaint, of which they and defendant were owners as tenants in common. The court upon trial granted the interlocutory decree prayed for. Thereafter defendant moved for a new trial, which was denied, and the appeal is from that order.

It appears from the original complaint filed, and upon which and the answer thereto the case was tried, that plaintiffs, being the owners of the property, conveyed to defendant an undivided one-fourth interest therein upon an agreement that he held the same subject to plaintiffs' right to the rents, issues, and profits derived therefrom until a joint sale thereof was made, at which time plaintiffs were to have and receive from the proceeds of such sale $10,200, and that defendant was to have and receive one-fourth of the excess over and above said sum of $10,200. In his answer defendant alleged that he was and had been since February, 1901, the owner in fee simple absolute of an undivided one-fourth interest in the property and entitled to the rents, issues, and profits therefrom, all of which since said date had been collected and appropriated by plaintiffs, and, upon allegations that the property could be partitioned in kind, asked for a decree accordingly.

Over defendant's objection, the court permitted plaintiffs to introduce much evidence wholly outside of and not pertinent to the simple issues joined, by reason of which fact plaintiffs, at the close of the trial, by leave of court, filed an amended complaint to conform thereto. The amended complaint contained two counts. In the first count thereof, in addition to the matters contained in the original complaint, it was alleged that, to evidence the agreement made between the parties, defendant made and delivered to plaintiffs his written agreement, as follows:

"San Luis Obispo, Cal., February 12, 1901.

"To Messrs. August Vollmer, William F. Wood and Robert B. Edmondson:

"In the event that petroleum in paying quantity should not be found on some part of the following tract of land, which has been bought by you at my suggestion, to wit, the town site of El Moro conveyed by the county bank, the 161 acres bought of L. W. Booker, the 440 acres bought of Allen Foster and the tidelands in Morro Bay granted by the state of California, then I hereby agree, that in any sale made by us jointly of our respective undivided quarter interests in said lands, no proportionate division of the proceeds of such sales shall be made to me until you shall have each received the sum of three thousand four hundred ($3,400) dollars, which has been contributed by each of you to the total purchase price. The surplus, if there be any, over and above the sum total of $10,200.00 shall then be divided share and share alike between all four of us. It is clearly understood that this agreement shall take effect only in the event that the petroleum (or other hydrocarbons) in paying quantity shall fail to be discovered on some part of the aforesaid lands. Time is not of the essence of this agreement. Alfred A. Wheeler."

Followed by an allegation as follows:

"That said agreement Exhibit B was then and there intended to mean, was then and there represented by defendant to plaintiffs to mean, and was then and there understood by plaintiffs to mean, and did mean that there should be no sale of said lands by any of the parties to this action otherwise than a joint sale; that in case petroleum or other hydrocarbons in paying quantity should fail to be discovered on said lands prior to a sale thereof defendant should receive no part of the rents, issues, and profits of said land until such sale (nor until the discovery of oil or hydrocarbons in paying quantity thereof, if such oil or hydrocarbons in paying quantity should be discovered thereon), and should likewise receive no part of the selling price of said lands until plaintiffs had been reimbursed therefrom the sum of $10,200 paid by them as the purchase price of said lands, but that in the event that petroleum or other hydrocarbon substances in paying quantity should be discovered on said lands then and from that date defendant should have a full one-fourth interest in and to said lands;" and that no oil or hydrocarbon substances had been discovered on the land.

By the second count of said amended complaint plaintiffs alleged facts upon which they asked for the reformation of said contract on account of alleged mistake and fraudulent representations made by defendant. In answer to the first count of the amended complaint, defendant admitted the execution of the agreement, alleged that no other agreement was ever made, and that he was the owner of a one-fourth interest in said land and entitled to the rents, issues, and profits thereof, from February 11, 1901, which rents, issues, and profits plaintiffs collected and appropriated to their own use and made no accounting thereof to him, that the real estate was susceptible of partition in kind, and prayed that an accounting be had. And in answer to the second count of said amended complaint defendant alleged, among other things, that said cause of action for the reformation of said written contract is barred by the provisions of subdivision 4 of section 338, Code of Civil Procedure.

[1] As to plaintiffs' right to have the contract revised, the court, upon evidence admitted, found in their favor, namely, that in case oil was not discovered upon the land prior to a sale thereof, plaintiffs should have the rents, issues, and profits derived therefrom to the time of such sale. In so finding and thus reforming the instrument the court erred. Section 338, Code of Civil Procedure, enumerates the kinds of actions which must be commenced within three years, and subdivision 4 of said section is as follows:

> "An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

The complaint is silent as to any allegation showing when the fraud and mistake on account of which it is sought to reform the contract was discovered, and therefore, since it failed to show such discovery within three years prior to the bringing of the action, it was obnoxious to the demurrer interposed. Simpson v. Dalziel, 135 Cal. 599, 67 Pac. 1080; Castro v. Geil, 110 Cal. 292, 42 Pac. 804, 52 Am. St. Rep. 84. Moreover, it conclusively and affirmatively appeared from the evidence that plaintiffs discovered the fraud and mistake set up in the second count of the complaint more than five years prior to the commencement of the action, at which time they brought an action for reformation of the contract by filing a complaint substantially in the form of the second count of the amended complaint here under consideration, which action was thereafter dismissed for want of prosecution. The action for reformation of the contract was therefore barred, from which fact it follows that all parol evidence introduced touching the question of the reformation of the contract was incompetent, and for that reason the court erred in receiving it.

[2] To our minds, the terms of the contract are plain and free from ambiguity. Whether construed according to its terms or in the light of the circumstances surrounding the making of the same, it should be interpreted in accordance with the plain import of the language used therein. The facts are that defendant, who appears to have been recognized by plaintiffs as an oil expert, held options to purchase the property; that in consummating the purchase plaintiffs furnished the money therefor, amounting to $10,200. The deeds were taken in the name of Vollmer, who conveyed to each of his coplaintiffs a one-fourth interest and to defendant a one-fourth interest, which conveyance so made to the latter was subject to the sole and only condition that, if oil in paying quantities was found upon the property, he was to own the one-fourth interest absolutely and free from obligation to pay any sum of money on account of the purchase thereof. But the discovery of oil was prospective only. The land, besides larger tracts, comprised several hundred small town lots, and, owing to the difficulty of dividing it in kind, an advantageous sale thereof could only be made en masse. It is apparent that not only on this account, but for the reason that, since no transfer could be made without their participation, such provision would protect plaintiffs for and on account of the money advanced to defendant. Hence the purpose of the parties is clearly that, in the event that oil was not discovered, a sale of the property should only be made by all of the parties uniting in a conveyance of the property as a whole. Not only does the contract restrict the parties to joint action in making a sale, but, as we understand counsel, they agree that such was their intent, and, as thus construed, since no sale was made, all the parties appear to have acted in accordance therewith.

[3, 4] Since by virtue of the conveyance by Vollmer to defendant the latter was the owner of a one-fourth interest in the property, subject solely and alone to the payment to plaintiffs of the sum of $10,200 derived from the proceeds of the sale of the entire property, it follows, in the absence of any provision transferring his right thereto, that he was and is entitled to his proportionate share of the rents, issues, and profits derived from the use of the property up to the time of making a sale thereof. The land was acquired in 1901. It is conceded that no oil has ever been discovered thereon. Nevertheless appellant insists that, since by the agreement it was provided that a sale and conveyance of the same should only be made by all of the parties uniting in a joint transfer thereof, no sale can be made because he refuses to join therein. We are not in sympathy with this contention. The statute (section 752, Code Civ. Proc.) provides that cotenants and owners of an estate such as the one here involved may have an action for a partition thereof, or where it appears that a partition cannot be made without great prejudice to the owners, the court may decree a sale of the property. We concede that there may be exceptional cases where a court of equity would, upon grounds in the nature of estoppel, be justified in refusing to

partition property, such as the cases of Hunt v. Wright, 47 N. H. 399, 93 Am. Dec. 451, and Avery v. Payne, 12 Mich. 549. No facts, however, are made to appear in this case constituting an exception to the rule declared in the section quoted as to a partition of the property, and since, owing to its condition, it cannot without prejudice to the parties be made in kind, a sale thereof is necessary. There is nothing in the contract showing a waiver on the part of plaintiffs to exercise their right to a partition, and since the order is for a sale of the entire interest, it would, though as to defendant involuntary, constitute a joint sale of the property by order of a court of equity, which, notwithstanding the existence of an agreement made by co-owners that the property should never be partitioned, will disregard the same unless supported by some fact other than the mere compact of the parties. Freeman on Cotenancy and Partition, § 442.

The judgment, in so far as it decrees a partition of the property by sale thereof, is affirmed. In so far as it purports to revise the contract, it is reversed, and a new trial is ordered only as to defendant's right to have an accounting of the rents, issues, and profits derived from the use of the property by plaintiffs.

We concur: CONREY, P. J.; JAMES, J.

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42 Cal. App. 16

CITY PROPERTIES CO. v. FITZMAURICE et al. (Civ. 2846.)

(District Court of Appeal, First District, Division 1, California. June 28, 1919.)

1. Judgment 🔑800(1)—Record of Transcript—Discharge of Lien.

When a transcript of judgment has been filed in another county than that of its rendition, under Code Civ. Proc. § 674, the lien thereby placed on all the real property of the judgment debtor in such county of filing is not discharged by the recordation of a copy of the clerk's docket, showing satisfaction of judgment, but is discharged by the satisfaction itself.

2. Infants 🔑105—Satisfaction of Judgment—Majority of.

A ward who, suing by guardian ad litem, had recovered a judgment on becoming of age was competent to sign satisfaction of the judgment; the fact of majority, under Code Civ. Proc. § 1760, alone terminating the guardianship.

3. Judgment 🔑800(1)—Lien—Satisfaction—Record.

Where a ward, suing by guardian ad litem, recovered judgment, transcript of which was recorded in another county where the judgment debtor owned realty, and after the ward reached her majority she filed satisfaction of judgment, which was recorded in the county where the property was situated, those dealing with the property were not charged to look further than the fact that the judgment had been satisfied in manner and form meeting all requirements.

4. Judgment 🔑800(1)—Lien—Discharge by Satisfaction—Restoration.

Lien upon judgment debtor's property in county other than that of suit having been discharged by satisfaction of judgment, it could not be restored except by the recordation anew of a transcript of judgment as required by Code Civ. Proc. § 674.

5. Lis Pendens 🔑22(2)—Satisfaction of Judgment — Notice of Action to Set Aside.

Filing of notice of the pendency of a new action to set aside satisfaction by a ward of judgment obtained by her in suit by guardian ad litem as fraudulent to the creditors of the ward was not sufficient to put on notice persons dealing with the land of the judgment debtor situated in a county other than that of suit, but where transcript of judgment had been filed pursuant to Code Civ. Proc. § 674, the title having previously been legally transferred by the judgment debtor, defendant in the original action.

Appeal from Superior Court, Alameda County; Jos. S. Koford, Judge.

Action by the City Properties Company against D. Isabelle Fitzmaurice and others. From judgment for defendants, plaintiff appeals. Affirmed.

Crane & Crane, of Chicago, Ill., for appellant.

Metcalf & Black and Aaron Turner, all of Oakland, for respondents.

NOURSE, Judge pro tem. Appeal from judgment for defendants in an action to quiet title to real property in Alameda county.

On September 2, 1914, a judgment was recovered in the superior court of San Francisco in favor of Annie M. Cochran, a minor, by her guardian ad litem, and against Anne Marham. On September 5, 1914, a transcript of the docket of said judgment was recorded with the county recorder of Alameda county, Anne Marham being then the owner of the property involved in this proceeding. On October 8, 1914, Annie M. Cochran individually made and acknowledged a satisfaction of judgment, which was filed with the county clerk of San Francisco. On October 22d, of the same year a transcript of the docket of the county clerk of San Francisco county, showing this satisfaction to have been filed, was recorded in Alameda county.

On January 12, 1915, Anne Marham, for a valuable consideration, executed a trust deed to the property to secure a loan, and on October 9, 1916, the trustees under this deed conveyed to one of the defendants through whom the other defendants claim.

On August 19, 1915, a notice was filed in Alameda county of the pendency of an action in San Francisco to set aside as fraudulent to creditors the satisfaction given by Annie M. Cochran on October 8, 1914. On January 12, 1916, said satisfaction was set aside by judgment of the superior court in San Francisco as a fraud upon the creditors of Annie M. Cochran. On February 21, 1916, the sheriff of Alameda county sold the property to appellant by virtue of an execution from San Francisco in the action entitled "Cochran v. Marham." This was subsequent to the execution of the deed of trust of January 12, 1915, but prior to all sales and transfers of title thereunder.

At the time of the trial the action was dismissed as to all defendants other than the actual occupant of the premises and those who held a deed of trust executed November 24, 1916. These all filed cross-complaints, and secured judgment against appellant.

The main ground of attack on this judgment is that the recordation in Alameda county of the copy of the docket of the county clerk of San Francisco, showing the filing of satisfaction, was not notice in Alameda county of the satisfaction of the judgment sufficient to relieve the respondents' predecessors in interest of further inquiry into the fact of satisfaction. In support of this proposition, appellant contends that the statute does not provide for such a method of releasing the lien previously placed by the recordation of the transcript of the judgment. In this appellant is technically correct. Section 674, Code of Civil Procedure, authorizes the filing of a transcript of the original docket of a judgment in another county where real property is situated. Thereupon the judgment becomes a lien on all the real property of the defendant in such county. The same section then provides: "The lien continues for two years unless the judgment is previously satisfied or the lien otherwise discharged."

[1-3] Respondents urge that the title of the property in Alameda county was cleared of the lien of the judgment when the certified copy of the county clerk's docket showing the filing of satisfaction, was recorded in that county. But the recording of a copy of this document could not give it greater force than the record of the original docket in the county where made. Civ. Code, § 1218. Hence, when a transcript of judgment has been filed in another county under section 674, Code of Civil Procedure, the lien thereby placed is not discharged by the recordation of a copy of the clerk's docket showing satisfaction. The lien is discharged by the satisfaction itself. Here the case is that the judgment was obtained by the guardian ad litem of Annie M. Cochran, and the satisfaction was signed by her individually on the representation that she had then become of age. If it be a fact that the ward was then of age she was competent to sign the satisfaction, because that fact alone terminated the guardianship. Code Civ. Proc. § 1760. The subsequent attack, which was made upon this satisfaction, was confined to the ground that it was in fraud of the creditors of the ward, and at no stage of the proceedings is it suggested that she was not of age and competent to give satisfaction of judgment at the time this document was executed. Such being the case, those dealing with the property in Alameda county were not charged to look further than the fact that the judgment from which the lien arose had been satisfied by the actual plaintiff in the case in a manner and form fully meeting all the legal requirements.

[4] If the ward had not reached her majority, and if the satisfaction had been procured by the defendant or her agents through fraud upon the ward, then the trustees under defendant's deed of trust and those deraigning title through them might be charged with the fraud, but there is no evidence of any such facts in the record. The lien upon the property having been discharged by satisfaction of the judgment it could not be restored except by the recordation anew of a transcript of judgment as required by section 674, Code of Civil Procedure.

[5] The filing of notice of the pendency of the new action to set aside the satisfaction as fraudulent to the creditors of the ward was not sufficient to put defendants on notice, as the title had previously been legally transferred by the defendant in the original action. The respondents accordingly took free from the cloud of the proceedings pending in San Francisco county, and were entitled to judgment.

For these reasons, the judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

41 Cal. App. 586

RATZLAFF v. TRAINOR-DESMOND CO.
(Civ. 1869.)

(District Court of Appeal, Third District, California. June 13, 1919. Rehearing Denied by Supreme Court Aug. 11, 1919.)

1. Brokers 🔑85(1) — Action for Commission — Proof of Services — Parol Evidence.

In land broker's action upon principal's written agreement to pay commissions for services performed, where answer alleged there was no consideration for agreement, parol evidence as to such services was not inadmissible as being violative of statute of frauds requiring broker's authority to be in writing, but was admissible for purpose of showing consideration.

2. Evidence 🔑422 — Action for Commission—Parol Evidence — Contract with Purchasers.

In land broker's action upon principal's written agreement to pay commission pro rata as purchase price was paid, parol evidence was admissible to show that the principal's contracts with purchasers were in full force at time of assignment thereof by principal.

3. Brokers 🔑75—Commission—Cancellation of Land Contract.

Where broker's contract with owner provides for payment of commissions pro rata as purchase price is paid, broker is entitled to entire commission upon cancellation of owner's contract with purchaser by mutual consent of owner and purchaser.

4. Brokers 🔑63(1)—Commission Contract —Duty of Owner.

Vendor, having agreed to pay broker commission pro rata upon payment of purchase price, is required to act in good faith and do nothing to prevent, discourage, or embarrass the completed purchase of the property and do everything possible to aid in securing the purchase price.

5. Brokers 🔑75—Commission Contract—Assignment of Contracts by Vendor.

Where vendor, having agreed to pay broker commissions pro rata upon payment of purchase price after payment of first 20 per cent., conveyed title to the land and assigned its interest in the contracts to another party, the entire commission became due; vendor having in effect abandoned and made it impossible to carry out its contract with purchasers procured by broker.

6. Interest 🔑43—Commission Contract — Antedated Contract.

Where antedated commission contract provided for payment of commissions pro rata upon payment of purchase price, with interest on commissions "payable as received," without specifying date from which interest was to be computed, interest was to be computed, not from time of default merely, but from date of the commission agreement, and from the real, not apparent, date of the execution of the agreement.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by D. B. Ratzlaff against the Trainor-Desmond Company. Judgment for plaintiff, and defendant appeals. Affirmed as modified.

Butler & Swisler and C. E. McLaughlin, all of Sacramento, for appellant.

Driver & Driver and B. F. Van Dyke, all of Sacramento, for respondent.

BURNETT, J. On or about the 1st day of March, 1912, the Sacramento Valley Colonization Company entered into a contract with the defendant to sell to the latter a large body of land in the Rancho del Paso in Sacramento county. At that time and for some time thereafter plaintiff was engaged in selling lands for defendant, and on or about March 26th following the former negotiated with one W. H. Stewart for the sale of some 1,608.33 acres, and thereafter defendant entered into a written contract with Stewart for the sale and purchase of said tract, acknowledging the receipt of $5,000, and agreeing that, when Stewart paid an additional sum of $12,000 on the purchase price, defendant would give Stewart a new contract according to a form attached to the first contract. When said $12,000 payment was about due according to said contract, plaintiff ascertained that Stewart was having considerable difficulty in raising funds to meet this payment, and on the 12th day of June, following, without any objection from Stewart, plaintiff induced one W. B. Harrison to enter into a contract with defendant for the purchase of section 29 included in Stewart's contract. About this time defendant, without the assistance of plaintiff, sold to one Jonas 320 additional acres of said tract covered by the Stewart contract. Thereupon plaintiff persuaded Stewart that the latter could handle the residue of the land included in said contract, and he came to California from Oklahoma and entered into the second written contract with defendant, whereby the latter agreed to sell to Stewart the north one-half of section 65 and of section 62, being all the land covered by Stewart's first contract, after deducting those portions sold to Harrison and Jonas. Defendant gave Stewart credit on the second contract for the $5,000 paid on the first, the second being dated July 1, 1912. Immediately after this plaintiff and defendant executed the following written agreement:

> "In entering into an agreement with D. Ratzlaff in the sale of the following described property it is understood that the net price to him would be $87.50, and the said Ratzlaff having disposed of the said land at $92.50 per acre, it is therefore understood and agreed that in consideration of the work done and to be done in the sale of section No. 29, and the north half of section No. 62 and north half of section No.

65, amounting to 1,288.33 acres located on Rancho del Paso in the county of Sacramento, state of California, we agree to pay D. B. Ratzlaff, of the city of Sacramento, state of California, the sum of $5 per acre as commissions; said commissions to be paid pro rata as paid by the purchasers after the first 20 per cent. payment is received; no commissions to be paid out of the first 20 per cent. The above commissions are to bear 6 per cent. interest, payable as received."

We may refer to this as "the commission contract," and upon it the action is based. It was dated February 19, but was actually executed in the early part of July, 1912. The reason for antedating is explained by plaintiff, but that consideration is of no importance here. Thereafter and on or about January 18, 1913, while said Stewart's second contract and the Harrison contract were in full force, defendant assigned to the Farmers' & Bankers' Investment Company its said contract of purchase with the Sacramento Valley Colonization Company and took in payment therefor the greater portion of the capital stock of said Investment Company. About the same time, at the request of said defendant, the Colonization Company conveyed the lands covered by said commission contract to the Investment Company, and on or about June 11, 1913, the Trainor-Desmond Company sold all of its said stock to one E. F. Robbins. Thereafter it is plain defendant had no interest whatever in any of said lands or in either of said contracts with Stewart and Harrison.

As to the complaint in the action, no criticism seems to be justified. In brief, it may be stated that it alleges the execution of said commission contract, the performance by plaintiff of the terms, covenants, and conditions therein recited, "that defendant has received payment in full for said lands, that heretofore, and while said contracts of sale were in full force and effect, defendant sold and transferred all its interest in the said lands," and that no part of said amount agreed upon has been paid. The complaint was verified and in the verified answer defendant admitted the execution of the commission contract, but claimed that plaintiff had sold thereunder only 648.33 acres, and was therefore entitled to the sum of $3,241.65 as commissions instead of $6,441.65, as claimed. A counterclaim was also set up for about $1,600, and the prayer was that this sum might be set off against plaintiff's claim, and defendant offered to pay to plaintiff the difference. Defendant was permitted, however, by the court to file an amended answer, from which was omitted the express admission of any amount due plaintiff. No objection was made to the form of the amended answer, although somewhat uncertain in its denials of certain material allegations of the complaint, and the cause was tried by the court. The findings were in favor of plaintiff on the commission contract for the full amount claimed, to wit, the sum of $6,441.65 together with interest thereon at 6 per cent. from the 19th day of February, 1912, amounting to $8,060.23, and in favor of defendant for the counterclaim for a little less than the amount demanded. The judgment was for the difference, the sum of $6,130.66 in favor of plaintiff, from which the appeal is taken.

[1] In the trial of the cause much parol evidence was received of the services performed by plaintiff in the effort to secure purchasers for said tract of land and to effect its sale. This included an account of the negotiations with said Stewart and Harrison and a statement of the contracts which plaintiff induced them to execute. The evidence was objected to principally on the ground that it was thereby sought to prove the authority of plaintiff as agent to represent defendant in the sale of real property, and it is claimed here that such evidence was inadmissible because violative of the statute of frauds, requiring such authority to be in writing. But appellant is entirely mistaken in the view that said rule is applicable to this case. The evidence was received and was certainly admissible for the purpose of showing the consideration for appellant's promise to pay respondent said commission of $5 per acre. It was not required of respondent in the first instance to offer such evidence, since the written contract would raise the presumption of sufficient consideration. But the answer virtually denied that any service was performed that would support the said promise to pay, and respondent, by offering such proof, simply anticipated this defense. Plaintiff, let it be repeated, did not rely upon any parol authorization of agency, but this action was and is based upon said written promise to pay. If A. should enter into oral negotiations with B. to sell for the former a tract of land, and the service should be performed, and thereafter A. should execute a written promise to pay a commission therefor, would any one contend that, if the consideration for said promise were disputed, B. would not be permitted to testify as to the service he had performed for A? We think there can be no serious controversy above the matter, and the ruling was altogether correct.

[2] Parol evidence was also received to show that, at the time appellant disposed of all interest in said land and in said contracts with Stewart and Harrison, the agreements for the sale to them were in full force and effect. This was entirely proper in view of the condition prescribed in the written promise for the payment of the commission. It was to be paid "pro rata" as the purchase price was paid. If, therefore, the contracts were forfeited by Stewart and Harrison and they declined or refused to pay the purchase price, respondent would not be entitled to his commission, and appellant, of course, would

be released of liability therefor. Respondent assumed the responsibility of losing his commission if said Stewart and Harrison defaulted. But he claimed, and still contends, that his commission became due by reason of the default of appellant, and, manifestly, to take advantage of that default, he must show that be had not already lost his right in consequence of the forfeiture of the said Stewart and Harrison contracts.

There remains the important question whether the legal effect of the acts of appellant as to the sale of the property to the Farmers' & Bankers' Investment Company was to make the said commission immediately due. It is the contention of respondent:

> That by said sale appellant "put it out of its power to ever receive any further payments or benefits under the Harrison and Stewart contracts of sale or to take steps to enforce payment thereunder. They likewise by this sale put it out of the power of plaintiff to do any further work for them under his commission contract, if there was any further work to be done thereunder."

In support of this claim they cite Wolf v. Marsh, 54 Cal. 228; Love v. Mabury, 59 Cal. 484; Poirier v. Gravel, 88 Cal. 79, 25 Pac. 962; Bagley v. Cohen, 121 Cal. 604, 53 Pac. 1117; Grant v. Warren, 31 Cal. App. 458, 160 Pac. 847; Realty Bonds, etc., Co. v. Pt. Richmond Co., 171 Cal. 238, 152 Pac. 433; Cheatam v. Yarbrough, 90 Tenn. 77, 15 S. W. 1076.

In the Wolf Case the promise in writing was to pay W. a certain sum of money, but with the express understanding that, if certain mines belonging to M. should yield him no profit, then the note was not to be paid, and the obligation was to become null and void. It was held that the yielding of profit to M. from the mines was a condition precedent to the obligation incurred, but that, M. having rendered the happening of the condition impossible by selling the mines, the obligation became absolute. The decision followed the statement of the principle in Bishop on Contracts, § 690, as follows:

> "If one voluntarily puts it out of his power to do what he has agreed, he breaks his contract, and is immediately liable to be sued therefor without demand, even though the time specified for performance has not expired."

In the Love Case the plaintiff's assignors "contracted to furnish materials and perform work in defendants' mine, in consideration of which the defendants agreed to pay them $1,700—$800 down during the progress of the work, and the balance out of the first proceeds of the mine, after deducting expenses." It was held that the contract contemplated that the defendants were to work the mine; and their failure and refusal to commence to work it within a reasonable time rendered them liable for the balance to be paid.

In the Poirier Case, supra, the promise was to pay a certain sum of money in installments, when realized, from the products of certain land owned by the defendant, and it was held that the money immediately became due by the sale and conveyance by the defendant to others of the land and products.

In the Bagley Case a note was given to be paid out of the profits of a business, and it was held that the liability became fixed and absolute when the maker voluntarily put it out of his power to make any profit out of the business or to fulfill the contract according to its terms, by a sale and conveyance of the business.

In the Grant Case the balance of the purchase price of certain lands was to be paid out of the proceeds of a certain quarry, and, the vendee having repudiated his agreement to work the mine, it was held that the measure of plaintiff's damage was the full balance due in cash, and not the amount of the royalty that the quarry might have yielded had it been worked.

In the Realty Bonds Case the action was by an agent to recover commissions for the sale of a tract of land to be paid out of the purchase price. The vendor agreed, however, to make extensive improvements on the land. He failed to keep his agreement, and it was held by the Supreme Court that this tended to show that he had prevented the purchasers from paying the purchase price, and that, under these circumstances, the agent was entitled to his full commission.

In the Cheatam Case a real estate broker was to be paid his commission out of the purchase price, but it was held that he was entitled to said commission notwithstanding there was no sale, since the sale was not consummated by reason of a defect in the vendor's title.

[3, 4] The principle of the foregoing cases would assuredly apply here, if it be true, as claimed in the brief of appellant, that the Stewart contract was canceled by mutual consent of Stewart and appellant. If appellant consented to such cancellation, it would, of course, by this voluntary act, in a legal sense prevent the payment of the purchase price. The commission contract necessarily implied that appellant would act in good faith and do nothing to prevent, or even discourage or embarrass, the completed purchase of the property. Indeed, according to the plainest principles of honesty and fair dealing, appellant was required to do everything possible to promote the purchase of the land by Stewart and Harrison, and thereby to aid in securing the purchase price, to the end that respondent might receive compensation for the services which he had performed.

[5] The court, however, found that the said contracts of Stewart and Harrison were still in force at the time of the conveyance as aforesaid to the said Farmers' & Bankers'

Investment Company. But by this conveyance and the assignment to said company by appellant of all its interest in said Stewart and Harrison contracts it waived all interest in the payment of said purchase price, and violated its implied obligation to promote the purchase of the property by Stewart and Harrison. The commission contract clearly contemplated that appellant would not change its attitude towards the property to the detriment of respondent. This is not like the case where a vendor who has entered into an executory contract for the sale of real estate simply conveys the property to another before the maturity of the obligation under said contract or where he enters into a contract for the sale of property which he does not own at the time of the execution of the contract. But in the case at bar the vendor not only conveyed all of his title in the land, but also relinquished all of his interest in the contract of sale, in which contract respondent was directly interested and upon which the payment of his commission depended. The effect of appellant's conduct, as far as respondent's interest is concerned, was the same as though the former had entirely rescinded or abandoned the contracts with Stewart and Harrison.

In 39 Cyc. 1388, it is said:

> "According to the weight of authority, where the vendor upon default in performance of the purchaser or in the absence of such default sells the land to a third party, this will amount to a rescission of the contract of sale, and a fortiori the contract will be considered as rescinded when in addition to the sale the vendor notifies the purchaser that he considers his contract rescinded. According to some decisions, however, sale of the property to a third person does not of itself constitute a rescission. These decisions proceed upon the theory that the vendor has not made performance on his part impossible, since he has it in his power to repurchase the property and perform the contract."

The rule as stated in the latter portion of the above quotation prevails in California. Joyce v. Shafer, 97 Cal. 335, 32 Pac. 320; Shively v. Semi-Tropical Land Co., 99 Cal. 259, 33 Pac. 848.

But here, as we have seen, the appellant has gone further and assigned its agreement to sell. It has therefore in effect abandoned and made it impossible for it, at least, to carry out the contract with Stewart and Harrison.

In fact, by said commission contract, the parties contemplated that appellant should retain its interest in the property and in the purchase price until the commission was paid. Love v. Mabury, supra. While not explicitly stated it is fairly implied, indeed, that the commission was to be paid out of the purchase price. Is that not a reasonable inference from this language, "Said commissions to be paid pro rata as paid by the purchasers after the first 20 per cent. payment is received, no commissions to be paid out of the first 20 per cent."? Why should appellant be at pains to provide that no part of the commissions shall be paid "out of" the first 20 per cent. of the purchase price, if it was the understanding that it should be paid out of no portion of said price? The fact that the first 20 per cent. was thus distinguished creates the implication that the remaining 80 per cent. was to be impressed with the burden of the commission.

We may add that this view leads to no injustice, since the services were performed by respondent, and a large sum of money was paid to appellant by Stewart and Harrison, and the property was afterward sold for its full value.

Appellant claims that—

> "The finding and judgment show that the court allowed $5 per acre on 1,608.33 acres. The contract on its face provides only for commission on 1,288.33 acres."

We do not so read the record. The court found that the principal sum due for commissions is $6,441.65. As we figure it, 1,288.33 acres at $5 per acre would just equal that sum.

The remaining question relates to the allowance of interest. It is to be observed that the commission contract does not specify the date from which interest shall be computed. It is provided that "above commissions are to bear 6 per cent. interest payable as received." It thus appears that the interest was to be due at the same time as the installments of the commission, and the rate was to be 6 per cent., but the initial point for the computation was not specified. In R. C. L. § 23, it is said:

> "It seems to be generally agreed that, where an instrument is payable at a future day, with interest, and nothing is said in it as to the commencement of the interest period, it is to be computed from the date of the instrument."

In one of the cases cited in support of the text, Hackenberry v. Shaw, 11 Ind. 392, the language of the stipulation was, "with 6 per cent. interest, if not paid at maturity." The Supreme Court of Indiana said:

> "The only question raised * * * is whether interest should be computed from the date of the bill, or only from the time of the default. The court below allowed interest from the date of the bill. This, we think, was right. To construe the words 'with 6 per cent. interest, if not paid at maturity,' to mean interest from the time of default merely, would be equivalent to striking them out of the bill entirely. That would be the effect of the bill without any statement as to interest."

Lord Denman, C. J., delivering the opinion of the court in Raffey v. Greenwell, 10 Ad. & El. 222, said:

"Generally speaking, an installment of this sort carries interest from its date, whether payable on demand or at a time specified. The reason is that the party who makes the promise must expect to keep it; and, if he does, no interest can be due from any other period than the date."

[6] But it appears herein, and the court so found, that said commission agreement was executed on or about the 1st day of July, although it bears date of February, 19, 1912. We think the real rather than the apparent date is what the parties had in mind. It is hardly to be supposed that, in the absence of an agreement to that effect, the parties contemplated the payment of interest for a period prior to the execution of any promise on the part of the obligor. As we compute it, the court allowed as interest about $43 in excess of the sum due. The facts fully appear in the findings, and the judgment may be modified here by reducing the amount to $6,087, and, as thus modified, it is affirmed; respondent to recover his costs.

We concur: CHIPMAN, P. J.; HART, J.

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41 Cal. App. 649

ANDERSON v. NATIONAL ICE & COLD STORAGE CO. (Civ. 2792.)

(District Court of Appeal, First District, Division 2, California. June 18, 1919.)

LIMITATION OF ACTIONS ⚷130(12)—EXTENSION OF TIME—"REVERSAL OF JUDGMENT ON APPEAL"—CERTIORARI.

Where an award of compensation to a widow under the Workmen's Compensation Act for death of her husband was annulled by the Supreme Court on a writ of certiorari, such annulment was not the "reversal of judgment on appeal" within the provisions of Code Civ. Proc. § 355, providing that where judgment is reversed on appeal, plaintiff may commence a new action within one year.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Anna I. Anderson against the National Ice & Cold Storage Company, a corporation. From judgment for defendant on demurrer to the complaint, plaintiff appeals. Affirmed.

Charles L. Brown, of San Francisco, for appellant.

Gavin McNab and Nat Schmulowitz, both of San Francisco, for respondent.

LANGDON, P. J. This is an action to recover damages from the defendant because of the death of the husband of plaintiff, alleged to have been caused by injuries sustained by him while in the employ of the defendant, and due to the negligence of the defendant. The defendant demurred to the complaint upon a number of grounds. The demurrer was sustained upon three grounds, and judgment entered for defendant, from which the plaintiff appeals.

Under our conclusion, it is only necessary for us to consider one point upon the appeal, and that is whether or not the action was barred by the provisions of section 340, Code of Civil Procedure, providing that an action for the wrongful death of another must be brought within one year. The facts of the case, pertinent to this inquiry, are briefly as follows: John A. Anderson, the husband of plaintiff, was injured on July 22, 1916, by falling through an elevator shaft at the place of business of the defendant company. He died from such injuries on August 10, 1916. In October, 1916, his widow commenced proceedings before the Industrial Accident Commission, which proceedings culminated in an award for the plaintiff. This award was annulled by the Supreme Court upon a writ of certiorari on November 22, 1917. Casualty Co. of America v. Industrial Accident Commission et al., 176 Cal. 534, 169 Pac. 76. Thereafter, on April 15, 1918, more than one year after the death of John A. Anderson, the present action was commenced in the superior court.

The appellant urges that section 355, Code of Civil Procedure, is applicable to the case, which section provides that where judgment is reversed on appeal, the plaintiff may commence a new action within one year after reversal. Appellant contends that the action of the Supreme Court in annulling the award of the Accident Commission was a reversal on appeal within the meaning of this section. In this matter we feel bound by the decision in the case of Fay v. Costa, 2 Cal. App. 241, 83 Pac. 275. A petition for hearing by the Supreme Court was denied in that case, and it expressly decides that where an order is annulled upon a writ of review, the annulment thereof cannot be deemed the reversal of a judgment upon appeal within the provisions of section 355 of the Code, allowing a new action to be commenced within one year after the reversal, and does not operate to extend the time for commencing an action.

We have given great consideration to appellant's argument that while the Workmen's Compensation Act provides only for a writ of review and for no other method of appeal, yet it specifies the matters to be determined upon the review, and such review embodies more than the ordinary features of a proceeding known as certiorari, because it is provided that the decision of the Industrial Commission may be reviewed to determine whether it has been procured by fraud or whether it is unreasonable, and that there-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

fore this proceeding is more in the nature of an appeal, and is different from the ordinary proceeding upon certiorari in which merely the question of jurisdiction may be examined. However, we are of the opinion that the language and reasoning of the case of Fay v. Costa, supra, covers these objections, and that we are not at liberty to consider the question an open one.

Furthermore, we call attention to the fact, pointed out by respondent in his brief, that section 355, Code of Civil Procedure, and the decision in the case of Fay v. Costa, were both in full force and effect at the time of the adoption of the Workmen's Compensation Act, and at the time of its amendment, and we must assume that the Legislature, in passing this law and therein limiting the rights of the parties after proceedings before the Industrial Accident Commission to a review only by writ of certiorari, had in mind the construction placed upon such Code section by the above-named case. Baker v. Hamilton, 55 Cal. 302; Estate of Healy, 122 Cal. 162, 54 Pac. 736. Indeed, the act itself provides that the sections of the Code of Civil Procedure of this state, relating to writs of review, shall, so far as applicable, apply to proceedings in the courts under the provisions of the act.

Under the authority of Fay v. Costa, supra, we are constrained to hold that the annulment upon writ of review of the award of the commission did not operate to extend the time for commencing the action, and that the plaintiff's action was barred by the provisions of section 340, Code of Civil Procedure.

The judgment is affirmed.

We concur: BRITTAIN, J.; HAVEN, J.

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41 Cal. App. 633

HUDSON et al. v. BARNESON. (Civ. 2902.)

(District Court of Appeal, First District, Division 2, California. June 17, 1919. Rehearing Denied by Supreme Court Aug. 14, 1919.)

1. Evidence 🔑442(1)—Written Contract—Completeness—Parol Evidence.

The test of whether parol evidence is admissible as an exception to the rule that where terms of an agreement have been reduced to writing no evidence of other negotiations or terms is admissible, under Civ. Code, § 1625, and Code Civ. Proc. § 1856, is the completeness or incompleteness of the written contract, and whether it contains all the terms of the agreement which is to be determined from an inspection of the contract itself.

2. Evidence 🔑442(5)—Written Contract—Parol Evidence—Incompleteness of Contract.

Written contract between owner and architect giving architect, as compensation for his services, 7 per cent. of the entire cost of the construction of house and garage without stating or limiting the cost of the construction, was incomplete, entitling owner to introduce parol evidence as to limit of cost of construction.

3. Appeal and Error 🔑1071(3)—Review—Harmless Error—Finding.

In architect's action against owner on contract giving architect stipulated percentage of cost of residence and garage, finding that owner directed architects to construct garage, not to exceed certain amount, if error, as not being supported by evidence, was harmless, where it was found that architects were not entitled to compensation in connection with construction of residence, and the payment actually made to architect was more than sufficient to compensate architects for their services in connection with the construction of garage.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Frank D. Hudson and another, copartners doing business under the firm name and style of Hudson & Munsell, against John Barneson. Judgment for defendant, and plaintiffs appeal. Affirmed.

Sheldon Borden and George H. Moore, both of Los Angeles, for appellants.

A. L. Weil and H. F. Shaw, both of San Francisco, for respondent.

HAVEN, J. Appellants contend that the trial court erred in admitting, over their objection, certain parol evidence, which they claimed varied the terms of a written agreement between the parties. The defendant employed the plaintiffs as architects to prepare plans and specifications for, and to superintend the construction of, a dwelling house and garage. Upon their completion, plaintiffs sent the plans and specifications to the defendant, and rendered him a bill reading as follows:

"To architectural work on residence & garage at San Mateo, agreement five per cent. on cost of buildings for plans, specifications and details now completed. Payment now due on account, $1,500.00."

Upon the receipt of such bill defendant wrote plaintiffs, acknowledging the same, remitting one-half of the amount thereof, and raising questions as to the basis of plaintiffs' compensation. A few days thereafter one of the plaintiffs called upon the defendant, at which time a discussion was had concerning the terms of the employment. Four days after such interview plaintiffs wrote the defendant the following letter:

"September 28, 1916. Captain John Barneson, 310 Sansome Street, San Francisco, Cal.—Dear Sir: In confirmation of our conversation of last Saturday, in regard to the architectural work on your proposed residence and garage in San Mateo, we agree to prepare all plans, specifications and details and also to superintend the erection of the buildings for a sum equal to seven per cent (7%) of the entire cost of the same. Necessary traveling expenses to be paid by you. Yours very truly, Hudson & Munsell, Per Frank D. Hudson."

Shortly thereafter the defendant wrote the plaintiffs as follows:

"October 7, 1916. Messrs. Hudson & Munsell, 415 Stimson Block, Los Angeles, Cal.—Gentlemen: I acknowledge receipt of your favor of September 28th and confirm same. Yours very truly, John Barneson."

Upon the trial oral evidence was admitted on behalf of defendant, the effect of which was to prove that the defendant had instructed plaintiffs when they were first employed, and subsequently during the time when the plans were in process of preparation, that the limit of cost of the proposed dwelling house was to be $25,000. Plaintiffs objected to this evidence upon the ground that it was an attempt to vary by parol evidence the terms of the agreement, which they claimed were entirely contained in the writings above referred to. The objection was overruled, the evidence admitted, and judgment rendered in favor of the defendant, from which plaintiffs appeal.

Plaintiffs alleged in their complaint that the defendant had constructed the garage at a cost of $5,448, and had refused to proceed with the construction of the dwelling house and abandoned the construction of it; and "that it would have cost $55,000 to have constructed said dwelling house." The court found, in conformity with the defendant's testimony, that the reason he refused to proceed with the construction of the dwelling house was the excessive cost thereof. The evidence of the defendant and members of his family supports the judgment of the trial court. The question involved in this appeal is whether such evidence was admissible. Appellants rely upon the familiar rule that, when the terms of an agreement have been reduced to writing, no evidence of other negotiations or terms is admissible. Civ. Code, § 1625; Code Civ. Proc. § 1856. Respondent, on the other hand, claims that the facts bring the case within the well-established exception to the above rule to the effect that, "Where a writing, although embodying an agreement, is manifestly incomplete, and is not intended by the parties to exhibit the whole agreement, * * * such parts of the actual contract as are not embraced within its scope may be established by parol." 3 Jones Comm. on Evidence, § 440; Sivers v. Sivers, 97 Cal. 518, 521, 32 Pac. 571; Kreuzberger v. Wingfield, 96 Cal. 251, 255, 31 Pac. 109; Williams v. Ashurst Oil, etc., Co., 144 Cal. 619, 624, 78 Pac. 28.

[1] The test of the application of the general rule or its exception to a given case is the completeness or incompleteness of the written contract; or, in other words, whether such contract contains all the terms of the agreement. With few exceptions, this question is to be determined from an inspection of the contract itself. In the leading case of Harrison v. McCormick, 89 Cal. 327, 330, 26 Pac. 830, 831 (23 Am. St. Rep. 469), which has been approved in many subsequent cases, it is said:

> "If it [the writing] imports on its face to be a complete expression of the whole agreement—that is, contains such language as imports a complete legal obligation—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed."

[2] The question for determination is therefore whether the contract evidenced by the writings above referred to appears upon its face to embrace all the agreements of the parties and this is to be determined from the language of the letter of September 26th from plaintiffs to defendant. Appellants contend that the confirmation of that letter by the defendant bound him to pay to the plaintiffs the agreed percentage upon whatever might be the entire estimated cost of any residence and garage which plaintiffs might plan. Respondent, on the other hand, insists that the amount to be paid plaintiffs could not be determined without a prior determination of the cost of the buildings, and as that cost was nowhere stated in the writings, it was an element of the contract omitted therefrom. In our opinion, the trial court did not err in construing the contract in accordance with respondent's contention. Disregarding the improvident nature of such a contract as appellants' construction would make of the one here involved, it is manifest that the plaintiffs' commissions could not be computed from the terms of the written contract alone. This shows its incompleteness. A necessary element of plaintiffs' cause of action was the cost of the buildings. Plaintiffs could not object to evidence on the part of defendant as to the amount of such cost upon the ground that the entire contract was included in the writings, while the necessities of their own case compelled them to adopt a like course to supply the same omitted portion of the contract. It cannot be held, therefore, that the letter imports on its face to be a complete expression of the whole agreement.

[3] It is further contended by appellants that the court erred in finding that the defendant directed the plaintiffs to prepare plans and specifications for a garage to cost not to exceed $3,500 to $4,000, as that finding is entirely unsupported by the evidence and is contrary thereto. Conceding the correctness of this contention, it appears that the plaintiffs have been paid by the defendant

the sum of $1,500, which was more than sufficient to compensate them for their entire services in connection with the garage. The contract evidenced by the letter of September 28, 1916, covered services in connection with both the residence and garage. As the court found plaintiffs were not entitled to any compensation in connection with the residence, the payment made must be applied to the services rendered upon the garage, if plaintiffs were entitled to payment therefor. It does not appear, therefore, that appellants were prejudiced by this finding.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

(41 Cal. App. 689)

HUTTON v. NEWHOUSE et al. (Civ. 2926.)

(District Court of Appeal, First District, Division 1, California. June 21, 1919. Rehearing Denied by Supreme Court Aug. 18, 1919.)

1. PLEADING 🔑406(5)—OBJECTION TO PLEADING—WAIVER.

In an action to foreclose a lien for improvement of a street intersection, objection to the complaint that the improvement ordinance was pleaded as to its passage, approval, and existence by recital, instead of directly, should have been made by special demurrer, and, not having been so made, was waived.

2. APPEAL AND ERROR 🔑931(9)—PRESUMPTION AS TO FINDINGS—BURDEN TO OVERTHROW.

When the record presents a judgment without findings, the presumption in its favor is that findings were waived, which presumption appellant must overthrow by embracing in his record on appeal an affirmative showing by bill of exceptions, statement, or other appropriate method that findings were not made.

3. MUNICIPAL CORPORATIONS 🔑294(4) — STREET IMPROVEMENT—SUFFICIENCY OF NOTICE.

Posted notice of a street improvement in the city of San Francisco *held* sufficient in form, in view of the improvement ordinance which merely required the notice should state briefly the improvement proposed and refer to the resolution of intention for further particulars.

4. MUNICIPAL CORPORATIONS 🔑530—STREET IMPROVEMENT—ACTION TO FORECLOSE LIEN —TIME.

Where property owners in the city of San Francisco did not avail themselves of the privilege of paying the assessment for a street improvement in installments, and did not execute the bond thereon required by the city's improvement ordinance, they were subject to suit for foreclosure of the lien on their property at any time after it had become perfected and within two years after proper recordation.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Thomas S. Hutton against Arthur A. Newhouse and others. From judgment for plaintiff, defendants appeal. Affirmed.

Hugo D. Newhouse and Jesse A. Mueller, both of San Francisco, for appellants.

Chas. A. Gray, of San Francisco, for respondent.

RICHARDS, J. [1] This is an appeal from a judgment in the plaintiff's favor in an action to foreclose a lien for the improvement of a street intersection in the city and county of San Francisco, under the provisions of the ordinance providing for such improvements, pursuant to the terms of section 33, chapter 2, article 6, of the charter of said municipality. The appellant urges several points upon appeal. The first of these is that the complaint was fatally defective in the respect that the street improvement ordinance relied upon was not sufficiently pleaded. No demurrer was presented to said complaint; no objection was made to the admission in evidence of the ordinance in question. The objection to the sufficiency of the pleading in respect to the passage and approval of said ordinance is for the first time made upon appeal. The belated objection is that the ordinance is pleaded as to its passage, approval, and existence by recital instead of directly. The objection comes too late. It should have been made by special demurrer, and, not having been so made, must be held to have been waived. City of Santa Barbara v. Eldred, 108 Cal. 294, 41 Pac. 410; Wells Fargo & Co. v. McCarthy, 5 Cal. App. 312, 90 Pac. 203.

[2] The appellant's next contention is that the judgment must be reversed, because there are no findings in the record, and because the record fails to show that findings were waived. The statement of this point embraces its own answer. When the record presents a judgment without findings the presumption in its favor is that findings were waived. This presumption the appellant must overthrow by embracing in his record on appeal an affirmative showing by bill of exceptions, statement, or other appropriate method, that findings were not waived. Smith v. Lawrence, 53 Cal. 34; Campbell v. Coburn, 77 Cal. 36, 18 Pac. 860; Richardson v. City of Eureka, 110 Cal. 441, 42 Pac. 965; Tomlinson v. Ayres, 117 Cal. 568, 49 Pac. 717; Baker v. Baker, 139 Cal. 626, 73 Pac. 469.

The next contention of the appellant is that the implied findings necessary to support the judgment are not justified by the evidence in the case. Under this head the appellant makes several points which we do not consider it necessary to review in detail, for the reason that we think appellants' objections to the sufficiency of the evidence, which is wholly documentary, are all answered either by the terms and requirements of the ordinance providing for this improvement, or by the decision of the Supreme Court in the cases of Bates v. Twist, 138 Cal. 52, 70 Pac. 1023, and Remillard v. Blake & Bilger Co., 169 Cal. 277, 146 Pac. 634, Ann. Cas. 1916D, 451, in which the cases are reviewed and the scope, purpose, and sufficiency of resolutions of intention are fully expounded. We think that these cases furnish a sufficient answer to the appellants' several contentions in respect to the insufficiency of the evidence as justifying the implied findings of the court.

[3] The next point urged by the appellants is that the posted notice of improvement was insufficient in form, and that the same was not posted in all of the places specified in the street improvement ordinance. As to the objection that the posted notice of improvement was insufficient in form, we think that the appellants' objections to it are sufficiently met by a reference to the terms of the ordinance, which only requires that the notice of improvement shall state "briefly the improvement proposed, and refer to the said resolution of intention for further particulars." We think also that the case of Perine v. Erzgraber, 102 Cal. 234, 36 Pac. 585, furnishes a sufficient answer to the appellants' objections in this regard and to the authorities which are cited in support of said objection.

As to the other point under this head urged by the appellants with respect to the insufficiency of the places of posting, we are not directed to the specific evidence or want of evidence as to the insufficiency in this respect.

The appellants' next contention is that the demand of payment was insufficient. This point was fully considered and disposed of against the appellants' contention in the recent case of Bienfield v. Van Ness, 176 Cal. 585, 169 Pac. 225.

[4] The final contention of the appellants is that the action was prematurely brought. The authorities which the appellants cite in support of this contention in our opinion fail to sustain it, for the reason that they deal with considerations other than those which are specified in the terms of the street improvement ordinance itself. By section 19 of said ordinance, it is provided that the warrant, assessment, and diagram shall be recorded in the office of the secretary of the board of supervisors, and that "when so recorded the several amounts assessed shall be a lien upon the land, lots or portions of lots assessed respectively for the period of two years from the date of said recording unless sooner discharged." It is true that in the street improvement ordinance provision is made for the payment of these assessments in installments by such property owners as elect to bring themselves and their property within the terms of this privilege by indicating such election in the manner, and by executing a bond in the form, fully set out in the ordinance, in which event the payment of the assessment is postponed according to the terms of the ordinance permitting such installment payments, and providing for such bond. But it is not contended that the appellants in this case availed themselves of the privilege of paying the assessment in installments, nor that they executed the required bond. They were therefore subject to suit for the foreclosure of the lien upon their property at any time after such lien had become perfected and within two years after the proper recordation thereof. This action, having been begun between these dates as shown by the record, cannot be held to have been prematurely brought without doing violence to the express terms of sections 19 and 22 of the ordinance in question.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

41 Cal. App. 693

W. J. WHITE CO. v. WINTON. (Civ. 2873.)

(District Court of Appeal, First District, Division 1, California. June 23, 1919.)

Appeal and Error ⚷428(1) — Notice of Appeal—"Filing" with Clerk.

Where the person who desired to serve defendant's notice of appeal proceeded to the office of the clerk of the court, and arrived there about the time the office closes, and after searching for a deputy returned to find the office closed, so that she slipped the notice under the door, there was no legal filing of the notice as of that day, the deputy clerk having placed the filing mark on the notice the next day; delivery being essential to "filing."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, File.]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the W. J. White Company, a corporation, against Mrs. Hally Winton. From an order granting defendant's motion to correct the record by changing the file mark on her notice of appeal, plaintiff appeals. Order reversed.

C. W. Eastin, of San Francisco, for appellant.

Milton S. Hamilton, of San Francisco, for respondent.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

WASTE, P. J. This is an appeal from an order granting defendant's motion to correct the record by changing the file mark upon her notice of appeal from January 17 to January 16, 1918.

It is conceded, as of course it must be, that in the taking of an appeal the notice thereof must be both served and filed within the time permitted by law. Neither alone is sufficient. In the present proceeding it appears that the plaintiff had obtained a judgment against the defendant, and that the last day upon which the latter might take an appeal was January 16, 1918. On that day she served a notice of appeal, and the question here presented is, Was the notice also filed on that day or, as indicated by the filing mark thereon, upon the day following?

According to the affidavit in support of the motion the person who served the notice, desiring to file the same, proceeded to the office of the clerk of the court, and arrived there at about 5 o'clock in the afternoon, which is the hour the office closes. In searching for a deputy to whom she might hand the notice for the purpose of filing she wandered out of the office, and when she shortly thereafter tried to re-enter she found the office closed. A person at that moment coming out of the office, upon learning from her her purpose there, informed her that she could effect her object by passing the notice through the door and leaving it, which she did. On the other hand, the attorney upon whom the notice had been served on the afternoon of that day, at the time of the service thereof noticed the lateness of the hour, and expressed the opinion to the person serving the notice that she would not have time to reach the clerk's office in order to file it. This statement of the attorney is not denied. An affidavit of the deputy clerk who placed the filing mark upon the notice is in part as follows:

> "On the 17th day of January, 1918, as such deputy clerk I filed in the above entitled action the notice of appeal of the defendant in the action. * * * Said notice of appeal was not filed nor delivered to the office of the county clerk for filing on the 16th day of January, 1918, nor until the 17th day of January, 1918. There is no mistake in the date of filing thereof which is indorsed on said notice of appeal. It is practically impossible to make a mistake in the date of filing any paper [then describing the method of avoiding mistakes], and positively no mistake was made in the date of the actual filing of the notice of appeal above mentioned."

In this state of the record we are constrained to hold that the appeal was not seasonably taken, for the reason that it cannot be held that merely leaving or depositing the notice thereof in the clerk's office on January 16th, under the circumstances narrated, constituted a legal filing. A paper is filed when it is delivered, at the place where it is to be filed, to the proper officer, and by him received to be kept on file. "If the filing can be proved by parole, the proof must show actual delivery of the paper to the clerk or one of his deputies, and the proof should be clear and positive. It is not enough to show the paper in the office of the clerk. It must be delivered to him for the purpose of filing." Boyd v. Desmond, 79 Cal. 254, 21 Pac. 756. "Delivering an instrument to the proper officer at a place other than the office where it is required to be filed is not sufficient, even though the officer indorse it as properly filed." Edwards v. Grand, 121 Cal. 256, 53 Pac. 797. A notice of appeal delivered to a deputy clerk after hours, and actually indorsed filed as of that date, was held not filed until he delivered it at the office next day. Hoyt v. Stark, 134 Cal. 178, 66 Pac. 223, 86 Am. St. Rep. 246.

It follows that the order should be reversed; and it is so ordered.

We concur: RICHARDS, J.; NOURSE, Judge pro tem.

41 Cal. App. 755

NADEAU v. LYNCH et al. (Civ. 2892.)

(District Court of Appeal, First District, Division 2, California. June 26, 1919. Rehearing Denied by Supreme Court Aug. 25, 1919.)

1. APPEAL AND ERROR ⇐110—ORDERS APPEALABLE—DENIAL OF NEW TRIAL.

An order denying motion for new trial is not appealable.

2. APPEAL AND ERROR ⇐553(1) — TRANSCRIPT—CERTIFICATE.

Where an appeal is taken on typewritten transcript pursuant to Code Civ. Proc. § 953a, the trial court's certificate that certain notices and affidavits in transcript are correct and were considered in connection with "other testimony" *held* insufficient to present such other testimony for appellate court's consideration.

3. APPEAL AND ERROR ⇐684(2), 709—RESERVING GROUNDS FOR REVIEW—RECORD.

Refusal of trial court to grant plaintiff's motion for jury trial in forma pauperis and denial of his motion for a continuance cannot be declared erroneous, where entire evidence on which the trial court acted is not presented to appellate court.

4. APPEAL AND ERROR ⇐1011(1)—DISCRETION OF COURT—SETTING ASIDE JUDGMENT.

Action of trial court in refusing to set aside judgment on ground of mistake, inadvertence, surprise, and excusable neglect cannot be disturbed, when based upon conflicting evidence.

5. APPEAL AND ERROR ⇐981—NEW TRIAL ⇐99—DISCRETION OF COURT—NEWLY DISCOVERED EVIDENCE.

Denial of a motion for new trial for newly discovered evidence is left largely to discretion of court below and its judgment is rarely interfered with by an appellate tribunal.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Appeal from Superior Court, City and County of San Francisco; John Hunt and Jas. M. Troutt, Judges.

Action by Joseph V. Nadeau against John C. Lynch, receiver of Pacific Coast Casualty Company, Casualty Company of America, and Emil Leydet. From judgment for defendants, and from order denying plaintiff's motion for new trial, plaintiff appeals. Affirmed.

Jay Monroe Latimer and A. A. Cailleaud, both of San Francisco (J. E. Pemberton, of San Francisco, of counsel), for appellant.

Hiram W. Johnson, Jr., and A. A. De Ligne, both of San Francisco, for respondent Lynch.

A. B. Weiler, of San Francisco, for respondent Casualty Co. of America.

HAVEN, J. [1, 2] Plaintiff appeals from a judgment rendered against him in an action tried before the court without a jury, for recovery of damages resulting from personal injuries, and also from an order denying his motion, made under section 473 of the Code of Civil Procedure, to vacate and set aside the judgment. He further attempts an appeal from an order denying his motion for a new trial, which latter order is not appealable. The appeal is prosecuted under the method prescribed by section 953a of the Code of Civil Procedure. The typewritten transcript which was filed in attempted compliance with the above section, contains no certificate of the judge who presided at the trial to the truth and correctness of such transcript as containing the matters required by the above referred to section of the Code. In lieu thereof appears a certificate of said judge to the effect that certain notices, stipulation, and affidavits set forth in said transcript "are correct and were before me and considered by me in connection with other testimony" upon the various rulings of which appellant complains. This certificate is manifestly insufficient. The "other testimony" which was considered by the judge of the trial court in making the rulings complained of is in no manner presented for our consideration. All presumptions are in favor of the action of the lower court. In the absence of all the testimony considered upon its rulings, its action cannot be disturbed on appeal.

[3] The motions of the appellant for a new trial and for the vacation of the judgment upon the ground of inadvertence, surprise, and excusable neglect were heard by a different judge of the trial court than the one before whom the trial was had and by whom judgment was rendered. The certificate of the latter judge is attached to the typewritten record, and is to the effect that the same "contains a true and correct transcript of the papers filed and proceedings had, action taken, and order made by me, the undersigned, upon and in connection with the plaintiff's motions for a new trial and to vacate and set aside the judgment entered in this case." As the record so certified is the same as was considered by the trial judge "in connection with other testimony" not therein set forth, the second judge was in no better position than this court to pass upon any alleged errors occurring during the course of the trial. Two of the errors complained of are the refusal of the trial judge to grant plaintiff's motion for a jury trial in forma pauperis without the payment of jury fees; and the denial of plaintiff's motion for a continuance of the time of trial. As the entire evidence which was before the trial judge in passing on these motions is not contained in the transcript, and presumably was not before the second judge, it cannot be held that the refusal to set aside the judgment or to grant a new trial on these grounds was erroneous.

[4] The next error complained of is the denial by the second judge of plaintiff's motion to vacate and set aside the judgment upon the ground of mistake, inadvertence, surprise, or excusable neglect. The evidence submitted in support of, and in opposition to, this motion was conflicting. In view of such conflict, the action of the judge of the lower court cannot be disturbed.

[5] The final contention of appellant is that his motion for a new trial upon the ground of newly discovered evidence should have been granted. This matter is left largely to the discretion of the judge who passes upon the motion, and the exercise of his discretion is rarely interfered with by an appellate tribunal. The affidavits submitted in support of this motion contain no sufficient showing of reasonable diligence to have discovered and produced this testimony at the time of the trial. Appellant's principal complaint in this regard is that his surprise at the refusal of the trial court to grant a continuance prevented the offering of this evidence. As stated above, upon the record, as submitted to us, we must presume that the motion for a continuance was properly denied.

The judgment and order appealed from are affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

42 Cal. App. 55

HALE v. PACIFIC TELEPHONE & TELEGRAPH CO. (Civ. 2852.)

(District Court of Appeal, Second District, Division 1, California. July 2, 1919. Rehearing Denied by Supreme Court Aug. 28, 1919.)

1. NEGLIGENCE 🔑56(1)—PROXIMATE CAUSE.

A defendant is not liable for damages from an injury, unless it is made to appear that its negligence was the proximate cause.

2. NEGLIGENCE 🔑62(3)—PROXIMATE CAUSE—INTERVENING ACT.

Where the original negligence of a defendant is followed by an independent act of a third person, which results in direct injury to plaintiff, defendant's negligence may constitute the proximate cause of the injury, if defendant should have known the intervening act was likely to happen; otherwise, if the act was one which defendant should not have reasonably anticipated.

3. EXPLOSIVES 🔑7—INJURIES—LIABILITY.

Where a boy surreptitiously entered the storehouse of a telephone company and took dynamite caps, knowing the turpitude of his act, and gave such caps to another boy, who exploded one in a toy pistol and was injured, the telephone company was not liable; the independent act of the boy who took the caps having been the proximate cause of the injury.

4. EXPLOSIVES 🔑7—INJURIES—SUFFICIENCY OF COMPLAINT.

In an action against a telephone company for injuries to a boy, caused by his explosion in a toy pistol of a dynamite cap stolen from the company's storehouse by another boy, complaint alleging that both plaintiff and the other boy, by reason of their extreme youth, were ignorant of the dangerous character of such caps, etc., *held* sufficient as against general demurrer.

5. EXPLOSIVES 🔑7—PERMISSION TO CHILD.

If a telephone company knowingly permitted a child to take dangerous dynamite caps from its premises, it was charged with the duty to anticipate the probable result that they would be exploded by himself or his playmates, causing injury.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by Robert Hale, a minor, by Lawrence L. Hale, his guardian ad litem, against the Pacific Telephone & Telegraph Company, a corporation. From a judgment for plaintiff, defendant appeals. Reversed.

Wright, Winnek & McKee, of San Diego, for appellant.

Wade Garfield and Claude L. Chambers, both of San Diego, for respondent.

SHAW, J. Action to recover damages alleged to have been sustained as a result of defendant's negligence. The jury rendered a verdict in favor of plaintiff, upon which judgment was entered, and from which defendant has appealed upon the judgment roll, accompanied by a bill of exceptions.

The facts out of which the accident grew, and concerning which there is little controversy in the evidence, are as follows: At the time when plaintiff sustained the injury, defendant was engaged in constructing and operating a telephone system in the city of San Diego. For its use as a storeroom for supplies and material required in its construction work, it occupied an uninclosed cottage in the rear of which was a lattice porch, with an open space of some 4 or 5 feet for entry. Upon this porch was a shelf platform 2½ to 3 feet above the floor, and on Saturday, the day preceding the accident, defendant's employés placed upon this shelf a wooden box wherein, underneath some excelsior packing, was deposited a tin box containing dynamite caps of a high explosive character and dangerous to persons unacquainted with the care and handling thereof. The top of this wooden box was covered by a board, one end of which was flush nailed and the other lightly tacked. Walter Hadley, a boy 8 years of age, lived with his parents in a house adjoining defendant's said storehouse, and between which and the Hadley cottage there was no fence. At times Walter and other boys played in a driveway entering the lot along the side of the storehouse, but none of them had ever gone upon the porch. On Sunday, June 6th, all of defendant's employés being absent therefrom, Walter Hadley entered upon this porch, and, seeing the wooden box upon the shelf, pried off the cover, raised up the excelsior packing, and, finding the tin box, opened it and took therefrom about 20 of the dynamite caps, of the character and danger in handling which he was wholly ignorant, but thought they could be used in a toy cap pistol which one of his playmates had. On the same day he gave some of these caps to the plaintiff, a boy of the age of 7 years, who likewise, by reason of his age and inexperience, was unacquainted with the character thereof, and who placed one of them in a toy pistol and caused it to explode, as a result of which he was seriously and permanently injured. It conclusively appears that Walter knew the nature of his act and the moral turpitude thereof, namely, that he was engaged in the surreptitious taking of property which did not belong to him; in short, that he was engaged in the theft of defendant's property, which he knew was wrong; and hence his connection with the matter, in so far as it affects plaintiff, must be deemed that of an adult and sui juris.

No purpose could be served in a review of the many authorities cited by counsel from other jurisdictions wherein similar questions have been involved. Suffice it to say that most of them involved features clearly dis-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

tinguishing them from the instant case and were decided upon principles not applicable to the facts here presented.

[1, 2] In order to recover damages for an injury alleged to be due to negligence of a defendant, it must be made to appear that such negligence was the proximate cause of the injury sustained. Conceding that defendant was culpably guilty in the care of the dynamite, such want of care was not the direct and immediate cause of plaintiff's injury, since, notwithstanding defendant's negligence, the accident would not have occurred, except for the intermediate wrongful acts of Walter Hadley in unlawfully breaking open and taking the caps from the wooden box in which they were deposited and giving them to plaintiff. Upon the admitted facts, was defendant's negligence the proximate cause of plaintiff's injury, or must it be attributable to the intervening unlawful act of a responsible third person? The rule, as we understand it, applicable to such cases, is that, where the original negligence of a defendant is followed by an independent act of a third person, which results in a direct injury to a plaintiff, the negligence of such defendant may nevertheless constitute the proximate cause thereof if, in the ordinary and natural course of events, the defendant should have known the intervening act was likely to happen; but if the intervening act constituting the immediate cause of the injury was one which it was not incumbent upon the defendant to have anticipated as reasonably likely to happen, then, since the chain of causation is broken, he owes no duty to the plaintiff to anticipate such further acts, and the original negligence cannot be said to be the proximate cause of the final injury. Thus, if A. negligently leaves his horse attached to a buggy unhitched in the street, and, due to the wrongful act of B. in frightening the horse, it runs away, causing injury to another by a collision, A. is liable to the person so injured, for the reason that he as a reasonably prudent man should have foreseen that the horse might be frightened as a result of which it, in accordance with the instinctive nature of such animals, would run away and cause damage. But, on the other hand, if B. steals the unhitched horse and, in escaping with it collides with another to the latter's damage, no recovery therefor can be had against A., for the reason that the wrongful theft of the horse was not a consequence which A. as a reasonably prudent man should be deemed to have anticipated as a result of leaving his horse in the street unhitched. So, in the instant case, notwithstanding the alleged negligence of defendant, no injury in consequence thereof would have resulted to plaintiff, except for the act of Walter Hadley, who testifies that he knew that it was both morally and legally wrong to take the caps from the box. He had never before been upon the porch, and, so far as appears, nothing had ever prior to the time been stolen from the yard, the porch, or the house, in which defendant stored various kinds of supplies and kept a quantity of material used in its construction work. The facts disclose no element of allurement whereby Hadley was attracted to the porch or induced to break open the box. It cannot, under the circumstances, be said that defendant was bound to anticipate the act committed, and guard against consequences which might follow in case one who, as here, admittedly knew the wrongful nature of his acts, should steal the caps and use them in a manner which would cause injury to another.

[3] The proximate cause of plaintiff's injury was Hadley's wrongful act, without which, notwithstanding defendant's negligence, the accident would not have occurred. And since it was the wrongful act of an independent third person and not intended by defendant, and by reason of its nature one as to which it was, under the circumstances, not charged with the duty of anticipating as a natural and ordinary consequence of its negligence, it is not liable for the injury. In support of these views reference may be had to the following, among other cases: Chicago, etc., Ry. Co. v. Elliott, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582; Cole v. German Savings & Loan Society, 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416; Berry v. San Francisco & N. P. R. R. Co., 50 Cal. 435; The Santa Rita, 176 Fed. 890, 100 C. C. A. 360, 30 L. R. A. (N. S.) 1210; Schwartz v. California Gas, etc., Co., 163 Cal. 398, 125 Pac. 1044; Hullinger v. Worrell, 83 Ill. 220; Burt v. Advertiser, etc., Co., 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97; Horan v. Town of Watertown, 217 Mass. 185, 104 N. E. 464; Stone v. Boston & Albany R. R. Co., 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794; Jacobs v. New York, N. H. & H. R. Co., 212 Mass. 96, 98 N. E. 688, 40 L. R. A. (N. S.) 41; Nicolosi v. Clark, 169 Cal. 746, 147 Pac. 971, L. R. A. 1915F, 638; Luehrmann v. Laclede Gaslight Co., 127 Mo. App. 213, 104 S. W. 1128; Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379; Hartford v. All Night & Day Bank, 170 Cal. 538, 150 Pac. 356, L. R. A. 1916A, 1220.

[4, 5] Our view of the case as herein expressed renders it unnecessary to consider the error predicated upon the action of the court in overruling defendant's general demurrer to the complaint. We may say, however, that in our opinion the allegation that both plaintiff and Walter Hadley, by reason of their extreme youth, were ignorant of the dangerous character of the dynamite caps, coupled with the allegation that defendant permitted Walter Hadley to go upon the premises and carry therefrom a large number of said dynamite caps, when measured by what is said upon a similar question in Cahill v. Stone & Co., 153 Cal. 571, 96 Pac. 84, 19 L. R. A. (N. S.) 1094, renders the complaint sufficient as against the demurrer in-

terposed. If defendant knowingly permitted a child to take such dangerous instrumentalities from its premises, it would be charged with the duty of anticipating the probable result that they would be exploded by himself or playmates, thus causing injury.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

(42 Cal. App. 39)

DOUBLE EAGLE MINING CO. et al. v. HUBBARD et al. (Civ. 1969.)

(District Court of Appeal, Third District, California. July 1, 1919.)

1. Mines and Minerals ⟹9 — Cancellation of Patents—Mining Claims.

When a patent of public lands to a railroad was canceled by decree of court, the land was restored to the public domain as of the date of the decree, and it was immediately open to the location of a mining claim, and a location then made was valid, and the claim could be held thereunder indefinitely, where the railroad did not appeal from the decree.

2. Mines and Minerals ⟹14(1)—Mining Claims—Location.

The rules of the land department, Nos. 51, 52, and 53, providing that upon the termination of a contest the register and receiver will render a joint report, etc., and the local officers will thereafter take no further action toward affecting the disposal of the land until instructed by the commissioner, have no application to mining claims, which take their origin under authority of the United States statutes, under regulations prescribed by law and according to local customs (Rev. St. § 2319 [U. S. Comp. St. § 4614]).

3. Mines and Minerals ⟹29(1)—Mining Claims.

By the performance of the necessary amount of work annually on his claim, a locator of a mining claim can hold it and work it against the whole world, and for an indefinite period, without obtaining or applying for a patent.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by the Double Eagle Mining Company and another against J. D. Hubbard and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Lon Bond and Deirup & Deirup, all of Chico, for appellants.

Niles E. Wretman, of San Jose, for respondents.

CHIPMAN, P. J. The action arises over conflicting claims to mining property. Plaintiffs had judgment that they were entitled to the possession of the premises in controversy, and the appeal is by defendants from said judgment.

The points urged by appellants for a reversal of the judgment are: That respondents failed to do their assessment work for the years 1913 and 1914, and "that at the time of location by the predecessors of respondents said land was not open to location."

1. The court found that plaintiffs and their predecessors have in all respects complied with the laws "relating to the performance of assessment work upon said claims." While there was a conflict in the evidence upon this point there was, in our opinion, sufficient justification for said finding, and, under the well-known rule, we must decline to enter upon a discussion of this point.

2. The contention that the land was not open for location is based upon the following facts:

On March 17, 1875, a patent was issued to the Central Pacific Railroad Company to land which included the mining claims in controversy. Said patent was canceled by a decree entered in the circuit court of the United States on January 11, 1898.

On July 23, 1898, the predecessors of plaintiffs posted a notice of location of a placer mining claim upon the land now claimed by them, and said notice was recorded on August 20, 1898.

On September 24, 1900, the commissioner of the general land office wrote to the register and receiver at Marysville, reciting the fact of the entry of said decree, stating that said decision had never been appealed from, and directing said register and receiver "to make proper notation on your records as to the cancellation of the patent as to said tract."

Defendants located a portion of said land on November 11, 1914, and another portion on May 3, 1915.

The contention of appellants is that the making of said decree by the circuit court "did not have the effect of restoring the land to the public domain, but that the effect of the decree was merely to return the land to the proper executive officers * * * for such disposition as they should make of it according to law," and, consequently, that the location by plaintiffs' predecessors was premature, and therefore invalid.

[1] The effect of the patent to the railroad company was to withdraw the land from public entry. When the patent was canceled by decree of the court the land was restored to the public domain as of the date of the decree. The railroad company had under the statute one year within which to appeal, but, as it did not avail itself of that right, the decree remained unaffected and became final as of its date.

The position of appellant is that the land was not open to a mineral location after the patent was canceled until the land department at Washington, by some formal proclamation or order, had so declared, and notice thereof had been given to the local land office at Marysville. The only action of the land department in the matter, so far as appears, took the form of the letter of the commissioner of the general land office above stated nearly three years after the patent was canceled. It did not purport to restore the land to entry nor did it in any wise affect the status of the land. It simply found it and left it as the effect of the decree left it, namely, as part of the public domain subject to disposition under congressional enactments pertaining to the mineral land in the several states. Appellant's contention that preceding any location of a mining claim after the decree it was necessary that some proclamation that the land was open to entry should have been given, would mean that the land to this day is reserved from location, for no such proclamation has ever been made. It would seem to us that leaving the land to the operation of the decree and the general land laws without further action by the government justifies the inference that in the opinion of the land department no further action after the decree was entered was necessary to open the land to location as mineral land. As tending to refute this view of the case appellant cites an act of Congress restoring part of an Indian reservation to the public domain. Kendall v. San Juan Milling Co., 144 U. S. 658, 12 Sup. Ct. 779, 36 L. Ed. 583, is cited where it was held that the restored portion of the reservation was not open to mineral location in advance of the proclamation of the president, any more than to any other kind of entry. But, by the very terms of the act, it was provided that "the same shall be open to settlement and entry by the proclamation of the President of the United States."

The following are the only rules of the land department called to our attention:

> "Rule 51. Upon the termination of a contest the register and receiver will render a joint report and opinion in the case, making full and specific reference to the postings and annotations upon their records.
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> "Rule 52. The register and receiver will promptly forward their report, together with the testimony and all the papers in the case, to the commissioner of the general land office, with a brief letter of transmittal, describing the case by its title, the nature of the contest, and the tract involved.
>
> "Rule 53. The local officers will thereafter take no further action affecting the disposal of the land in contest until instructed by the commissioner."

[2, 3] These rules clearly refer only to contests arising out of entries of land initiated in a local land office and in which the contest also originated in that office. These rules have no application to mining claims, for the reason that mining locations are not initiated in any local land office of the government, but take their origin under authority of the United States Statutes "under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining districts so far as the same are applicable and not inconsistent with the laws of the United States." Rev. Stats. § 2319 (U. S. Comp. St. § 4614). This act provides "that all valuable mineral deposits in land belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States." And this has been the law since the acts of July 26, 1866, c. 262, 14 Stat. 251, and May 10, 1872, c. 152, 17 Stat. 91. Under this invitation and authority, the prospector may go onto any of the public lands of the United States and make his explorations, and upon the discovery of valuable minerals, and in order to secure his title to the same, he need only to post his notice, stake out his claim, and file his notice in the office of the recorder of the mineral district, or in the office of the county recorder, "according to the local customs or rules of miners in the several mining districts." He has nothing to do with the local land office in perfecting his claim or in working it. He may never apply for a patent to his claim, and until he does so apply no notice to the general government is required of him that he has made a claim. By the performance of $100 worth of work annually on his claim he can hold it and work it against the claim of the whole world and for an indefinite period. It is common knowledge that many valuable mines are worked out under such locations for which patents are never applied. In this respect the locator of a mining claim stands on a wholly different footing from the homesteader or pre-emptor of public land.

Under the location claimed by plaintiffs this mining land has been occupied and worked ever since 1898, and many thousands of dollars have been expended in its exploration and development. Defendants in 1914, 16 years after this location was made in good faith and kept alive with equal good faith, entered upon the claim, dispossessed plaintiffs, and seek to maintain their right upon what, we think, is an erroneous construction to be given the effect of the decree canceling the railroad company's patent, and upon regulations of the general land office, which we think wholly inapplicable.

Respondents call attention to the fact that the land department at Washington has issued a patent to a mining claim, being a part of the section in question, and located under circumstances similar to those under which respondents are claiming. And it is urged by respondents that this is virtually an admission by the government that such locations were regular and authorized. As to this appellants say: "We do not agree that the issuance of patents to other parties, particularly without contest, can be taken as an adjudication on any point whatever." Appellants are, no doubt, right in holding that the action of the land department in the case mentioned is not at all conclusive in the present case. But it must be admitted that the land department would not have been likely to pass to patent a claim which on its face would show that it was prematurely made, and therefore void, even if there was no contest. However this may be, we do not base our conclusion in any degree upon the action taken in the case mentioned. Both parties concede that no case has been found in which the question now here has been decided by any court, and we have found none. We are satisfied that the location under which plaintiffs claim title and right of possession was authorized and legal, though initiated before time for appeal from the decree of the federal court had expired.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

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41 Cal. App. 676

NOYES v. HUFFMAN et al. (Civ. 2803.)

(District Court of Appeal, First District, Division 2, California. June 20, 1919. Rehearing Denied by Supreme Court Aug. 18, 1919.)

1. APPEAL AND ERROR 🔑757(1) — BRIEFS — SUFFICIENCY.

Where a case is appealed on a typewritten transcript under Code Civ. Proc. § 953c, the brief must accurately present those portions of the record necessary for a decision.

2. QUIETING TITLE 🔑6—ADVERSE CLAIM.

The holder of the legal title may maintain an action to quiet title against any one claiming an adverse interest.

3. QUIETING TITLE 🔑51—RELIEF TO DEFENDANT.

If a defendant in an action to quiet title shows an equitable right to have the legal title conveyed to him the court may, in the exercise of its chancery powers, grant the proper relief, under Code Civ. Proc. § 738, providing that all questions not exclusively of probate jurisdiction shall be finally determined in such actions.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Suit to quiet title by B. S. Noyes against George W. Huffman, A. J. Coll, and others. Decree for plaintiff, and the last-named defendant appeals. Affirmed.

W. P. Thompson and A. W. Carlson, both of Fresno, for appellants.

A. M. Drew, of Fresno, for respondent.

BRITTAIN, J. A. J. Coll, one of the defendants, appeals by the alternative method from a decree quieting the plaintiff's title to land in Fresno county. The suit was against one Huffman, Josephine E. Warner, formerly Rybka, Coll, and fictitious defendants. Huffman and Mrs. Warner defaulted, and the suit was dismissed as to the fictitious defendants leaving Coll as the only active defendant. Apparently he admitted the legal title of the plaintiff, and claimed a right of conveyance from the plaintiff under a series of contracts, of which none are printed in the briefs. Neither was there printed in the appellant's brief nor in an appendix Coll's answer, the findings, or the decree. A portion of the findings and a skeletonized statement of certain oral testimony are printed in the appellant's brief, and there are general statements of fact referring to pages of the typewritten record. From this unsatisfactory presentation of facts it is gleaned that the plaintiff entered into a contract to sell to Huffman on time the land in controversy, that Huffman assigned to Mrs. Warner his interest in the contract, and that Mrs. Warner entered into a contract with Coll in which, representing herself as the owner of the land, she obligated herself to convey an undivided half interest to Coll upon his doing certain planting and other work on the land and cultivating it for a period of years; also, that this contract was modified by a later contract regarding the work to be done by Coll and the time within which it was to be done. It is further gathered from the briefs that default in payments of both interest and principal under the plaintiff's original contract had continued for several years.

The oral testimony printed in the brief of the appellant appears to have been introduced to overcome contrary evidence, apparently produced by the plaintiff, to the effect that there was no foundation for a claim of Coll that the plaintiff had agreed with him about a year before the suit was brought that conveyance would be made to Coll if he would pay the unpaid balance under the original contract. It is stated that in his answer Coll offered to make the payment, and it is claimed both that there was such an agreement and a good tender on the part of Coll. The character of the only testimony presented for consideration here leads to the conclusion that the nonexistence of the claimed agreement on the part of the plaintiff to convey to Coll was determined upon conflicting evidence.

It is claimed that Coll had performed the work required of him by his contracts with Mrs. Warner, and was entitled to a half interest in her contract, but it does not appear that any evidence was introduced upon the subject of his performance, neither does it appear that under his contract he could have acquired any claim against the plaintiff. No evidence is presented upon which the appellant's claim of subrogation may be based. From the meager statement in the appellant's brief there does not appear to be merit in the appeal.

[1] The case is clearly within the rule which "exists in the statute, for the very purpose of compelling counsel to select from the record, and accurately present for convenient reference, those portions of the record which are necessary to a decision. The time which judges might consume in searching through the original transcript of a case is time taken from other cases that wait for attention." Tobey v. Randall, 182 Pac. 771; Code Civ. Proc. § 953c; Scott v. Hollywood Park Co., 176 Cal. 681, 169 Pac. 379.

[2, 3] There is nothing in the contention that the plaintiff should have pursued some other remedy. The holder of the legal title to land may sue any one claiming an interest adverse to him, and if the defendant in such a suit shows by proper pleading and proof an equitable right to conveyance of the legal title, in the exercise of its chancery powers, the court may grant the proper relief. Code Civ. Proc. § 738; United Land Ass'n v. Pacific Imp. Co., 139 Cal. 371, 69 Pac. 1064, 72 Pac. 988; Mills v. Rossiter Eureka Mfg. Co., 156 Cal. 167, 103 Pac. 896. Upon this appeal it does not appear that the defendant proved any equity in himself.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

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41 Cal. App. 604

GLOBE GRAIN & MILLING CO. v. DRENTH, Constable. (Civ. 2872.)

(District Court of Appeal, First District, Division 1, California. June 16, 1919. Rehearing Denied by Supreme Court Aug. 14, 1919.)

1. Appeal and Error 🔑1195(3)—Law of Case—Prior Appeal.

Statement in opinion on appeal that in view of admissions by defendant plaintiff had established prima facie case, being a statement concerning the facts of the case as disclosed by the record then under review, was not the law of the case upon subsequent trial.

2. Pleading 🔑376 — Issues and Proof—Action for Conversion — Admissions by Defendant.

In action against constable for conversion of property sold under execution against third persons after claim made by plaintiff, allegations in constable's second and separate defense that a verified claim of ownership had been served upon him did not relieve plaintiff of necessity of proving service of such claim in order to establish its case under Code Civ. Proc. § 689, since such allegation, being new matter constituting a defense, was deemed controverted.

3. Pleading 🔑36(3) — Admissions — Answer—New Matter.

New matter in answer, constituting a defense, will be deemed to be controverted, and may not be regarded as evidence in favor of plaintiff.

4. New Trial 🔑159 — Insufficiency of Evidence—Properly Admitted Evidence.

On plaintiff's motion for new trial on ground of insufficiency of evidence to sustain judgment for defendant, the latter is not entitled to have evidence disregarded, though it was improperly admitted.

5. Appeal and Error 🔑877(1) — Parties Entitled to Allege Error—Motion for New Trial.

Defendant, appealing from order granting plaintiff a new trial for insufficiency of evidence to sustain judgment in favor of defendant, cannot object that evidence was improperly admitted in favor of plaintiff.

6. Appeal and Error 🔑837(11)—Review —Motion for New Trial—Evidence.

On appeal from order granting plaintiff new trial on ground of insufficiency of evidence to sustain judgment for defendant, court will consider all the evidence, including that improperly admitted over defendant's objection.

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by the Globe Grain & Milling Company against Ben Drenth, Constable, etc. Judgment for defendant, and from order granting plaintiff a new trial, defendant appeals. Affirmed.

See, also, 171 Pac. 821.

Barnard & Watters and S. L. Strother, all of Fresno, for appellant.

Short & Sutherland, of Fresno, for respondent.

KERRIGAN, J. This is an appeal from an order granting the plaintiff a new trial in an action for the conversion of certain personal property.

It appears that S. C. Robertson and Geo. R. Harrison in the month of June, 1916, had undertaken to sell to plaintiff approximately two carloads of barley and to deliver the same when harvested at a certain nearby railroad station. During the course of the harvesting and before the completion thereof, the defendant took the barley into his possession as constable under a writ of attachment, and subsequently sold it under execution. In a former trial of this action a motion for nonsuit was granted upon the grounds that plaintiff's evidence failed to show a sale to it of the barley, or a sufficient change of possession thereof, if sold, to satisfy the requirements of section 3440 of the Civil Code. From the judgment entered upon the order granting the nonsuit plaintiff appealed, and upon that appeal this court held that growing crops did not come within the meaning of said section of the Civil Code. In reviewing the facts at that time we also said that the testimony introduced by plaintiff tended to show that an actual sale of the barley had been made to the plaintiff, and that, as the defendant admitted that plaintiff at the time of the attachment had served upon him a verified claim of ownership, and did not deny that he had refused to deliver the barley to the plaintiff, it was clear that the latter had established a prima facie case. Accordingly, the judgment entered upon the nonsuit was reversed.

Upon the second trial the jury brought in a verdict in favor of the defendant, upon which, as before stated, judgment was entered. Subsequently the court granted plaintiff's motion for a new trial, basing its order upon three grounds, but which can be supported only upon the ground of the insufficiency of the evidence to sustain the judgment. The pleadings and evidence were the same on both trials, the only difference being that the first trial, as did the appeal therein, proceeded on the theory that an allegation in the defendant's second and special defense, to the effect that plaintiff had served him with a verified claim of ownership, was an admission in favor of plaintiff to that extent; whereas upon the present trial the ruling and instruction of the court that such statement in the special defense should be so considered by the jury must, we think, be deemed to have been made and given over the objection of the defendant. The plaintiff in no other way attempted to prove its demand upon defendant, who now insists that no competent evidence was before the jury of service of the verified claim of ownership of the barley, and hence that the plaintiff, having thus failed to establish its case (Code Civ. Proc. § 689), it cannot be held that the evidence was insufficient to sustain the judgment in the defendant's favor.

[1, 2] We agree with defendant that plaintiff was not relieved of the necessity of proving such demand on the theory that the statement in the former opinion that the plaintiff's evidence as there reviewed made out a prima facie case constituted the law of the case. What was there said on the subject was said concerning the facts of the case as assumed to be disclosed by the record then under review. A statement of facts set forth in an opinion as the ground upon which an appellate court bases its decision of a point of law does not constitute the law of the case. Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000; Moore v. Trott, 162 Cal. 272, 122 Pac. 462; Cowell v. Snyder, 171 Cal. 297, 152 Pac. 920.

[3-6] Nor do we think, as argued by the plaintiff, that the allegations in defendant's second and separate defense, that a verified claim of ownership had been served upon him, relieved the plaintiff of the necessity of proving that fact in order to establish its case. The allegation in the answer was new matter constituting a defense, which must, under the rule prevailing in this state, be deemed controverted, and may not be regarded as evidence in favor of plaintiff. Tustin Packing Co. v. Pac. Coast F. A. Co., 21 Cal. App. 274, 131 Pac. 338. But, having been so regarded upon the trial, the defendant, upon a motion by plaintiff for a new trial, is not entitled to have this evidence disregarded. As before stated, the only ground upon which the order in this case granting a new trial can be supported is that the evidence is insufficient to sustain the judgment in favor of the defendant, and the established rule is that on an appeal by defendant from such order he cannot be heard to complain that evidence was improperly admitted in favor of plaintiff. The case upon appeal, therefore, must be considered in the light of all the evidence embraced within the record, including that improperly admitted over the defendant's objection. McCloud v. O'Neall, 16 Cal. 392; In re Olmsted's Estate, 122 Cal. 224, 54 Pac. 745; Pierce v. Jackson, 21 Cal. 636; 1 Hayne on N. T. & App. § 98. It follows that the allegation of defendant's separate defense above referred to, having been presented to the jury as an admission in favor of the plaintiff, although over defendant's valid objection, was properly regarded as evidence in the case by the trial court in its decision on the motion for a new trial.

For the reasons given the order is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

41 Cal. App. 696

PACIFIC WESTERN COMMERCIAL CO. v. WESTERN WHOLESALE DRUG CO.

(Civ. 2774.)

(District Court of Appeal, First District, Division 2, California. June 23, 1919.)

1. SALES ⚷441(1)—BREACH OF WARRANTY—REJECTION OF GOODS.

Correspondence *held* to establish that defendant buyer gave plaintiff seller prompt and definite notice that potassium carbonate was defective in not meeting the percentage of purity guaranteed by the seller's warranty.

2. SALES ⚷441(1)—BREACH OF WARRANTY—WAIVER.

Evidence regarding defendant buyer's attempts to resell certain goods and its offer to make an equitable adjustment of the situation *held* not to show that it waived plaintiff seller's breach of warranty in furnishing impure potassium carbonate.

3. SALES ⚷287(1) — REJECTION — EFFECT.

Where plaintiff seller did not deliver the character of goods it had agreed to sell, defendant buyer was justified in rejecting them, and no obligation rested upon it to tender their return, etc.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the Pacific Western Commercial Company against the Western Wholesale Drug Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Alfred B. Weiler, of San Francisco, for appellant.

Lloyd W. Moultrie, of Los Angeles, and Corbet & Selby, of San Francisco, for respondent.

HAVEN, J. In this action plaintiff sued as the assignee of one C. R. Haley to recover from defendant the purchase price of certain potassium carbonate alleged in the first count of the complaint to have been sold and delivered to defendant, and in the second count to have been bargained and sold to said defendant. The cause was tried upon an agreed statement of facts. The trial court sustained the defense of a breach by the plaintiff's assignor of an express warranty that the material sold should be at least 95 per cent. pure. The essential facts upon which the judgment for defendant was based appear in the following findings of the trial court, which are supported by the admitted facts and justifiable inferences therefrom:

"That by and in said contract of sale, and as a condition thereof, it was expressly warranted by said C. R. Haley that said potassium carbonate was in quality of 95 per cent., or over, pure; that it was agreed and intended by the said parties that such warranty should be, and the same was, a condition to the purchase thereof by the defendant; that by and in said contract it was further warranted, as a condition thereof, that said five tons of potassium carbonate would be shipped to and ready for delivery by the defendant to its customers during the months of April and May, 1916; that in purported accordance with the terms and conditions of said contract aforesaid, said C. R. Haley, on or about May 5, 1916, shipped to the order of defendant five tons of potassium carbonate; that said five tons of potassium carbonate, so shipped by said C. R. Haley, contrary to and in breach of the warranty of said C. R. Haley, and the condition aforesaid, was not of the quality of 95 per cent., or over, pure, but was of a quality of less than 95 per cent. pure, being only 93 per cent. pure, and no more; that immediately upon discovering that said goods were not of the quality so warranted, as aforesaid, said defendant rejected said goods, and rescinded said contract of sale, and notified said C. R. Haley of such rejection, and rescission, and said goods were held subject to the order of C. R. Haley, as rejected, until said goods were disposed of; that said goods were never accepted by defendant, and said goods were not 95 per cent. pure potassium carbonate."

Appellant admits the breach of warranty as found by the court, but contends that such breach was not a complete defense to the action, for the reason that respondent elected not to reject the goods, but to rely on a set-off for damages as its sole defense, as to the amount of which damages no evidence was offered. This election is alleged to have resulted from (1) the failure of the defendant to give prompt notice of the defect in the goods; (2) the making of objections to the quality of the goods upon grounds other than the breach of warranty; (3) the use of the goods by the defendant; (4) the offer of the defendant to make an equitable and proper adjustment of the dispute between the parties; and (5) an attempt to rescind the contract, which was ineffectual by reason of failure to make a tender of a return of the goods.

[1] The evidence upon which the case was submitted consists of a voluminous correspondence between the parties covering the terms of the contract between them and the positions taken on each side with regard to the breach of the warranty and the consequences thereof. An attempt to summarize such correspondence would extend this opinion beyond reasonable limits. It is sufficient to state that the following facts were established: After purchase of the goods, and before delivery of a sample or any other portion thereof, defendant contracted to sell the bulk of its purchase to parties in Philadelphia. In its contract of resale, defendant warranted that the chemical sold should not contain over 2 per cent. potassium chloride or over one-tenth per cent. of insoluble matter. Under instructions of defendant, the bulk of the material purchased was shipped

to its purchasers in Philadelphia, and 100 pounds to the defendant itself, at Los Angeles. Upon receipt of this last shipment the defendant promptly notified plaintiff's assignor that it found that the quality of the goods did not correspond with the sample and analysis previously sent. During the next month an extensive correspondence was carried on between the defendant and plaintiff's assignor with regard to the quality of the chemical shipped, it appearing that different analyses made thereon did not agree. During this correspondence plaintiff's assignor attempted to collect the purchase price upon a draft drawn against defendant. Defendant refused to pay said draft, and the delivery of the goods to its purchaser was held up. Upon defendant's suggestion, it was subsequently agreed that the chemical should be delivered to its purchasers in Philadelphia for the purpose of examination by them. In making this suggestion defendant wrote:

> "It appears to us that it would be better to have the goods delivered, and then make the proper adjustment after they have been received and tested by our parties. You can appreciate that we are not invoicing this lot until we have their report on the goods."

Upon examination by the Philadelphia purchasers, they refused to accept the shipment upon the ground that the material contained a larger quantity of insoluble matter than warranted by defendant.

Appellant claims that the warranty by defendant to its purchasers was a different one than made by plaintiff's assignor to the defendant. It appears, however, that, while the rejection in Philadelphia was based upon an analysis which showed that the insoluble matter and other foreign contents were so large as to constitute a breach of defendant's warranty to its customers upon resale, they were also sufficient to reduce the pure potassium carbonate below 95 per cent. as warranted by plaintiff's assignor. Defendant's final rejection of the goods followed promptly after this test of the material in Philadelphia. Until that time the matter had been held in abeyance by consent of both parties. Taken as a whole, the correspondence proves that defendant gave plaintiff prompt notice of the defect in the material purchased; that the objections made by it were sufficiently definite to cause plaintiff's assignor to believe that the basis of objection was the failure to meet the required percentage of purity as covered by his warranty; and that the subsequent acts of defendant did not indicate a waiver by defendant of the breach thereof.

[2] The contention that defendant waived the breach of the warranty by reason of the use of the goods is based upon the admitted fact that it contracted to resell the same to its Philadelphia customers. It is argued that that fact was an exercise of ownership and implied that the buyer had assumed title to the property. It appears, however, that such contract of resale was made prior to any opportunity being afforded to defendant to inspect the goods; that the whole arrangement was contingent upon the fulfillment by plaintiff's assignor of his warranty of purity to the extent, at least, of enabling defendant to meet its warranty to its customers; and, further, that the proposed resale was not consummated on account of breach of such warranty. Under these circumstances, it cannot be said that the defendant exercised such dominion over the property as to evidence acceptance thereof. Some contention is also made that an attempt to sell the property, made by the defendant at a later time, indicated an acceptance. This effort to sell was made by defendant after it had notified plaintiff's assignor of its rejection of the goods, and immediate notice thereof was communicated to Mr. Haley, said assignor. In acknowledging receipt of such notice, he thanked the defendant for its kindness in the matter. The reasonable construction of the letters upon this subject is that this sale was attempted by defendant for the benefit of plaintiff and in order to minimize its loss.

The offer of defendant to make an equitable and proper adjustment of the misunderstanding between the parties, relied upon by appellant as an additional circumstance proving the election by the defendant, does not appear to have been a consideration for the delivery of the goods, nor to have been relied upon by Haley. Throughout the correspondence, the question in dispute was the purity of the goods. The suggestion of an equitable adjustment was not made in such a manner as to indicate a waiver by defendant of its right to stand upon the warranty.

[3] The further contention as to the attempted rescission of the contract and the failure to make a tender of the return of the goods need not be discussed for the reason that it clearly appears that the sale was never consummated. Hence there was no completed contract to be rescinded. Plaintiff did not deliver the character of goods which it agreed to sell. Defendant was justified in refusing to accept the goods, and, having done so, no further obligation rested upon it. Mechem on Sales, § 1402. A buyer cannot "be required to accept and pay for a thing different from that which he contracted to receive." Mechem on Sales, § 1155. "If the sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability; and if this condition be not performed, the purchaser is entitled to reject the article, or, if he has paid for it, to recover the price as money had and received for his use." Benjamin on Sales, § 600. The conclusion of the trial court that the breach of warranty by plaintiff's assignor was a com-

plete defense to the action was fully warranted.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

41 Cal. App. 727

PEOPLE et al. v. MAGEE. (Civ. 2788.)

(District Court of Appeal, First District, Division 2, California. June 25, 1919.)

1. LIMITATION OF ACTIONS ⊶65(1) — PERFORMANCE OF PRELIMINARY ACT—DELAY BY PLAINTIFF.

Where plaintiff's right of action depends upon some act to be performed by him preliminarily to commencing suit, he cannot suspend indefinitely the running of the statute of limitations by delaying the performance of the preliminary act.

2. LIMITATION OF ACTIONS ⊶110 — APPOINTMENT OF RECEIVER.

The appointment of a receiver does not affect the running of the statute of limitations.

3. EQUITY ⊶87(1) — LACHES — PERIOD OF LIMITATIONS.

The defense of laches is available whenever a demand or other preliminary action is necessary on the part of plaintiff, and such action is not taken within the period of limitations.

4. LIMITATION OF ACTIONS ⊶69—RECEIVERS—PERMISSION TO BRING ACTION.

Action to recover installments due under written contract was barred for failure to bring action within four years after installments became due, under Code Civ. Proc. § 337, subd. 1, though defendant was in hands of a receiver, and permission from court to bring action was obtained within the four-year period.

5. CONTRACTS ⊶310—AGREEMENT BETWEEN LATER AND FORMER LESSEE—TERMINATION OF LEASE—RIGHTS OF FORMER LESSEE.

Where later lessee's agreement with former lessee, in consideration of former lessee's surrender of his lease so that the later lessee could lease the premises, provided for installment payments by later lessee to former during existence of later lessee's lease and during period of renewal, upon later lessee's election to renew its lease, and provided for assignment to former lessee of right of renewal upon later lessee's failure to exercise option, former lessee was not entitled to payments during period of renewal, notwithstanding later lessee's failure to assign or exercise option to renew, where later lessee's lease was cancelled by court before time of renewal by reason of its insolvency.

6. LIMITATION OF ACTIONS ⊶51(2) — RUNNING OF PERIOD — MEMORANDUM OF AMOUNTS DUE UNDER CONTRACT.

Where installments were due under written contract, and creditor charged amounts accruing under contract and credited payments in memorandum, period of limitations ran from date installment was due under contract, and not from date of last entry in memorandum; the action being based upon the contract and not upon the memorandum account.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Proceedings by the People of the State of California, etc., for appointment of a receiver for the California Safe Deposit & Trust Company, in which George S. Smith files petition in intervention against E. De Los Magee, who was appointed receiver. Judgment for receiver, and intervener appeals. Affirmed.

Crane & Crane, of Chicago, Ill., and Leon A. Blum, of San Francisco, for appellant.

De Laveaga & Magee, of San Francisco, for respondent.

HAVEN, J. The above-entitled proceeding was commenced on December 7, 1907, in the name of the people of the state of California, upon complaint of the bank commissioners of the state, under the provisions of the Bank Act of March 24, 1903, as amended in 1905, for the purpose of obtaining the appointment of a receiver for the liquidation of the affairs of the California Safe Deposit & Trust Company (hereinafter referred to as the bank). The respondent, E. De Los Magee, is the present receiver in said proceeding. On July 28, 1917, by leave of court first had and obtained, the appellant, George S. Smith, filed his petition in intervention in said action, wherein he prayed for judgment in the sum of $19,000, with interest, alleged to be due to said appellant upon certain contracts executed by the bank prior to the commencement of this proceeding. The facts upon which said claim is based are briefly these:

On July 31, 1906, appellant, George S. Smith, was the lessee of certain premises on Fillmore street, in San Francisco. The bank desired to secure a lease of said property, and entered into negotiations with the owner thereof for that purpose. As a result of such negotiations the lease between the owner of the property and the appellant was canceled, a new lease was executed by the owner to the bank, and an agreement was entered into between the bank and appellant, upon which latter agreement the rights sought to be enforced herein are based. Under such agreement the bank agreed to pay the appellant $2,000 in cash and $200 a month for a period of five years from July 31, 1906; and further agreed that, under certain conditions, it would continue said payments of $200 a month to appellant for a second period of five years from and after July 31, 1911. The amount demanded by appellant in his present petition in intervention

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⊶For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes covered the monthly payments for the period extending from March 31, 1909, to July 31, 1911, and also the entire payments for the second period of five years from August 1, 1911, to July 31, 1916. The lease between the owner and the bank contained a clause giving the former the option to terminate the lease upon the insolvency of the lessee. After the appointment of the receiver, the owner demanded the termination of the lease under said clause, which was refused by the receiver. Litigation followed, in which a decree was made canceling the lease. In accordance with such decree the premises were delivered by the receiver to the owner on March 1, 1909. In a former suit the appellant recovered from the receiver the monthly payments of $200 up to the time of such cancellation of the lease.

One of the defenses pleaded by the respondent is that the cause of action set forth in appellant's petition in intervention was barred by subdivision 1 of section 337 of the Code of Civil Procedure, and by the laches of said petitioner. The trial court found in favor of the respondent upon this defense. As the first period, during which monthly payments are claimed by appellant to have matured, terminated on July 31, 1911, it is manifest that the plea of the statute of limitations as to that cause of action was good, unless the running of the statute was suspended by reason of the receivership proceeding. Appellant contends that the statute did not run, for the reason that his present proceeding could have been maintained only by leave of court first had and obtained, and in support of that contention cites Union Collection Co. v. Soule, 141 Cal. 99, 74 Pac. 549, which follows Hoff v. Funkenstein, 54 Cal. 233, 235. In both of these cases it is said:

> "The theory of our statute of limitations is that a creditor has four years (or other time, as the case may be) on any day of which he may, of his own volition, commence an action."

The first case above cited was an action upon a promissory note against the maker, who had been adjudged insolvent under the provisions of the Insolvency Law of 1895 (St. 1895, p. 152). That act contained a provision to the effect that "no statute of limitations of this state shall run against a claim which in its nature is provable against the estate of the debtor." Section 62. In the earlier case the action was also upon promissory notes against the maker, who had been adjudged bankrupt under the provisions of the United States Bankruptcy Law then in effect. The decision is based upon a section of such act prohibiting the maintenance of any suit by a creditor proving his claim in the bankruptcy proceeding. The act under which the present proceeding against the California Safe Deposit & Trust Company is pending contains no provision suspending the running of the statute of limitations or staying the commencement of an action. It is necessary, however, for a claimant to obtain permission of the court before filing an action or petition in intervention against the receiver. It is this necessity upon which appellant bases his claim that the suit upon the present demand could not have been brought by the appellant of his own volition, for the reason that permission to sue might not have been granted him.

[1-4] It is well settled that where plaintiff's right of action depends upon some act to be performed by him preliminarily to commencing suit, he cannot suspend indefinitely the running of the statute of limitations by delaying the performance of the preliminary act. This for the reason that he has it within his power at all times to do the act which fixes his right of action. 25 Cyc. 1198. This rule applies to the preliminary necessity of obtaining permission of court to file a suit. The obtaining of such permission is no part of the plaintiff's cause of action, but simply a step in his remedy. "His cause of action (if any he has) accrues independent of and prior to the application for leave, and is the very basis upon which the application rests; and hence a statute of limitation commencing to run from the date when his cause of action accrues, commences to run from the same time that it would commence if no such leave were required; that is to say, in a case like this at bar, the statute commences to run from the time when the wrong complained of was done, and not from the time of obtaining leave to sue." Litchfield v. McDonald, 35 Minn. 167, 168, 28 N. W. 191. See, also, Ganser v. Ganser, 83 Minn. 199, 86 N. W. 18, 85 Am. St. Rep. 461. In Williams v. Bergin, 116 Cal. 56, 60, 47 Pac. 877, this principle is applied to the failure of a plaintiff to demand an assessment and warrant from a superintendent of streets, upon the issuance of which his right of action upon a street assessment depended. In County of San Luis Obispo v. Gage, 139 Cal. 398, 73 Pac. 174, it is held that the running of the statute of limitations against the demand of a county against the state was not suspended by reason of the necessity under the law of the presentation of a claim by the county to the state board of examiners, which presentation was a necessary prerequisite to the maintenance of an action upon such demand. It is also the general rule that the appointment of a receiver does not affect the running of the statute of limitations. High on Receivers, § 135; Alderson on Receivers, § 195; White v. Meadowcroft, 91 Ill. App. 293. Furthermore, the defense of laches is available whenever a demand or other preliminary action is necessary on the part of the plaintiff and such action is not taken within the period of the

statute of limitations. Harrigan v. Home Life Ins. Co., 128 Cal. 531, 548, 58 Pac. 180, 61 Pac. 99. Under the principles announced by the above authorities, the right of action of appellant for the recovery of all installments which became due more than four years prior to the filing of his petition in intervention was barred both by the statute of limitations and by his own laches.

[5, 6] Part of the payments claimed to be due during the second five years matured, if at all, within the statutory limitation. The facts with regard to this second period are these: The agreement between the bank and appellant provided that the monthly payments should continue during the second period of five years, if the bank itself renewed the lease for that period. This it did not do. The agreement further provided that if the bank did not wish to renew the lease, its right to renew was to be assigned to appellant, and failure by the bank to so assign would obligate the bank to make further payments; and also that the bank was obliged to notify the appellant 30 days prior to June 1, 1910, that it would either exercise its option or abandon its right thereto, and the failure to give such notice was to be deemed to be the exercise by the bank of its option to renew the lease. The bank did not and could not exercise its option to renew the lease, nor assign the same to appellant, for the reason that, prior to the time when such option was to be exercised or such assignment to be made, the lease had been canceled by decree of court, based upon a provision of the lease itself, to the effect that the insolvency of the bank should terminate the tenancy. There was therefore no lease in existence to be renewed or assigned at the time the second tenancy was to have begun. The conditions under which appellant was to be entitled to the monthly payments during the second tenancy never arose, and no right ever vested in appellant to such payments.

Appellant further contends that his cause of action is based upon a book account, in which the last entry was made on July 7, 1917, and therefore his cause of action is not barred. The alleged book account was a memorandum kept by appellant, in which he charged the amounts accruing under the contract and credited the several payments made, including that collected by him as the result of the judgment in the former suit above referred to. Appellant's alleged cause of action is based upon his contract and not upon this account. The writing is a mere memorandum of debts accruing from an entirely independent source. In Mercantile Trust Co. v. Doe, 26 Cal. App. 246, 253, 146 Pac. 692, a number of definitions of a book account, as applied to the statute of limitations, are given, among which is the following:

> "In 1 Ruling Case Law, p. 207, it is said: 'The expression "outstanding and open account" has a well-defined and well-understood meaning. In legal and commercial transactions it is an unsettled debt arising from items of work and labor, goods sold and delivered, and other open transactions, not reduced to writing, and subject to future settlement and adjustment. It is usually disclosed by the account books of the owner of the demand, and does not include express contracts or obligations which have been reduced to writing, such as bonds, bills of exchange, or promissory notes.'"

Under the facts of this case, the alleged book account is not such a one as fixes a new date for the running of the statute of limitations.

Respondent presents other reasons why the appellant's cause of action fails, the consideration of which is unnecessary in view of the conclusions above set forth.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

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42 Cal. App. 77

WIBLE v. CITY OF BAKERSFIELD et al.

(Civ. 2812.)

(District Court of Appeal, Second District, Division 1, California. July 3, 1919.)

1. TAXATION 🔑611(6) — FRAUDULENT ASSESSMENT—SUFFICIENCY OF EVIDENCE.

Evidence that assessed value of plaintiff's property was increased 60 per cent. for purpose of school taxation, that such increased assessed value did not exceed the property's real value, and that assessor considered the valuation fair, etc., *held* not to establish a fraudulent assessment.

2. TAXATION 🔑453 — REVIEW — APPLICATION TO BOARD OF EQUALIZATION—NECESSITY.

A landowner who failed to make complaint to the board of equalization regarding a tax assessment cannot attack the tax lien in court.

3. SCHOOLS AND SCHOOL DISTRICTS 🔑102—TAXATION—POWER OF CITY.

A city may levy a school tax upon lands lying without the municipal limits but within a city school district.

4. SCHOOLS AND SCHOOL DISTRICTS 🔑102—TAXATION—PROPERTY LIABLE.

An ordinance requiring a tax to be levied for school purposes on all taxable property within the city, etc., includes land within a city school district but outside the city limits, in view of Pol. Code, § 1576, providing that territory outside the city shall be deemed a part of the city for purpose of levying school taxes, etc.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action to quiet title by S. P. Wible against the City of Bakersfield and others. From an adverse judgment, plaintiff appeals. Affirmed.

E. L. Foster and Chas. A. Barnhart, both of Bakersfield, for appellant.

Walter Osborn, City Atty., W. W. Kaye, and Rowen Irwin, all of Bakersfield, for respondent.

JAMES, J. An adverse judgment was entered against the plaintiff in this suit, and an appeal is taken therefrom.

The action was to quiet title to certain real property, some of it lying within and some without the corporate limits of the city of Bakersfield. The city of Bakersfield by answer alleged that certain liens in its favor existed against the property for municipal taxes which had not been paid by the plaintiff. On the lands lying without the city limits, the liens represented a levy for school purposes only. It appears that the city school district included, as is permitted by law, certain territory lying without the corporate limits of the municipality, and that the land of the plaintiff was all included within the limits of the municipal school district. It is claimed on behalf of appellant: (1) That the assessment was void because the assessor did not, as required by the ordinance of the city, assess the property at its proper value, or that the assessment represented at all the judgment of the assessor in the matter, but that the same was arbitrary and discriminatory; (2) that the ordinance levying the tax for school purposes designated the territory affected as being that within the municipal limits only, and that therefore no legal levy was ever made upon the property lying without the municipal limits. These are the main contentions and those which have been principally discussed in the briefs.

[1, 2] 1. The evidence showed that pursuant to the ordinance of the city which provided that the assessor might use the county assessment roll for the purpose of making up the assessment, the city assessor having that roll before her, and at the suggestion of certain members of the city council and the city manager, for the purpose of producing a sufficient amount of revenue, fixed values upon all the property within the municipality 60 per cent. above the value fixed by the county assessor on his roll; in other words, a horizontal raise of 60 per cent. was made upon all property within the city proper. The property within the school district which lay without the municipal limits was not raised. As to the making of this assessment, the city assessor testified that she was satisfied to make the raise as suggested, and that when so made the valuations placed did not exceed the cash value of the property affected. In effect, her testimony was that the assessment when completed represented a fair valuation, in her judgment. What the character of the outside property was, and whether the same proportionate increase in valuation was fairly applicable to that, does not appear from the testimony. The plaintiff, however, did testify that in no case was the valuation fixed in excess of the market value of this property. It was admitted that all of the property within the city and all of that lying without but within the school district, was assessed alike, except that the county assessor's valuations controlled as to the outside property, and that the valuations were made up on the property inside the city as indicated by making the 60 per cent. raise. It was also admitted that no application was made to the board of equalization on behalf of the plaintiff to have a reduction made, or that any complaint was made to said board as to the inequality of the assessment as entered. To our minds, the evidence was not sufficient to show a fraudulent assessment, as is claimed by the appellant. Even if we concede that such fraud is impliedly to be deduced from the use of the method of assessment indicated, still the plaintiff, having failed to make any complaint before the board which was authorized to correct the assessment, cannot now attack the lien of the tax as having been created in an unauthorized way. There are a number of cases which hold that the taxpayer's only recourse in such cases is to apply to the board of equalization, a leading one among which is Los Angeles Gas & Electric Co. v. County of Los Angeles, reported in 162 Cal. at page 164, 121 Pac. 384. The opinion in that case goes further than it is necessary to go on this appeal, for it is there held that even where the application is made to the board of equalization and upon the ground of discrimination amounting to fraud in the assessment, the taxpayer will have no recourse without showing, in addition to the acts of fraud on the part of the assessing officer, the fact also that the board of equalization acted improperly and not upon a reasonable discretion.

[3, 4] 2. The right of a city to levy a tax upon lands lying without the municipal limits for school purposes, where such lands are included within the city school district is clear. Visalia Savings Bank v. City of Visalia, 153 Cal. 206, 94 Pac. 888. But, appellant argues, the ordinance levying the tax was not appropriate in its terms to include this outside territory, because it was ordered that the levy for school purposes be made upon "all taxable property within the city of Bakersfield for the support and maintenance of public schools." The item levying the tax for school purposes was distinct and separate from the other items in the ordinance. In determining as to what territory was included for that purpose, section 1576 of the Politi-

cal Code is important for consideration. That section deals with the annexation of territory to municipalities for school purposes, and contains the following declaration:

> "And such outside territory shall be deemed to be a part of said city or incorporated town for all matters connected with the school department thereof, for the annual levying and collecting of the property tax for the school funds of said city or incorporated town; * * * provided, however, that the last assessment roll made by the county assessor shall be the only basis of taxation for such school district on the property outside the corporate limits so annexed for school purposes."

Therefore, it would follow that for school purposes, including the levying and collection of taxes, the municipal lines and the school district lines are deemed to be coincident. In our opinion, the language used in the ordinance, construed in connection with the provisions of the section just quoted from, is sufficient to sustain the assessment on the outside property.

No other points are suggested which seem to merit particular discussion. We think that the court was correct in determining the title to the real property to be in the plaintiff, except that the city of Bakersfield was possessed of the tax liens the amounts of which are set forth in the findings.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

42 Cal. App. 12

M. H. HOFFMAN, Inc., v. BERNSTEIN FILM PRODUCTIONS. (Civ. 2805.)

(District Court of Appeal, First District, Division 2, California. June 28, 1919.)

1. Corporations 🔑422(3)—Dealings with Officer—Binding Force.

In the absence of any showing to the contrary, a corporation is bound by the statements of its president and general manager, with whom another company dealt, relying on his personal responsibility and control.

2. Money Received 🔑18(3) — Receipt of Amount—Evidence.

A motion picture film producing company's receipt from a distributing company of $6,500 *held* to have covered both a $1,000 and a $5,500 payment made to the producing company by its distributor in three states, whose contract had been assumed by the distributing company, so that the producing company received the $6,500 from the distributor in three states for the use and benefit of the distributing company.

3. Appeal and Error 🔑1170(3) — Harmless Error—Reversal—Constitution.

In an action on the common counts for money had and received, judgment for plaintiff will not be reversed on defendant's contention that, since the written contract between it and plaintiff was executory, judgment on the common counts cannot be sustained; a technical defense involving no change in result by sending the case back for retrial being no cause for reversal, under Const. art. 6, § 4½.

4. Assumpsit, Action of 🔑6(1) — Cause of Action.

Assumpsit is the proper remedy to recover money which defendant has admitted belongs to plaintiff and has promised to pay.

5. Money Received 🔑1 — Cause of Action.

The action for money had and received will lie wherever it appears that defendant has received money which in equity and good conscience he should pay to plaintiff.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Action by M. H. Hoffman, Incorporated, against the Bernstein Film Productions. From judgment for plaintiff, defendant appeals. Affirmed.

Leon E. Morris, of San Francisco, for appellant.

Harry A. Levinson, of San Francisco, for respondent.

BRITTAIN, J. The defendant appeals from a judgment for $6,500, with interest and costs, rendered on the common count for money had and received. On behalf of the appellant, it is contended that the findings are not supported by the evidence, and that recovery on the common count could not be had under the facts disclosed.

The defendant, a producer of motion pictures, in April, 1917, had in course of production a picture play entitled "Who Knows." It had in contemplation the production of a series of other motion picture plays. On April 6, 1917, the defendant contracted with one Zierler to deliver to him for exclusive distribution in the states of New York, New Jersey, and Connecticut the film of "Who Knows," and to give him the option on later plays for distribution in those states. The contract price of "Who Knows" for the three states was $6,500, of which Zierler paid $1,000 on the signing of the contract and promised to pay the remaining $5,500 on delivery of the film. The film was shipped to Zierler after May 1, 1917, and he paid to the defendant on its delivery the $5,500. The suit is to recover these two sums claimed by the plaintiff to be due to it by reason of dealings between the parties to the action subsequent in date to the Zierler contract.

On April 24, 1917, the defendant entered into a written contract with the plaintiff, under which, for the period of five years, the defendant agreed to produce and deliver to

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the plaintiff, for exclusive distribution throughout the world, all its picture plays, under an arrangement by which they were to share in net profits. The cost of production was to be paid by the distributor to the producer, but until September 1, 1917, one-half of this cost was to be paid on delivery of the negative to the distributor and the remaining half out of the first receipts of the distributor as each film was delivered and marketed. At that time the play "Who Knows" had not been completed. In the contract with the plaintiff the Zierler contract was briefly described, and the fact that he had already paid $1,000 was recited. The particular clause of the contract then continued:

> "With this understanding, it is understood by the producer and the distributor that this agreement is made subject to said contract with said Zierler, which contract the distributor agrees to assume, and with the contents of which he is familiar."

It will be noted that, while under the terms of the second contract there was no sum of money payable at that time from the plaintiff to the defendant, the former then paid the defendant $6,500. On May 8th the defendant shipped the positive copies of "Who Knows" C. O. D. to Zierler, and collected $5,500. The plaintiff immediately protested against this collection and demanded that the money be paid to it. The negative of "Who Knows" was never delivered to the plaintiff, and therefore the defendant never became entitled to the first half of the cost of its production. It was entitled to $6,500 on the Zierler account. It received $6,500 from the plaintiff upon the understanding of the parties of the meaning of the assumption clause of their contract, and it received from Zierler and was holding $6,500, which should have been paid to the plaintiff on its demand. In other words, being entitled to $6,500 on the Zierler account, it had received $13,000, one half from Zierler on his direct obligation and one half from the plaintiff on its assumption of Zierler's contract. In the correspondence and oral negotiations between the president of the plaintiff and Isidore Bernstein, the president of the defendant, the latter not only admitted that the money was advanced by and was due to the plaintiff, but, representing that his company was in financial straits, he asked for time, promising to make the payment.

[1, 2] On the trial no objection was made to the proof of the facts above set forth and no evidence was introduced on behalf of the defendant. In the appellant's brief there is no suggestion that the defendant is not indebted to the plaintiff. It is claimed that the evidence does not support the finding that the defendant received $6,500 from Zierler for the use and benefit of the plaintiff. This attack is on two grounds, namely, that it was not shown that Bernstein had power to contract for the defendant, and that as to the first $1,000 it was paid before the plaintiff came into the transaction. The first of these contentions is answered by the contract, which expressly describes Isidore Bernstein as the president and general manager, and the life of the contract is made to depend upon his continuing to act in those two capacities. The plaintiff dealt with the defendant upon the personal responsibility and control of Bernstein. In the absence of any showing to the contrary, the corporation is bound by the statements of its president and general manager. Lowe v. Yolo County, etc., Water Co., 157 Cal. 512, 108 Pac. 297. In regard to the second contention, so far as the plaintiff is concerned, the payment of the first $1,000 was as of the date of the contract in which its receipt was admitted by the defendant when the defendant received of the plaintiff the $6,500, which covered the $1,000 as well as the $5,500 payment.

[3-5] On behalf of the appellant, it is contended that since the written contract between the plaintiff and the defendant is executory, a judgment on the common count cannot be sustained. The defense is technical and the result would not be changed by sending the case back for retrial on other pleadings. Const. Cal. art. 6, § 4½; Poak v. Pacific Electric Ry. Co., 177 Cal. 192, 170 Pac. 159; Kurtz v. Forquer, 94 Cal. 91, 29 Pac. 413. The action was not on the written contract, but upon oral negotiations in which the parties placed their own construction on its terms. Bernstein admitted the money belonged to the plaintiff and promised to pay it. Assumpsit is the proper remedy in such a case. Ehrman v. Rosenthal, 117 Cal. 496, 49 Pac. 460. It is urged that recovery on the common count cannot stand as to the first $1,000. This has been discussed from another point of view. Considered as a matter of pleading, it appears that the money ought to have been paid and was being withheld at the time suit was brought. "The action for money had and received will lie wherever it appears that defendant has received money which in equity and good conscience he should pay to the plaintiff." Fox v. Monahan, 8 Cal. App. 709, 97 Pac. 765.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

41 Cal. App. 715

GOUSSE v. LOWE. (Civ. 2789.)

(District Court of Appeal, First District, Division 2, California. June 24, 1919. Rehearing Denied by Supreme Court Aug. 18, 1919.)

1. APPEAL AND ERROR 🔑1002—REVIEW—VERDICT.

A jury's finding on conflicting evidence is conclusive.

2. MASTER AND SERVANT 🔑302(6)—INJURY TO THIRD PERSON—SCOPE OF EMPLOYMENT—PERSONAL ERRAND.

Where a chauffeur, instead of proceeding from the garage to his master's house, disobeyed instructions by driving several miles in the opposite direction on a personal errand, and negligently collided with plaintiff on the return trip, he was not acting within the scope of his employment so as to render his master liable.

3. MASTER AND SERVANT 🔑332(2)—SCOPE OF EMPLOYMENT—QUESTION OF FACT OR LAW.

Whether an act was within the scope of a servant's employment should be submitted to the jury only where reasonable men may differ in regard to the facts; and if the facts are admitted, or capable of but one meaning, the court should declare the law upon the admitted facts.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Arthur Gousse against L. P. Lowe. Judgment for plaintiff, and defendant appeals. Reversed.

Cooley & Lachmund and Winfield Dorn, all of San Francisco, for appellant.

John Ralph Wilson, Fred L. Berry, and Chas. B. Morris, all of San Francisco, for respondent.

BRITTAIN, J. The defendant appeals from a judgment for $1,250 damages for injuries to the plaintiff, found by a jury to have been caused by the negligent operation of an automobile, owned by the defendant and driven by his chauffeur.

[1] The appellant argues that the physical facts are such as to demonstrate the contributory negligence of the plaintiff, but as there is evidence to the contrary, the finding of the jury is conclusive. Error is claimed in rulings of the court concerning certain questions asked of jurors and of the plaintiff, the purpose of which, it is argued, was to suggest that the suit was being defended by an insurance carrier of the defendant. The particular questions do not appear to have been objectionable. The jury was instructed to disregard the answers, and if error were committed it was of such a character as not to warrant the reversal of the judgment.

[2] Objection is made to the giving and refusal to give certain instructions upon the rule of respondeat superior. The attack upon them is the same as that upon the ruling of the court in denying nonsuit and in refusing to instruct the jury to find for the defendant. The judgment must be reversed, because under the admitted facts the case is within the rule announced by Chief Justice Holt:

> "No master is chargeable with the acts of his servant but when he acts in execution of the authority given by his master." Middleton v. Fowler, 1 Salk. 282; Baker v. Kinsey, 38 Cal. 634, 99 Am. Dec. 438.

Stated most strongly for the plaintiff and respondent, the facts in regard to agency are as follows:

When the chauffeur was employed he was instructed never to use the car for any purpose of his own. The car was kept at his employer's residence, on Washington street, in San Francisco, four or five blocks westerly from a public garage, near Presidio avenue and Sacramento street, where the defendant's gasoline and supplies were ordinarily purchased. The chauffeur did not board at the employer's house, and got luncheon near the public garage. Ordinarily when supplies were needed he asked his employer's wife for permission to take the car to the public garage for the supplies when he went to his luncheon. He was under general instructions to report at the house after luncheon at 2 o'clock. On the day of the accident the chauffeur did not ask permission to take the car to the public garage, but, needing gasoline, he took it there at the noon hour. He left the car at the public garage while he took his midday meal and on his return purchased gasoline and filled the tires with air. Under his general instructions it was then his duty to drive the car four or five blocks westwardly to his employer's house to report there for duty at 2 o'clock. This duty he did not perform.

The chauffeur was having an overcoat altered at a tailor shop at Sutter and Montgomery streets, some 2½ miles east of the garage. Wholly for his own purposes he desired to go to the tailor's. He looked at his watch and concluded that if he went down town on the street car he could not get back to the garage in time to take the motorcar to his master's house by 2 o'clock. In disobedience of his instruction never to use the car for his own purposes he abandoned his duty to drive the car west four blocks and drove it easterly about 2½ miles. At the tailor shop he attended to his business and started westerly. He picked up a friend, intending to leave him near the public garage, and on the way out, while still more than a mile east of the garage, at Bush and Taylor streets, the car he was driving collided with the plaintiff's machine under circumstances which the jury found were caused by the chauffeur's negligence. Upon these facts it is contended on behalf of the respondent that there was a mere temporary deviation from the line of the servant's employment; that after his visit to the tailor shop it was his duty to take the car to his master's house by 2 o'clock; that he was performing that duty; and, in either case, that the question of whether or not he was acting within the scope of his agency at the moment of the accident was one of fact to be determined by the jury.

In the opinion in a case which, in the respondent's brief, is not sought to be differentiated in principle from this, the court quoted at length from a note in 35 Am. Dec. 192 the general rules that govern the master's liability. Upon the question presented here the quotation was that—

> "If a servant abandons or departs from the business of his master and engages in some matter suggested solely by his own pleasure or convenience, or pursues some object which relates to an end or purpose which may be said to be the servant's individual and exclusive business, and, while so engaged, commits a tort, the master is not answerable, although he was using his master's property, and although the injury could not have been caused without the facilities afforded to the servant by reason of his relations to his master."

Continuing, the writer of the opinion said:

> "With these rules no one quarrels. The difficulty has been to determine whether they are applicable to a given state of facts, and upon a question of this kind opinions will always differ. To take the case in hand, it would be easy to cite decisions that hold the master to be liable under similar or analogous facts, and it would be just as easy to cite cases * * * in which his liability has been denied."

The court ordered judgment for the defendant notwithstanding the verdict for the plaintiff. Patterson v. Kates (C. C.) 152 Fed. 481. So, in this case quotations are made in the respective briefs from decisions and text-books which seem applicable on one side or the other to the facts now under consideration. No amount of legal reasoning and no multiplication of comments upon other facts can change the facts in this case. Upon an errand of his own the man left the garage and had not returned to within a mile of it when the collision occurred. He took his master's automobile, not in furtherance of any business of the master, but solely because it was a quicker means of conveyance than a street car, because without using it he would not have had time to attend to his private business. The facts are not unlike those in Patterson v. Kates, supra, and the rule of law declared in that case is not only applicable but is controlling. This is not the case of a mere slight deviation from the line of duty, but a departure for the purposes of the servant.

In a very few cases in other states when the tort occurred on the homeward journey of the disobedient servant the master has been held liable, but the great current of authority, in this country and in England, is against those isolated cases. Danforth v. Fisher, 75 N. H. 111, 71 Atl. 535, 21 L. R. A. (N. S.) 93, 139 Am. St. Rep. 670; Colwell v. Ætna, etc., Co., 33 R. I. 531, 82 Atl. 388; Reynolds v. Buck, 127 Iowa, 601, 103 N. W. 946; Riley v. Roach, 168 Mich. 294, 134 N. W. 14, 37 L. R. A. (N. S.), 834; Ludberg v. Barghoorn, 73 Wash. 476, 131 Pac. 1165; Chicago, etc., Ry. Co. v. Bryant, 65 Fed. 969, 13 C. C. A. 249; St. Louis Ry. Co. v. Harvey, 144 Fed. 806, 75 C. C. A. 536; Hartnett v. Gryzmish, 218 Mass. 258, 105 N. E. 988; Solomon v. Commonwealth Trust Co., 256 Pa. 55, 100 Atl. 534; Mitchell v. Crassweller, 13 Com. Bench 237; Storey v. Ashton, L. R. 4 Q. B. 476. They cannot be supported upon any sound reason. If the servant takes his master's machine for a junketing or a business trip of his own, the trip is not complete when he reaches a point miles away from the place where the machine ought to be. The servant is upon his own trip until his return to the point of departure, or to a point where in the performance of his duty he should be. No clearer statement of the rule and the reasons upon which it is based has been made than in the opinion written by Mr. Justice Mitchell of the Supreme Court of Minnesota:

> "The liability can only occur when that which is done is within the real or apparent scope of the master's business. It does not arise when the servant steps outside of his employment to do an act for himself, not connected with his master's business. Beyond the scope of his employment the servant is as much a stranger to his master as any third person. The master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment. A master is not responsible for any act or omission of his servant which is not connected with the business in which he serves him, and does not happen in the course of his employment. And in determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself, and as his own master pro tempore, the master is not liable. If the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended. Such, variously expressed, is the uniform doctrine laid down by all authorities." Morier v. St. Paul, etc., Ry., 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793.

[3] While ordinarily the question of whether or not the act was within the scope of the servant's employment should be submitted to the jury, in this case the only evidence was that at the time of the injury the servant was upon a trip for his own purposes contrary to his master's orders. It is only where reasonable men may differ in regard to the facts that a case should go to the jury. If the facts are admitted or are susceptible of but one meaning, it becomes the duty of the judge to declare the law upon the admitted facts. Under the facts in this case, the motion for a directed verdict should have been granted. There was no dispute of fact to be submitted to the jury.

Judgment is reversed.

We concur: LANGDON, P. J.; HAVEN, J.

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41 Cal. App. 712

SUBSIDIARY HIGH COURT OF ANCIENT ORDER OF FORESTERS v. PESTARINO et al. (Civ. 2811.)

(District Court of Appeal, First District, Division 1, California. June 24, 1919. Rehearing Denied by Supreme Court Aug. 18, 1919.)

1. Insurance ⚷697 — Fraternal Associations—"Dissolution."

Under a fraternal association's constitution and by-laws, providing that local courts or lodges could not voluntarily surrender their charters except under certain conditions, and that upon dissolution all funds should be delivered to the permanent secretary, etc., *held*, that funds must be surrendered upon the voluntary disbanding of a court as well as upon its involuntary dissolution, since "dissolution" means surrendering the charter and disbanding.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dissolution.]

2. Insurance ⚷697 — Fraternal Associations—Constitution and By-Laws.

The constitution and by-laws of a fraternal association constitute a contract between the parent order and a subsidiary court or lodge and the members thereof.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by the Subsidiary High Court of the Ancient Order of Foresters against A. Pestarino and others. Judgment for defendants, and plaintiff appeals. Reversed.

J. W. Sullivan and Geo. W. Waldorf, both of San José, for appellant.

H. A. Gabriel, of San José, for respondents.

NOURSE, Judge pro tem. The Corte Christoforo Colombo, No. 8229, A. O. F., was granted a charter by appellant in 1894, was organized and continued to act as such until July 1, 1916, when, by unanimous vote of its members, it terminated its existence as a court of the Ancient Order of Foresters. It thereupon surrendered its charter and returned to appellant its books, regalia, and paraphernalia. The funds in its treasury were transferred to a corporation organized by members of the former court and designated "Corte Christoforo Colombo, No. 1, Universale Ordine dei Foresters." This corporation, however, has no connection with the Ancient Order of Foresters, and its organization was not sanctioned by that order. Demand was made by appellant upon the officers and members of the disbanded court for the payment of these funds into the sick and funeral fund of the High Court, and when this was not done the present action was commenced against the officers and members of the court No. 8229 and the new corporation for an accounting and the recovery of the moneys found to be held by defendants. Judgment went for defendants, and plaintiff brings this appeal.

Appellant relies upon the provisions of article 16, section 19, paragraph 5, of the constitution and by-laws of the order, which reads as follows:

> "No court shall voluntarily surrender its charter so long as nine members in good standing object to its surrender, nor shall the funds of said court ever be divided among its members, but on its dissolution all funds, books and other property shall be immediately delivered to the permanent secretary and applied to the High Court sick and funeral fund."

This section was in full force and effect for several years before the court disbanded, and all of the officers and members of the court had theretofore promised and agreed to abide by its terms. Respondents now seek to evade the penalty of the section on the claim that they did not dissolve, but merely disbanded, and, having unanimous consent, could dispose of the funds of the court as they saw fit.

[1, 2] There are only two questions involved on the appeal which require consideration. First, whether the court was dissolved within the meaning of this section of the by-laws; and, second, whether, if so dissolved, the High Court is entitled to the funds remaining in the subsidiary court's treasury.

To dissolve means to disorganize; to break up; to separate. When applied to a fraternal order of this nature it means to surrender the charter; to disband. The section quoted prohibits the voluntary surrender of a charter so long as nine members in good standing object. Thus, if nine members do not object, a subordinate court may surrender its charter and thereby become dissolved, disbanded, or disorganized. It is the voluntary surrender of the charter that the section quoted refers to, and it is such a voluntary dissolution that is contemplated in the latter part of the section which prohibits the distribution of the funds among the members of the court, and requires the delivery to the High Court of all funds, books, and other property.

Respondents contend that it is only in case of an involuntary dissolution that the funds of a subsidiary court are to be turned over to the High Court. But the opening words of the section refer to the voluntary surrender of the charter, and the word "dissolution" clearly relates back to the opening sentence. Again, the section requires the delivery of the "funds, books, and other property." Certainly it could not be seriously argued that upon a voluntary dissolution of a subsidiary court the members of the court could keep or deliver to persons outside the order any of the books, seals, or secret regalia of the order.

The purpose of the section seems clearly to be that these funds, books, and other property should be delivered to the High Court upon the dissolution of the subsidiary court, whether voluntary or involuntary. This being so, the question remains whether, upon dissolution, the High Court is entitled to the funds remaining in the treasury of the subsidiary court. The constitution and by-laws of a fraternal order of this nature constitute a contract between the parent order and the subsidiary court and the members thereof. Grand Grove v. Duchein, 105 Cal. 219, 224, 38 Pac. 947. The particular section involved in this appeal was subscribed to by the subsidiary court through its duly authorized representatives at the session of the High Court when the section was adopted. It thus became binding upon the subsidiary court and all of its members. Those who became members subsequent to its adoption subscribed to the by-laws and thereby became bound by the provisions of this section.

The dissolution was purely voluntary and made in view of the express terms of this section. There is therefore no question of taking property without due process of law. It is a case of forfeiture by contract. The funds were raised in full contemplation of every privilege and penalty of the constitution and by-laws of the order, and the penalty of forfeiture was effected by the voluntary act of the members of the subsidiary court.

Such being the case, the appellant is entitled to the funds, books, and other property of the subsidiary court; and the judgment is therefore reversed.

We concur: WASTE, P. J.; RICHARDS, J.

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41 Cal. App. 706

BEAZLEY v. EMBREE et al. (Civ. 2177.)

(District Court of Appeal, Second District, Division 1, California. June 23, 1919.)

1. VENUE 🔑41 — CHANGE — RESIDENCE OF DEFENDANTS.

Where a personal action was brought in county where two material defendants resided, the trial court was justified in refusing to change place of trial to residence of third defendant.

2. VENDOR AND PURCHASER 🔑214(6) — ASSIGNEE'S CONTRACT—ASSIGNEE'S LIABILITY.

Instrument by which purchasers transferred their interest in a land sale contract and assignee agreed to accept same did not impose a personal liability upon assignee to pay purchase-price installments, despite Civ. Code, § 1589, providing that a voluntary acceptance of benefits involves an assumption of all obligations.

3. VENDOR AND PURCHASER 🔑219—DEFECT IN TITLE—SUFFICIENCY OF EVIDENCE.

Evidence that plaintiff vendor had transferred a right of way across his property *held* insufficient to show that he would not be able to deliver such title as he had contracted to furnish.

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by E. E. Beazley against O. H. Embree, Rachel M. Embree, and Philip L. Wilson. Judgment for plaintiff, and the last-named defendant appeals. Reversed.

A. W. Ashburn, of Los Angeles, for appellant.

E. E. Keech, of Santa Ana, and Head & Marks, of Fullerton, for respondents.

JAMES, J. Defendant Wilson appeals from a judgment entered in this action against him, and also from an order made prior to judgment, denying his application for a change of place of trial from the county of Orange to the county of Los Angeles.

This action was brought to recover the sum of $1,000 and certain interest money alleged to be due from the defendants on account of conditions stated in a certain contract for the sale of realty. The real property was located in the county of Los Angeles. Plaintiff alleged that in 1911, as vendor, he made a contract for the sale of the real estate with the two defendants Embree as vendees; that in November, 1912, the vendees assigned their interest in the contract to the defendant Wilson, the assignment being in the following form:

> "We hereby transfer all our right, title, and interest in this contract to Philip L. Wilson, and he agrees to accept the same. O. H. Embree, Rachel M. Embree, Philip L. Wilson."

This allegation followed:

> "That at the time of receiving and accepting said transfer, all of the facts concerning said transaction were known to the defendant Philip L. Wilson, and he thereby consented to and assumed all of the obligations arising from it, and all of the obligations of the defendant O. H. Embree and Rachel M. Embree contained in said written agreement for purchase and sale."

In the contract of sale, copy of which was attached to the complaint, it was shown that the total purchase price of the property was to be the sum of $8,000, which, after the first two payments of $500 each, was to be paid in installments of $1,000 annually, with interest. The plaintiff alleged that $4,000 had been paid, but that the payment of $1,000, due December 1, 1915, with interest, was unpaid. This action was brought February 16, 1916. It appeared without dispute in the evidence that defendant Wilson received the assignment of the Embrees immediately after the first two payments of $500 each had been made, and that he took possession of the land and made the additional payments of $3,000 and interest which in the complaint it was admitted had been credited on the account. In this action the Embrees were permitted to file a cross-complaint as against defendant Wilson, in which they alleged in general substance the same facts respecting the assumption by Wilson of their obligation under the contract, and prayed that they have judgment against Wilson for any amount for which the court might render judgment in favor of plaintiff against them, and that Wilson be declared the principal debtor. The court's judgment awarded nothing to defendants Embree, but did direct, in accordance with the prayer of the complaint, that judgment be against the three defendants, and "that execution first issue upon said judgment against the defendant Philip L. Wilson, and that upon a return of the same unsatisfied as to the whole or any part thereof, execution then issue against the defendants O. H. Embree and Rachel M. Embree for the balance then due."

[1] We think that the motion for change of place of trial was properly denied. The action was for the recovery of money upon the contract, and was not for foreclosure of a lien against the real property. Of the three defendants the two Embrees were residents of Orange county, and they were proper parties defendant, and from what will be said hereinafter it will appear that they are the real parties chargeable to the plaintiff under the contract. While at the time the notice was given for change of place of trial the two Embrees had not appeared in the action, they did appear before the motion was heard. The action being in form a personal one, and as two material defendants resided in the county where it was brought, the court was justified in refusing to change the place of trial to the county of the residence of the third. McKenzie v. Barling, 101 Cal. 459, 36 Pac. 8.

[2] The main contention of appellant as going to the merits of the case is that under the assignment of the contract as made, appellant assumed no personal liability to the vendor; hence there was no right of recovery of the judgment as made. By the terms of the written assignment it would appear that the Embrees assigned only their "right, title and interest" in the contract. No words appear in the instrument of assignment by which appellant agreed to assume the obligations of the Embrees. In other words, the assignment was a naked assignment and similar to that referred to in the case of Lisenby v. Newton, 120 Cal. 571, 52 Pac. 813, 65 Am. St. Rep. 203. In that case Newton, the vendee, under an executory contract for the sale of real estate, "assigned all his right, title, and interest in and to the contract, and the premises which were the subject thereof, to Sharples." In the opinion it is said that Sharples took possession of the land and made certain payments to the vendor of principal and interest on account of the purchase price. Default being made as to some of the payments, the vendor brought suit on the contract against the vendee and his assignee; the superior court holding, however, that the assignee was not liable to the vendor. Lisenby, as the administrator of the vendor's estate, prosecuted the appeal. In determining the case against the vendor's contention, the Supreme Court said:

> "Of course, no assignee of the purchaser in an executory contract for the sale of real estate can require the vendor to convey unless the purchase money be paid, but this conditional right to a conveyance is quite a different thing from personal liability to compulsory payment at the suit of the vendor; such liability can result only from some express or implied contract of the assignee, and is not implied from the mere assignment of the original contract, although followed by possession of the land. * * * By the assignment from Newton to Sharples it may be that as between them Sharples became impliedly bound to protect his assignor against the demands of the vendor on the contract; * * * but that is no concern of the plaintiff; such an obligation (if it arose) did not spring from a contract expressly made for the vendor's benefit, and he cannot take advantage of it."

The case, to our minds, is not governed by the provisions of section 1589, Civil Code, which are that—

> "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

In Canale v. Copello, 137 Cal. 22, 69 Pac. 698, it is said that the provisions of that section apply only where the person accepting the benefit of the transaction is a party to it, citing Stone v. Owens, 105 Cal. 292, 38 Pac. 726. Even assuming that the section might be made to apply to a case where an assignee of a contract to convey real estate was sought to be charged, it would seem that it could only then apply where the executory contract had been fully performed on the part of the vendor, and the assignee had accepted the benefits thereof. Such appears to be the holding in Anderson v. De Urioste, 96 Cal. 404, 31 Pac. 266, and Robinson v. Rispin, 33 Cal. App. 536, 165 Pac. 979. These latter cases, for that reason, do not disturb the rule announced in Lisenby v. Newton, supra. In the case of Jones et al. v. Allert et al., 161 Cal. 234, 118 Pac. 794, the assignee was held bound because it was the real party in interest; it was a corporation which had been organized expressly for the purpose of taking over the particular land described in the contract.

In the endeavor to show liability of appellant to the vendor on the contract, one of the vendees was allowed, over the objection of appellant, to testify as to what was discussed and understood at the time the assignment was made. In this connection respondent O. H. Embree testified as follows:

> "When Wilson and I closed up our deal at the time of the assignment of the contract to him, he paid me what I had already paid Mr. Beazley on account of the contract, and I got back from Wilson whatever I had paid to Beazley. That was the payment to me of my equity. I had nothing to sell but my equity. I was selling the contract. At the time of the assignment I got from Mr. Wilson a little less than $1,500 in money. When the assignment was indorsed on the contract my wife and I signed it, and Mr. Wilson signed it right there with us at that time, right there in the house. * * * The discussion was that he was to take the contract the same as I had—the thousand dollars a year, interest and taxes."

Conceding that this oral testimony was competent to enlarge the terms expressed in the written assignment, we do not think, under the decisions cited, particularly under the language used in the concluding portion of the opinion in Lisenby v. Newton, supra, that any agreement was shown which would operate further than to create a liability against appellant in favor of his assignors. The case of Lisenby v. Newton was cited with approval in Southern Pacific Co. v. Butterfield, 39 Nev. 177, 154 Pac. 932. In the latter decision other cases are referred to holding to the same effect. Among these, and as very much in point on the general subject, is Bimrose v. Matthews et al., 78 Wash. 32, 138 Pac. 319. See, also, Ruling Case Law, vol. 2, p. 625.

[3] We do not agree with appellant in the further point he makes, to wit, that the written instrument sued upon was a mere option; it contained terms which were appropriate to create reciprocal obligations. Neither do we agree with the contention that there could be in the case no judgment against either defendant because plaintiff had, prior to the making of the contract, created an incumbrance against the property which was not thereafter removed. In our opinion the evidence, which consisted only of the showing of the transfer of a right of way to the Standard Oil Company, was insufficient to warrant a conclusion that the plaintiff, upon proper tender and demand, would not be able to deliver such a title as he contracted to furnish. Brimmer v. Salisbury et al., 167 Cal. 522, 140 Pac. 30.

That judgment of reversal should be entered on this appeal is evident from the conclusions which we have expressed. Plaintiff here was not without a remedy against this appellant, but that the remedy was to foreclose the interest of appellant upon default being made in the installment payment. However, he preferred to sue directly for money payments under the contract. Appellant had made no contract obligating himself to pay the plaintiff—no privity existed; hence no right to recover.

The order denying defendant's application for change of place of trial is affirmed.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

41 Cal. App. 721

WILLIAMSON v. WILLIAMSON.
(Civ. 2647.)

(District Court of Appeal, Second District, Division 1, California. June 24, 1919. Rehearing Denied by Supreme Court Aug. 21, 1919.)

1. DEEDS 🔑195, 196(3) — CONVEYANCE BY HUSBAND TO WIFE—PRESUMPTION.

Under Civ. Code, §§ 158, 2224, 2231, 2235, conveyance by husband to wife, in view of their confidential relations, is presumed to be not only without sufficient consideration, but the result of undue influence.

2. APPEAL AND ERROR 🔑1011(1)—CONFLICTING EVIDENCE—PROVINCE OF COURT.

It was the province of the court to weigh and determine the value of the conflicting evidence.

3. DEEDS 🔑211(4)—CONVEYANCE TO WIFE—VALIDITY.

Evidence *held* to show that defendant husband, uninfluenced other than by a situation due to his own wrongful acts, and prompted by a desire to secure a dismissal of the action wherein his wife was declared entitled to a divorce, conveyed the property in question to her as her sole and separate estate.

4. TRIAL 🔑163 — MOTION FOR NONSUIT — SUFFICIENCY.

A motion for nonsuit should specify the ground upon which it is made.

5. JUDGMENT 🔑650—ADMISSIBILITY IN EVIDENCE—UNEXPIRED TIME FOR APPEAL.

Where the time for appeal had not expired, the judgment had not become final, and was properly excluded as incompetent.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Jessie Ray Williamson against Andrew Williamson. From judgment quieting plaintiff's title and from an order denying motion for new trial, defendant appeals. Affirmed.

Will D. Gould, of Los Angeles, for appellant.

Charles M. Ackerman, of Los Angeles, for respondent.

SHAW, J. Defendant appeals from a judgment quieting plaintiff's title to certain real estate described in the complaint, and from an order of court denying his motion for a new trial.

The errors complained of are: First, insufficiency of evidence to support the findings; second that the court erred in denying defendant's motion for a nonsuit made at the close of plaintiff's evidence; third, that the court erred in sustaining plaintiff's objection to the introduction in evidence of a judgment rendered by the superior court of Los Angeles county in an action wherein each of the parties sought a decree of divorce against the other, in which action neither party obtained relief.

The conclusions of the court as to the facts are embodied in 14 findings, each and every one of which is attacked by appellant as being without support. The substance of the material findings made in response to the issues is that the parties, who were husband and wife, were living separate and apart from each other; that in an action brought by plaintiff against her husband for divorce an order of court was made on June 12th, granting her an interlocutory decree therein; that before the signing and entry of the decree defendant sought a reconciliation with plaintiff, who, in response to his overtures, had an interview with him wherein he expressed great remorse for his conduct and sought her forgiveness, promising that if she would return to him he would treat her with kindness and consideration, and as an atonement for his past misdeeds and as a guaranty of his future good conduct, he would give her the property in question; that the result of defendant's solicitations was a reconciliation between the parties. Upon stipulation the action was dismissed without the entry of the interlocutory decree, and defendant, voluntarily and in accordance with his suggestion, without any representations made or acts committed by plaintiff calculated to deceive or with the intention on the part of plaintiff to deceive, executed and delivered to plaintiff a grant deed to the property; that plaintiff returned to defendant's home, where she conducted herself as a good and faithful wife until some eight months afterward, when, in February, 1914, by reason of his harsh and cruel treatment of her, she, fearing for her safety and to protect herself from the cruel and inhuman treatment to which she was subjected by her husband, again left him and went home to her parents; that said property was conveyed to plaintiff by defendant as a gift and as her own separate estate, and free from any claim or interest therein of her said husband, and that it was not the intent of the parties that said property so conveyed to plaintiff by defendant should be held by her other than as her sole and separate estate; that when plaintiff returned to her husband she did so with the full intent of granting defendant condonation of his past acts, and stated to defendant that all she desired was his love and tenderness to herself and child, rather than any property that he might bestow upon her.

The allegation as to fraud made by defendant is that plaintiff sought the reconciliation with her husband and promised, in consideration of the execution of the deed, that she would resume marital relations with him and faithfully keep her marriage vows and perform her duties as a wife and never again desert him without his knowledge and consent, and that defendant, believing she was acting in good faith, and relying upon her promises and representations so made to him, conveyed the property to her; that the promises so made were false and untrue, and so known to the plaintiff to be false and untrue, and made to mislead, deceive, and defraud him, and without any intention of performing the same as to all of which the court properly found adversely to defendant.

[1] At the time when defendant made the deed conveying the property to plaintiff the parties were husband and wife; hence, as declared in section 158, Civil Code, the transaction was subject to the general rules applicable to dealings in property between a trustee and his beneficiary. Among these rules are the following: All transactions entered into between a trustee and cestui que trust by which the former secures any benefit are presumed to be without sufficient consideration and under undue influence. Section 2235, Civ. Code. A trustee may not use the influence which his position gives him to obtain any advantage of the beneficiaries. Section 2231, Civ. Code. And if he does, it constitutes fraud for which a court of equity will grant relief. Section 2224, Civ. Code; Brison v. Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; Jackson v. Jackson, 94 Cal. 446, 29 Pac. 957. By virtue of these provisions of the law the position of plaintiff at the time the conveyance was made to her must be deemed that of a trustee for her husband, and since she as a result of the transaction obtained title to the property from one whose relation to her was that of cestui que trust, the transfer is presumed, not only to have been made without sufficient consideration, but as a result of undue influence. It, therefore, devolved upon plaintiff, not only to show the execution of the grant, but also to produce evidence showing a sufficient consideration, and that it was not obtained by undue influence. As to these controverted issues, plaintiff's testimony, as to which in part there is corroboration, clearly tended to prove that after the interlocutory decree of divorce was ordered, defendant, on January 14th, anxiously sought her, begging that she return to him and resume relations with him as his wife, stating that they could have the decree of divorce annulled; in response to which she said: "No; you have hit me and kicked me and abused me, and I am afraid of you. You'd do it all again; it would be the same thing." He insisted that she give him another chance, saying: "I want to give you the property; it is for you, anyway, and the baby, and I don't want it. All I have got is for you and the baby, anyway, and I'll give it to you. Won't you come back?" to which she replied: "No, I won't come back; I am afraid to trust you." He returned the following day, but, not seeing the plaintiff, he came back the next day and again interceded with her to return to him; and, upon plaintiff repeating her refusal to return to him, he left, but shortly again returned and repeated his promises to never abuse her again, nor curse nor strike nor kick her, and said, "Come on up town and I'll give you a deed to the property," to which plaintiff replied: "I don't want the property; I want to be happy. I can't be happy with you; you have caused me so much misery." Thereupon he induced plaintiff to join in a visit to a mutual friend, a Mrs. Pahl, for advice, but before reaching the house of this friend plaintiff refused to go further, whereupon defendant got down on his knees in the street and begged her to accompany him, to which entreaties she finally yielded. Mrs. Pahl assured her that if she would return, defendant would treat her right, and said to defendant: "One of the things that little girl has been afraid of, you always told her you were going to sell the property and take the baby and leave her stranded. Now, Mr. Williamson, to make the little girl secure and give her a home, why don't you deed her part of that property, * * * so that if you get on one of your tantrums and go off, she will have a shelter." Defendant replied: "Well, I'll do better than that; I'll give it all to her. I want to give it all to her." Plaintiff replied: "I don't want the property, Mrs. Pahl; I want happiness. I haven't been happy with him, and if I can live by myself with the boy and be happy, I would rather do it than go back and subject myself to any more trouble." Upon leaving, defendant said to Mrs. Pahl that he was going to give plaintiff a deed to the property, which deed he had drawn and executed, and gave it to plaintiff saying: "Here, wife, here's a gift. I want this as a proof of my sincerity, and that it is a pledge of my good future conduct to you; and I will always be kind and loving and true to you in the future." Plaintiff says she believed that he was sincere in what he said, and told him that she would forgive him, and a reconciliation took place. On the 17th of June, upon stipulation of the parties, the divorce action was dismissed, and plaintiff returned to the home of her husband, resuming marital relations with him, which continued until the following February, when, as shown by her testimony she was, on account of his mistreatment and abuse, compelled to leave him.

[2, 3] It was the province of the trial court to weigh and determine the value of the conflicting evidence. The testimony of plaintiff, the truth of which the court believed as against that of defendant, clearly tends to prove that he, uninfluenced other than by a situation due to his own wrongful acts, and prompted by a desire to secure a dismissal of the action wherein his wife was declar-

ed entitled to a divorce and have her return to him and being fully cognizant of the effect thereof, conveyed the property to her as her sole and separate estate. Whether deemed a gift or for a good consideration, the transfer is valid, and the transaction unaccompanied by undue influence exerted by the grantee.

[4] As to the second contention, appellant makes no argument in support thereof other than claiming that the transaction must be considered from the standpoint that the parties occupied confidential relations towards each other, from which, basing his argument upon the entire testimony adduced, he insists the wife was to take and hold the property as community property for the benefit of both. No reasons are pointed out showing that the court committed error in the ruling. Moreover, it is the settled rule that a motion for nonsuit should specify the grounds upon which it is made (Daley v. Russ, 86 Cal. 114, 24 Pac. 867); the reason therefor being that upon the defect being pointed out plaintiff might overcome the objection by additional evidence permitted by the court (Warner v. Warner, 144 Cal. 615, 78 Pac. 24). The motion was made "on the ground that they [the plaintiff] have failed to make out a prima facie case; and on the further ground that they have failed to make out such a case, if the case were tried before a jury, as would warrant them in returning a verdict for the plaintiff." There is nothing in this to indicate wherein the evidence was insufficient to make out a prima facie case, or wherein the grant deed from defendant to plaintiff, offered in evidence and her testimony in connection therewith, failed to show that she was entitled to the relief sought. If defendant's theory was that, it having been admitted that the parties were husband and wife, by reason of which fact, under section 158, Civil Code, there existed a confidential relation on account of which it devolved upon plaintiff, in addition to proving the execution and delivery of the deed, to also show that the act of the husband was not influenced by fraud or undue influence, then he should have so stated in his motion, in order that his opponent and the court might understand the ground thereof and thus, by specifically pointing out his objection, give his opponent an opportunity to introduce evidence to meet the same, subject to the ruling of the court upon an application so to do. Warner v. Warner, supra.

[5] The third alleged error is predicated upon the ruling of the court in not permitting the introduction of the judgment, unaccompanied by the judgment roll, in a second action brought by plaintiff against defendant for a divorce and wherein he also asked for a divorce and an adjudication of property rights. As to the subject-matter of the instant case, the judgment contained a finding "that by reason of lack of jurisdiction in the premises, the court expressly withholds any order, judgment, or decree affecting the property mentioned in said defendant's cross-complaint, and leaves said parties to their appropriate action at law or otherwise for the settlement of any disute between them as to said property." Hence, it appears that, in so far as the issues in this case are concerned, the judgment was immaterial. Moreover, it appears from the record that the time within which an appeal could have been taken from the judgment had not expired. As it had not become final, it was properly excluded as incompetent evidence.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

41 Cal. App. 596

MAGUIRE et al. v. REARDON et al., Board of Public Works. (Civ. 2809.)

(District Court of Appeal, First District, Division 1, California. June 14, 1919. Rehearing Denied by Supreme Court Aug. 11, 1919.)

1. Municipal Corporations 🔑628 — Fire Limits—Destruction of Wooden Building—Nuisance—Injunction.

Owner of wooden building constructed within fire limits of city in violation of San Francisco Ordinance No. 1198, passed pursuant to Charter of City and County of San Francisco, art. 2, c. 2, § 1, subd. 5, cannot restrain city from demolishing building under Building Law, Ordinance 4170, N. S., regardless of validity of latter ordinance, since such building constitutes a nuisance, and equity will refuse any relief designed to perpetuate its maintenance.

2. Municipal Corporations 🔑626 — Ordinances — Discrimination — Demolishing of Wooden Buildings.

Building Law, Ordinance of City and County of San Francisco, No. 4170, N. S., authorizing board of public works to demolish wooden building within fire limits upon owner's failure to so do within specified period after notice, is not discriminatory in providing for the general demolishing and removal of wooden building, and not referring to building of other inflammatory material.

3. Municipal Corporations 🔑120 — Ordinance—Retroactive Operation.

Building Law of San Francisco, Ordinance No. 4170, N. S., providing for the demolition of wooden buildings within fire limits, by board of public works upon owner's failure to raise building within specified period after notice, is not retroactive with reference to building constructed in violation of Ordinance No. 1198, describing fire limits and prohibiting construction of wooden building therein.

4. Constitutional Law 🔑320—Due Process of Law — Demolition of Wooden Buildings.

Building Law of San Francisco, Ordinance No. 4170, N. S., providing for the demolition of wooden buildings within fire limits by board of public works upon owner's failure to raze building within specified period after notice, does not deprive owner of building, erected in fire district in violation of Ordinance No. 1198, of any vested rights without due process of law.

5. MUNICIPAL CORPORATIONS ⚷628—ILLEGAL MAINTENANCE OF WOODEN BUILDING—RIGHTS OF TENANT.

Contracts made by owner of wooden building constructed within fire limits in violation of City and County of San Francisco Ordinance No. 1198, with tenants, must be deemed to have been made with knowledge that the building was illegally maintained, and subject to right of city to remove it at any time.

6. ESTOPPEL ⚷62(5) — MAINTENANCE OF WOODEN BUILDINGS IN FIRE LIMITS—DESTRUCTION BY CITY.

City was not estopped to destroy wooden building constructed and maintained within fire limits in violation of City and County of San Francisco Ordinance No. 1198, though building permit to construct building was issued by board of public works, the right to destroy building being an exercise of police power which cannot be bartered away.

7. MUNICIPAL CORPORATIONS ⚷593 — POLICE POWER—BARTER.

City's police power cannot be bartered away by express contract.

8. MUNICIPAL CORPORATIONS ⚷628 — POLICE POWER—REMOVAL OF WOODEN BUILDINGS IN FIRE LIMITS.

City's power to remove wooden buildings erected within fire limits is an exercise of the police power, since it immediately concerns the safety of persons and property.

9. MUNICIPAL CORPORATIONS ⚷192 — AUTHORITY OF BOARD OF SUPERVISORS—REMOVAL OF WOODEN BUILDING IN FIRE LIMITS.

Under City and County of San Francisco Charter, art. 2, c. 1, § 1, and article 6, c. 1, § 9, subd. 5, and article 9, c. 6, § 1, board of supervisors had power by adoption of ordinance, to confer upon board of public works full and complete authority to take and provide required steps to remove wooden building, constructed and maintained within fire limits in violation of Ordinance No. 1198.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by Michael Maguire and others against Timothy A. Reardon and others, Board of Public Works of City and County of San Francisco. Judgment for defendants, and plaintiffs appeal. Affirmed.

Andrew G. Maguire and J. F. Riley, both of San Francisco, for appellants.

George Lull, City Atty., of San Francisco (Maurice T. Dooling, Jr., Asst. Dist. Atty., of San Francisco, of counsel), for respondents.

WASTE, P. J. Plaintiffs and appellants brought this action to enjoin respondents, the board of public works, and chief building inspector of the city and county of San Francisco from demolishing a certain wooden building erected and maintained within the fire limits of said city and county. The cause was submitted upon an agreed statement of facts, and this is an appeal from the judgment of the lower court denying the plaintiffs the relief asked for.

The building was erected in May, 1906, immediately following the great fire of that year, at a cost of $12,000, and is a wooden building containing nine stores, producing a substantial rental, the tenants in the said nine stores using the same for lawful business purposes. At the time of its construction, by and with the consent of defendants, and under the written permit and supervision of the said board of public works, an oven was constructed and installed by the plaintiffs in said building, and as a part thereof at a cost of $700. By its construction the oven became, and at the time of the filing of the complaint still was, a part of the building.

Acting under and by virtue of the authority and direction of an ordinance of the city and county of San Francisco, approved May 8, 1917 (Ord. No. 4170, N. S.), and known as the "Building Law," the board of public works adopted a resolution, directing plaintiffs to raze the buildings in question within five days of the date of the service of notice thereof. The adoption of this resolution was followed by notice served on plaintiffs, to the effect that the board would demolish and remove the buildings upon the failure of the plaintiffs to remove the same within five days of the date of the notification. Notice of the intention of the board of public works was also served on each of the tenants of the building. Application to the lower court for an injunction to prevent the board from carrying out its determination and the judgment of the lower court, refusing the same, followed.

The question thus clearly presented to this court for determination is whether or not wooden buildings, erected within the fire limits, may be summarily destroyed by duly authorized public officers of the municipality. Appellant maintains that the only ordinance in force covering the subject at the time of the erection of the building did not prohibit the erection of a one-story, wooden building such as the one in question, and that there is nothing in the charter of the city and county of San Francisco prohibiting such construction. These propositions must be determined adversely to the contention of the appellants.

The charter of the city and county of San Francisco now provides, and at all times mentioned in the agreed statement of facts did provide, in subdivision 5 of section 1, chapter 2, article 2, as follows, to wit:

> "Section 1. Subject to the provisions, limitations and restrictions in this charter contained, the board of supervisors shall have power * * *
>
> "5. To fix limits within which wooden buildings or structures shall not be erected, placed, or maintained, and to prohibit the same within such limits. Such limits when once established shall not be changed except by extension."

Pursuant to the power thus given by the charter, and long prior to the construction of the frame building herein referred to, the board of supervisors of the city and county of San Francisco duly and regularly adopted and enacted an ordinance, No. 1198. Said ordinance was approved on May 5, 1904, and was entitled: "Defining the fire limits of the city and county of San Francisco." This ordinance provides in section 1 thereof that "the fire limits shall be bounded by a line commencing, * * *" followed by an apt description of metes and bounds. The building in question here is situated within the described district. Section 2 of the ordinance provides a penalty for violating the provisions of the ordinance, but does not otherwise provide that wooden buildings or structures shall not be erected, placed, or maintained within the district described. The above provisions of the charter and this same ordinance were considered by this court in Bancroft v. Goldberg, Bowen & Co., 16 Cal. App. Dec. 37, and it was there held that the effect of the ordinance and the charter provisions is to make the erection or maintenance of a wooden building within the fire limits, as defined in the ordinance, unlawful; that the function of the ordinance is to define the fire limits, and when these limits are thus defined the charter itself makes it unlawful to erect or maintain wooden buildings within such limits. The court said:

> "No express prohibition in the ordinance is required. The charter makes the prohibition. * * * So when the board of supervisors adopted the ordinance defining the fire limits, it was exercising its power 'to fix the limits within which wooden buildings or structures shall not be erected, placed, or maintained.' It was thus unlawful to maintain the building in question upon the leased premises at the date of the lease and at all times subsequently."

The Supreme Court granted a rehearing in the above case and in Bancroft v. Goldberg, Bowen & Co., 166 Cal. 416, 137 Pac. 18, sustained the decision of this court to the effect that the building there under consideration was erected in violation of the provisions of the building ordinance of the city and county of San Francisco.

The appellants argue that Ordinance No. 4170, N. S., under which the respondents, the board of public works, are proceeding to demolish this building is unconstitutional for various reasons. The Supreme Court, in Bancroft v. Goldberg, Bowen & Co., supra, further held that the ordinance, requiring the building which had been erected subsequently to April, 1906, in violation of the existing laws of the city and county, to be demolished or removed on or before a certain date, is a declaration of the policy of the board of supervisors that all temporary wooden buildings, erected in violation of law within the fire limits after the great conflagration of April 18, 1906, are a menace to the safety of the city, no longer finding any possible warrant in the necessities of the people, and that they constituted public nuisances which should be abated as soon as is reasonably possible.

[1] We see no distinction between the building under consideration in that case and the one which is the subject of this litigation. The building constitutes a public nuisance, and a court of equity will refuse any relief designed to perpetuate its maintenance, regardless of the validity of the ordinance. Varney & Green v. Williams, 155 Cal. 318, 100 Pac. 867, 21 L. R. A. (N. S.) 741, 132 Am. St. Rep. 88. It would appear, therefore, that the appellants are not in position to attack said Ordinance No. 4170, for the reason that, having erected a wooden building in violation of law, and having continued in violation of law to maintain it to the present time, they cannot seek aid of a court of equity to maintain it. Civ. Code, § 3517.

[2] Assuming, however, that appellants might suggest the unconstitutionality of the ordinance, and for the reasons urged on this appeal, we are satisfied that there is no merit in any of the points made. The ordinance is not discriminatory in providing for the general demolition and removal of wooden buildings, and not referring to buildings of other inflammable material. Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830.

[3] The ordinance is not retroactive, for the building sought to be removed by the city was erected after the passage of the ordinance defining the fire limits. Bancroft v. Goldberg, Bowen & Co., supra.

[4] The ordinance does not deprive appellants of any vested rights without due process of law. "In removing a building erected in violation of law * * * no private right is invaded, because none could grow out of the illegal act." Baumgartner v. Hasty, supra; Brooklyn v. Furey, 30 N. Y. Supp. 349. Such building erected in violation of an ordinance fixing the fire limits may be torn down and removed without any judicial proceeding whatever. Eikenlaub v. City of St. Joseph, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590; Lemmon v. Guthrie Center, 113 Iowa, 36, 84 N. W. 986, 86 Am. St. Rep. 361.

Appellants contend that because the city permitted them to erect a building, there was at least an implied contract upon its part that they should be permitted to maintain it, including the right to enter into contracts with others for the use and enjoyment of it. This contention, like all the others made by the appellants, has been decided to the contrary.

"The charter of the city and county of San Francisco authorizes the board of supervisors to fix the limits within which wooden buildings or structures shall not be erected or maintained, and provides that 'such limits when once established shall not be changed except by extension.' Charter, c. II, § 5. So that it would seem that the supervisors would have had no authority after the fire, even by ordinance, to permit the erection of any wooden building within the limits previously defined as the fire limits, the charter provision limiting their powers in this behalf. But they did not even purport to so do by ordinance, which even if there were no charter provisions would be essential to any change in existing ordinances on the subject. All that there was in this case in effect was the unofficial announcement of the municipal authorities that they would regard the law on the subject suspended for the time being, and would not attempt to enforce it, which was followed by the actual failure on the part of such authorities to enforce the same. The good faith both of the authorities and those erecting wooden buildings under the assurance thus given is not to be questioned in the slightest degree. It may freely be conceded that the emergency was such as to morally justify the authorities and those acting upon their assurance in doing as they did. But of course the law could not be changed in any such way. The ordinances on the subject continued in force unaffected by the unofficial announcement in the slightest degree, with the result that the construction of this building on this lot, which was expressly provided for in the lease, was 'contrary to an express provision of law,' and therefore 'not lawful' (Civ. Code, § 1667), on May 17, 1906, and at all times thenceforth. We regard this proposition as so elementary in its nature as to require no citation of authority to uphold it. Certainly no case cited by learned counsel for plaintiff tends to support a contrary law." Howell v. City of Hamburg Co., 165 Cal. 175, 131 Pac. 130.

[5-8] Any contracts made by the appellants with their tenants must be deemed to have been made with the knowledge that the building was illegally maintained, and subject to the right of the city to remove it at any time. The city was not estopped to destroy the building. The police power cannot be bartered away even by express contract; and the power to remove a wooden building erected within the fire limits is an exercise of the police power of the first importance, since it immediately concerns the safety of persons and property. Fire Dept. v. Atlas Co., 106 N. Y. 566, 13 N. E. 329; Boston Beer Co. v. Mass., 97 U. S. 25, 24 L. Ed. 989, 992; Union Cemetery Association v. Kansas City, 252 Mo. 466, 161 S. W. 261.

Appellants' last contention is that the board of supervisors has no power to authorize the board of public works to demolish buildings. As before pointed out, the board of supervisors has power under the charter "to fix the limitations within which wooden buildings or structures may not be erected, placed or maintained," and to prohibit the same within such limitations.

"The board of public works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the supervisors * * * of the supervision of any and all building construction in the city and county." Charter, subd. 5, § 9, c. 1, art. 6.

"The chief engineer, assistant chief engineers, battalion chiefs and the fire marshal shall constitute a board of fire wardens, with power to inspect, and report to the board of public works, as to the safety of buildings and other structures within the city and county." Sec. 1, c. 6, art. 9, of the charter.

"All the legislative power of the city is by the charter vested in the board of supervisors. Article 2, c. 1, § 1. By virtue of this clause, the constitutional grant of the police powers of the state to the city goes directly to and vests in the board, which thereby becomes possessed of the right to exercise within the city limits the entire police power of the state subject only to the control of general laws." Odd Fellows Cemetery Ass'n v. San Francisco, 140 Cal. 226, 230, 231, 73 Pac. 987; In re Montgomery, 163 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914A, 130.

[9] It seems but logical to conclude, therefore, that the board of supervisors had ample power, by the adoption of the ordinance, to confer upon the board of public works full and complete authority to take and provide the required steps to remove the building in question, and thereby abate the nuisance arising from its erection and maintenance contrary to law.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

42 Cal. App. 53

ARTHUR v. FETTERMAN. (Civ. 2898.)

(District Court of Appeal, Second District, Division 2, California. July 2, 1919.)

APPEAL AND ERROR ⊂⊃766—BRIEFS—RECORD.

For failure to comply with Code Civ. Proc. § 953c, and court rule 8 (176 Pac. ix), as to setting out in briefs portions of record desired to be called to court's attention, with index thereof, brief should be disregarded.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by L. J. Arthur against George C. Fetterman. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Appeal from order dismissed. Judgment affirmed.

H. H. Appel and F. E. Davis, both of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondent.

THOMAS, J. This is an action brought by the plaintiff, L. J. Arthur, against the defendant, George C. Fetterman, to recover damages alleged to have been sustained by reason of certain alleged fraudulent representations, alleged by plaintiff to have been made in connection with an exchange of real properties between himself and defendant, and as fully set forth in the complaint.

The defendant, by his answer, makes admission as to certain allegations of the complaint, but for our present purposes suffice it to say that, so far as material here, with the said exceptions, all the material allegations of the complaint are denied. No demurrer was interposed. There was a trial by jury, and the verdict was in favor of the plaintiff for the sum of $20,000. Motion for a new trial was made and denied. From the judgment and order denying his motion for a new trial, defendant appeals.

Appellant relies upon and urges the following five "points" for a reversal here, viz.: (1) That the complaint does not state facts sufficient to constitute a cause of action; (2) that the court erred in not granting defendant's motion for nonsuit; (3) that the evidence is insufficient to support the verdict; (4) that the plaintiff is not a party in interest; and (5) that the court erred in its instructions to the jury.

No purpose of value could, we think, be served by quoting from any of the pleadings, or in attempting any formidable discussion of the points presented or the principles involved; for, as we understand it, all these have already been abundantly covered by the decisions in this state. At the very beginning of the trial before the jury, and after the plaintiff—who was the first witness—had been sworn and had answered one question, defendant interposed an objection to the introduction of any evidence on the ground:

> "That the facts alleged in the complaint do not constitute a cause of action; * * * and upon the further ground, upon the facts alleged in the complaint, it appears that the plaintiff in the action is not entitled to any relief whatsoever, either in law or in equity."

The objection was overruled by the court. This ruling, we think, was proper, as we are of the opinion that against this objection—which, in legal contemplation and for all practical purposes, is the same thing as a general demurrer—the complaint is good.

The appeal here is under the alternative method. We do not think that the provisions of section 953c of the Code of Civil Procedure, or of rule 8 of this court (176 Pac. ix), are ambiguous. Still, we are constantly confronted with the condition presented by the record here, to wit, a failure to "print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." It is true that in this case appellant has brought up in the record, and caused to be printed in the briefs, portions of the evidence, as well as his own construction of the evidence, etc.; and, in the instances where he has done so, we are given the page of the transcript where such quoted portions may be found. But for our present purposes we call attention to "point 5," referred to above, in this case. Here we are not given a single citation as to line or page where the alleged erroneous instructions may be found. For the greater part of appellant's discussion of this point he simply states his conclusion as to what the court's instructions were; and in the few instances where there appeared what purported to be quotations from the instructions objected to, we are not given the help of even a citation to page, to say nothing of the lines on the page, where said "erroneous instructions" may be found.

The record in this case consists of 1,090 typewritten pages. From this it is obvious that ours was an arduous task to find within the record the portions objected to. A strict compliance with the statute and rule of court cited would bring this case within the rule laid down in Welk v. Sorenson, 178 Pac. 498. But notwithstanding this rule, adopted for the guidance of attorneys and to decrease the burden which we have voluntarily assumed in this case, we have gone through and have read the entire voluminous record here. We have therefore considered every point raised by appellant, and find in the record nothing to justify our supporting the position taken by him here.

⊂⊃For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

The appeal from the order denying defendant's motion for a new trial is dismissed, and the judgment is affirmed.

We concur: FINLAYSON, P.J.; SLOANE, J.

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41 Cal. App. 733

SCALES v. HOLJE. (Civ. 2753.)

(District Court of Appeal, First District, Division 2, California. June 25, 1919. Rehearing Denied by Supreme Court Aug. 21, 1919.)

1. Bankruptcy 🔑185—Trustee in Bankruptcy — Fraudulent Transfers — Right to Avoid.

As to fraudulent or avoidable transfers by bankrupt, antedating the four-month period prior to bankruptcy, the trustee in bankruptcy is in no better legal position than the creditors whom he represents; his right to avoid the transfer being merely that of the creditor's common-law right.

2. Bankruptcy 🔑152 — Property Not in Custody of Court—Status of Trustee—Judgment Creditor.

Status of trustee in bankruptcy as judgment creditor as to property not in custody of the bankruptcy court, under Bankruptcy Act July 1, 1898, § 47a, cl. 2, as amended by Act Cong. June 25, 1910, § 8 (U. S. Comp. St. § 9631), attaches upon date of filing of petition in bankruptcy.

3. Bankruptcy 🔑303(1) — Fraudulent Transfers of Assets — Avoidance by Trustee—Proof.

Under Civ. Code, §§ 3431, 3439, 3442, trustee in bankruptcy cannot recover assets of corporation transferred by sole stockholder more than four months before bankruptcy, in absence of proof of fraud or a fraudulent conspiracy between stockholders and transferee, or of insolvency, or contemplated insolvency, at time of transfer, or that there were creditors of the corporation at such time.

4. Corporations 🔑240(1) — Liability of Stockholder — Rights of Creditors — Transfer of Assets—Right to Complain.

Where sole stockholder drew checks on corporation payable to his personal creditor, only such creditors of the corporation as were creditors at time of transaction may complain; each payment being a separate transaction of which only such creditors as were creditors at the particular time thereof may complain.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by H. H. Scales, as trustee of the R. B. Moore Mill & Lumber Co., bankrupt, against Elizabeth M. Holje, as executrix of the last will and testament and estate of Martin Holje, deceased. Judgment for plaintiff, and defendant appeals. Reversed.

James S. Spilman, of San Francisco, for appellant.

Wm. H. H. Hart and T. John Butler, both of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment for the plaintiff for $13,053.63. Plaintiff sues as trustee in bankruptcy of the R. B. Moore Mill & Lumber Company to recover the aggregate amount of 42 checks, drawn by R. B. Moore as president of the Moore Mill & Lumber Company and given by him to Martin Holje, defendant's testator, in payment of a personal indebtedness of Moore to Holje. The complaint is in two counts, one count for money had and received, and the other to recover the same funds as having been paid out of the corporation's treasury in fraud of creditors while it was insolvent and as the result of a conspiracy between Moore and Holje. The facts of the case are briefly: In November, 1906, Moore Mill & Lumber Company was organized, with a capital stock of $100,000, divided into 1,000 shares of $100 each. Three hundred thirty-three and one-third shares each were issued to Moore and Holje. At no time during the life of the corporation were there any other stockholders, except "dummy" directors holding one share each, for which they paid no consideration. On February 9, 1909, Moore individually purchased at par from Holje all of the shares owned by Holje, and for said shares Moore gave Holje his promissory note for $33,333.33, secured by a pledge of shares then purchased by Moore. Thereafter Moore made payments on account of interest on said note by checks drawn on an account in the name of Moore Mill & Lumber Company. The first of these checks was dated April 29, 1909, and the last was dated October 1, 1913. The principal of the note given by Moore to Holje has never been paid in whole or in part. Holje died on January 16, 1914, and Moore died in the spring of 1914. In June, 1914, Moore Mill & Lumber Company was adjudicated a bankrupt and the plaintiff was appointed trustee in bankruptcy. In October, 1914, plaintiff, as trustee, presented to defendant a creditor's claim for the amount of the checks that had been paid to Holje. The claim was rejected by the executrix, and this action was brought.

[1-3] The plaintiff as trustee in bankruptcy is in no better legal position than the creditors whom he represents. There is no claim made that any of the money was paid to Holje within four months of the bankruptcy. "When * * * the trustee seeks to avoid a fraudulent or any avoidable transfer by the bankrupt antedating the four months, he does so, not in the right conferred as a concomitant to the due operation of the system, but exclusively in the creditor's common-law

right. He is, with relation to these anterior transfers, so to speak, subrogated to that right. Such of these anterior transfers as any creditor might have avoided he may avoid. Such as no creditor could have avoided he cannot avoid." In re Gray, 47 App. Div. 554, 62 N. Y. Supp. 618, 3 Am. Bankr. Rep. 647. The Bankruptcy Act, as amended in 1910 (Act Cong. July 1, 1898, c. 541, § 47a, 30 Stat. 557, as amended by Act Cong. June 25, 1910, c. 412, § 8, 36 Stat. 840 [U. S. Comp. St. § 9631]), provides that as to all property not in the custody of the bankruptcy court the trustee in bankruptcy shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied. The time at which the trustee assumes such status is the date of the filing of the petition in bankruptcy—in this case June 11, 1914. Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275. The rights incident to such status are to be tested by the law of this state. In re Mullen (D. C.) 101 Fed. 413. The law of this state is that "in the absence of fraud, every contract of a debtor is valid against all his creditors, existing or subsequent, who have not acquired a lien on the property affected by such contract." Section 3431, Civ. Code. Section 3439, Civil Code, provides that—

> "Every transfer of property, * * * with intent to delay or defraud any creditor or other person, * * * is void against all creditors of the debtor. * * *"

Section 3442, Civil Code, provides that no transfer or charge shall "be adjudged fraudulent solely on the ground that it was not made for a valuable consideration; provided, however, that any transfer or incumbrance of property made or given voluntarily, * * * by a party while insolvent or in contemplation of insolvency, shall be fraudulent and void as to existing creditors." By the second count of his complaint, the plaintiff seeks to state a cause of action under these two last-mentioned sections of the Code. He alleges a fraudulent conspiracy upon the part of Moore and Holje to defraud creditors of the corporation, and also alleges that the corporation was insolvent at the times the payments were made. But there is no evidence or finding regarding a fraudulent conspiracy and no finding as to fraud upon the part of Moore or Holje, nor of insolvency of the corporation, nor of contemplated insolvency at the time when the checks, or any of them were issued, nor that there were existing creditors at the times of the payments. There is a failure of proof of sufficient facts to support the second count of the complaint.

[4] The judgment must be supported then, if at all, upon the count for money had and received for the use of the corporation upon the theory that the payment of the personal indebtedness of Moore was an improper application of corporate funds. It appears from the admitted facts that there were no stockholders except Moore interested in the corporation during the period when the checks were issued. It was what has been called a "one-man corporation." It has been repeatedly held that in such a case, the sole owner may do what he will with the assets and credit of the corporation and no one but creditors may complain. First Nat. Bank v. Winchester, 119 Ala. 168, 24 South. 351, 72 Am. St. Rep. 904; Schilling & Schneider Brewing Co. v. Schneider, 110 Mo. 83, 19 S. W. 67. The matter has been considered by our own Supreme Court in the case of Sargent v. Palace Café Co., 175 Cal. 737, 167 Pac. 146, which holds that a corporation may execute its note for the personal indebtedness of its sole stockholder, and no one but the creditors of the corporation may complain. And this brings us to a consideration of the question of what creditors of a corporation may complain. We think that only such creditors may complain as were creditors of the corporation at the time of the transaction of which complaint is made. It is said, in Clark and Marshall on Private Corporations, vol. 3, § 777c, that it is a well-settled rule of law that if an individual without any intent to defraud creditors disposes of his property for an adequate consideration, or without any consideration at all, subsequent creditors cannot reach the property. They are not injured, for they have given credit to the debtor in the status which he had after the conveyance was made. This rule applies to creditors of a corporation, as well as to creditors of a natural person. The assets of a corporation are not held in trust for the benefit of its creditors in any such sense as to entitle a creditor to attack as fraudulent a voluntary conveyance made by the corporation before he became a creditor. Graham v. Railroad Co., 102 U. S. 148, 153, 26 L. Ed. 106.

There is no evidence in the record that there were any creditors of the corporation at the various times that these checks were given.

There is no finding directly upon this point. The court did find that—

> "The creditors of R. B. Moore Mill & Lumber Company were not given notice of the said transaction of February 9, 1909, and had no knowledge of the execution of said promissory note. * * *"

The only evidence to sustain this is the evidence of former office employés of the corporation who testified that so far as they knew no notice was given to creditors of the transactions complained of. There is no evidence whatever as to who the creditors were at that time, or of the amount of their claims, or, in fact, that there were any creditors at all. The only pretense of evidence upon the subject is the implication in the testimony of the office employés to the effect that there were some creditors of the corporation who might have been notified. There is nothing whatever in the testimony to indicate that the creditors at the time the checks were issued, if any there were, are the same creditors represented by the trustee. The mere general implication in the testimony and the findings that there were some creditors at the time the note was executed and the checks issued is not sufficient, for as such creditors could only recover the amount they had been injured, i. e., the amount of their respective claims, and as only such creditors could recover as were creditors at the time of the payments to Holje, specific findings upon these various matters are necessary to a proper judgment. Each payment to Holje was a separate and distinct transaction; only such creditors as were injured by the individual transactions may recover upon the theory of the case relied upon in the first count of the complaint.

As it is impossible for us to determine at this time which theory of the case plaintiff will attempt to sustain in the event of a retrial, we cannot determine the questions discussed as to which statute of limitation would be applicable and the admissibility of the counterclaim.

The judgment is reversed.

We concur: HAVEN, J., BRITTAIN, J.

180 Cal. 748

In re DUFFILL'S ESTATE (two cases).
(L. A. Nos. 5886, 5907.)

(Supreme Court of California. July 30, 1919. Rehearing Denied Aug. 28, 1919.)

1. WILLS 🔑656—CONDITIONS—OPERATION—REMOVAL OF CONDITION.

Provision in testatrix's will that in case her son shall marry "A." that trustee shall pay to him thereafter annually a sum less than the amount theretofore named operated upon the trustee only; and, where son was divorced from his then wife, and thereafter married "A." before the death of testatrix, the contingency upon which the inhibition was to become effective was removed, in view of Civ. Code, § 749, providing that condition in will shall take effect at testator's death.

2. WILLS 🔑481—TIME OF TAKING EFFECT.

Wills generally speak as of the date of the death of their makers.

3. TRUSTS 🔑272(3) — STOCK DIVIDENDS — "INCOME"—"PRINCIPAL."

Stock dividends paid out of earnings accumulating after the death of a stockholder, who has created a trust estate by will, are income belonging to the life beneficiary of the trust, and not principal belonging to the corpus of the estate.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income; Principal.]

4. LIFE ESTATES 🔑15(2) — DIVIDENDS — WHETHER INCOME OR PRINCIPAL.

The determination of the directors of a corporation as to the source of its dividends has no binding or persuasive effect upon the court when it is required to decide whether a stock dividend constitutes income which goes to the tenant for life or for years or is principal to be held for the benefit of the remaindermen.

5. LIFE ESTATES 🔑15(2) — DIVIDENDS — "PRINCIPAL" OR "INCOME."

If the funds out of which a dividend is paid accrued before the life estate arose, it is principal belonging to the corpus of the estate, but if the fund was earned after the life estate arose it is income belonging to the life tenant.

6. PERPETUITIES 🔑9(7)—ACCUMULATIONS.

Provision in will that when grandson shall become 21 trustee shall segregate trust fund and any accumulations thereof and convey one part to the son, etc., though void by Civ. Code, § 723, as providing for further accumulation of income of other half until grandson becomes 25 years of age, *held* not to make invalid the gift of the income in view of section 733.

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the Estate of Eugenie A. Duffill, deceased. From decree of distribution Albert Duffill, a minor, by his guardian, Los Angeles Trust & Savings Bank, and others, appeal, Harry Duffill appealing from certain portions of the decree. Affirmed.

E. E. Bacon, W. E. Mitchell, Gibson, Dunn & Crutcher, Hunsaker & Britt and Le Roy M. Edwards and Samuel Poorman, Jr., all of Los Angeles, for appellant Harry Duffill.

Kemp, Mitchell & Silberberg, of Los Angeles, for remaining appellants.

MELVIN, J. Certain parties to a proceeding on objections by the heir at law to the distribution of the estate under the will of Eugenie A. Duffill have appealed from the decree of distribution. These are Albert Duffill, a minor, by his guardian, Los Angeles Trust & Savings Bank, a corporation, Martha Duffill and Los Angeles Trust & Savings Bank, a corporation, executor and trustee named in the will.

While the appeal is general, appellants attack: (1) That part of the decree holding invalid the provision in the will reducing the devise to Harry Duffill (son of the testatrix), and making smaller his annuity in the event of his marriage to Mrs. Alice McNamara; and (2) that portion of the judgment by which one-half of certain stock dividends, received by the executor during administration, and paid, as appellants allege, from the earnings of the Grasselli Chemical Company, which accrued prior to the death of Eugenie A. Duffill, should go to Harry Duffill at once as income from a trust created by the will; the contention of appellants being that these dividends should become part of the corpus of the trust for subsequent distribution under the terms thereof.

The will was dated September 10, 1914. Mrs. Duffill, the testatrix, died January 7, 1916. At the time of the execution of the will Harry Duffill was living with his mother. Martha Duffill, Harry's wife, and their son Albert were living elsewhere. A suit for divorce in which she was plaintiff and in which Mrs. Alice McNamara was named as corespondent was pending. This was later tried, an interlocutory decree being entered December 14, 1914. A final decree was given on the 16th day of December, 1915, and on the following day Mrs. McNamara and Harry Duffill were married. The latter immediately apprised his mother of the marriage.

The principal asset of the estate was 4,467 shares of stock of the Grasselli Chemical Company, of the par value of $446,700, which had paid excellent dividends. Its value had been augmented shortly before the death of the testatrix by the payment of a stock dividend of 10 per cent., which was received by the executor after her death, and thereafter other dividends both in cash and stock were declared and paid.

The executor in due time after probate filed its final account and petition for distribution, which was resisted by Harry Duffill.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

There was a hearing upon this matter and thereafter, but before decision, there was a stipulation, to which we shall later refer more in detail, establishing certain facts surrounding the issuance of stock dividends by the Grasselli Chemical Company, and in July, 1918, the court signed the order and decree from which the appeal of proponents is prosecuted.

The principal beneficiaries under the will were Harry Duffill, the son, and Albert Duffill, the grandson, of the testatrix in whose favor certain trusts were created. That which was created for the benefit of Harry Duffill provided for the payment by the trustee, Los Angeles Trust & Savings Bank, to him annually of the sum of $4,000 during the minority of his son Albert. This trust provision contained the following language:

> "Provided, that if my son Harry Duffill shall marry one Mrs. Alice McNamara, then and in that event, I desire that the said trustee shall pay to him thereafter only the sum of two thousand dollars ($2,000) per year instead of four thousand dollars ($4,000) per year."

The will also contained a provision for the final distribution of Harry Duffill's estate in the following language:

> "When my grandson Albert Duffill shall attain the age of twenty-one years, said trustee shall segregate said trust fund and any accumulations thereof, into two equal parts and transfer and convey one of said parts to my son Harry Duffill, provided, however, that in the event my said son Harry Duffill shall have married Mrs. Alice McNamara prior to the date when said Albert Duffill shall have attained the age of twenty-one years, then and in that event the said trustee shall at said time distribute to my son Harry Duffill one-half of the balance of the estate in the hands of said trustee after withdrawing therefrom all of the stock of the Grasselli Chemical Company."

The trial court found that at the time of his marriage to Mrs. McNamara, in the lifetime of his mother, Harry Duffill "had neither knowledge nor notice of those provisions of said will in restraint of such marriage, nor had he knowledge or notice thereof until after the testatrix's decease." Harry Duffill, the heir at law, and all other persons interested in the estate, except Albert were adults at the date of the death of Mrs. Eugenie A. Duffill. The court held that all of the provisions of the will for the accumulation of income for the benefit of any person other than the minor grandson were void, and that the conditions for the prevention of the marriage of Harry Duffill were also void. Distribution on this theory was decreed.

[1, 2] Counsel for appellants have learnedly discussed the rules of the civil law and of the ecclesiastical law derived therefrom. It is asserted by them that section 710, Civil Code, is merely a codification of the ecclesiastical law and the temporal law regarding restraints upon marriage, and that while the ancient and the modern rule prohibited or disregarded general restraints upon entry into the marriage state, any particular inhibition against marriage to a named individual has always been upheld. Under the circumstances presented by this appeal, it is not necessary for us to decide whether section 710, Civil Code, is a codification of English probate law or not, because even assuming, for the sake of argument, that this part of the will would be effective if a marriage between Mrs. McNamara and Harry Duffill had been contracted after the death of the testatrix, their marriage before Mrs. Duffill's death removed the very contingency upon which the inhibition in the will was to become effective. Wills generally speak as of the date of the death of their makers. Section 749, Civil Code, provides that:

> "The delivery of the grant, where a limitation, condition, or future interest is created by grant, and the death of the testator, where it is created by will, is to be deemed the time of the creation of the limitation, condition, or interest."

There is nothing in the will by which Harry Duffill is to receive a diminished share of the property in the event of his marriage before his mother's death. When she executed the testament he was a married man, and could not have been legally married to Mrs. McNamara. He was being sued for divorce. The mother perhaps, indeed probably, believed that in the event of the granting of the divorce during her lifetime she could influence her son against marrying Mrs. McNamara. The will (either for that or some other reason) contemplated the possibility of the marriage after Mrs. Duffill's death. The words of restraint operate not upon Harry, but upon the trustee. The income is not to be automatically decreased upon his marriage, but the trustee shall "thereafter" pay to him only $2,000 annually. The direction as to the corpus is that the trustee shall distribute Harry Duffill's share when Albert shall have attained the age of 21 years, withholding all of the stock in the Grasselli Company, if he shall have married Alice McNamara. All of these things were to be done by the trustee—the conveyancer made so by the will only after the death of the testatrix.

A very similar case to the one at bar is Brown v. Severson, 59 Tenn. (12 Heisk.) 381. The will considered in the opinion in that case directed that the executor and executrix should hold and administer certain property for the "support, education, and inheritance" of the testator's children. The fund (being all of the property, real and personal, not otherwise disposed of specifically by the will) was to be "legally and equitably estimated" whenever any child should marry or attain lawful age, so that such child should then have an equal share of said estimated fund or property. It was provided, however:

> "That no child shall ever marry any blood kin, or blood relation, or any Catholic, or adherent of the Roman Catholic Church, or of its Papal Head; nor before her eighteenth year shall be full; and should any of my said children marry in any way contrary to any part of this provision, then that child shall take or receive, in lieu of what is or has been herein bequeathed to her, one thousand dollars in money, to be disbursed and used by my said executor and executrix in the careful purchase of such things as said child may need in and towards housekeeping, and to be given to said child on loan or in trust, and to constitute the whole of that child's legacy."

One of the daughters, during her father's lifetime and before she was 18 years of age, had married with her father's knowledge. The court held inter alia that the provision or condition in the will was intended to apply only to those marriages occurring after his death. After citing the part of the will quoted above the court said:

> "It is evident from this that the testator contemplated a forfeiture taking place when his executor and executrix should have charge of his estate, which could only be after his death."

These words are very pertinent to the provisions of the will here under discussion. The court also supported the conclusion reached by section 2195 of the Tennessee Code of 1858, which provides that a will is to speak and take effect as if it had been executed immediately before the testator's death. We decide, therefore, that the court did not err in holding that the provision of the will in restraint of marriage was void.

[3] We shall now discuss the stock dividends declared and paid after Mrs. Duffill's death. The question, according to the trustee and its associated appellants, is this: Do such dividends constitute parts of the corpus of the residuary estate, or are they to be regarded as part of the income thereof? Respondent Harry Duffill insists that the stock dividends were actually paid from earnings of the Grasselli Chemical Company which had been accumulated after the death of the testatrix. We shall examine this contention, before determining the rule of distribution applicable to the dividends. The facts as stipulated are as follows:

On November 23, 1916, the directors of the Grasselli Chemical Company resolved that there be distributed to the common stockholders of record December 15, 1916, "out of the surplus accumulated prior to March 1, 1913," a 10 per cent. common stock dividend, payable January 2, 1917. On August 23, 1917, a similar resolution was passed, making a stock dividend of 3½ per cent. payable out of the same surplus, the "same to be distributed on September 29, 1917." On November 22, 1917, the said directors resolved that there be distributed to the common stockholders of record December 15, 1917, out of the earnings of the year 1917, a 4.15 per cent. dividend, the same to be distributed December 31, 1917. It was further stipulated that the Grasselli Chemical Company had surplus and undivided profits of the value shown on its books in the following amounts upon the dates specified:

January 1, 1913	$ 8,116,175 84
January 1, 1914	4,665,254 08
January 1, 1915	5,335,384 88
January 1, 1916	7,213,304 56
January 1, 1917	9,796,906 40
January 1, 1918	10,166,737 81

Under the first resolution the executor received a stock dividend of 491.4 shares of the common stock, and 174$^{25}/_{200}$ shares under the second.

[4] While it is true that the first and second resolutions declare the dividends payable out of the surplus accumulated prior to March 1, 1913, that declaration was not binding upon the probate court. Except in a few of the states the determination of the directors of a corporation as to the source of its dividends has no binding or even persuasive effect upon the court when it is required to decide whether a stock dividend constitutes income which goes to the tenant for life or for years or is principal to be held for the benefit of the remainderman. As was said in McLouth v. Hunt, 154 N. Y. 179–198, 48 N. E. 548, 553 (39 L. R. A. 230):

> "The mere adoption by the corporation of a resolution cannot change accumulated earnings into capital, as between the life tenant and remainderman. When questions arise under a will between parties standing in such relations to each other, with respect to the right to accumulated earnings upon capital stock, the courts must determine the question for themselves, according to the nature and substance of the thing which the corporation has assumed to transfer from the one to the other, and they are not concluded by mere names or forms. For all corporate purposes the corporation may doubtless convert earnings into capital, when such power is conferred by its charter, but when a question arises between life tenants and remaindermen concerning the ownership of the earnings thus converted the action of the corporation will not conclude the courts."

And in the opinion in the case of Pritchitt v. Nashville Trust Co., 96 Tenn. 472–477, 36 S. W. 1064, 1065 (33 L. R. A. 856) the court said:

> "The right to the use of the property entitles the life tenant to its net income. As applied to land, it entitles him to the crops or rent; as applied to money or bonds, it entitles him to the interest; and as applied to corporate stock, it should, upon the same reasoning, entitle him to the net earnings. If the life tenant may not be deprived of crops or rents to make the land better, or of interest to enlarge the corpus of money or bonds, why should he be deprived of net earnings of corporate stock, covered by stock dividends, to augment the remainder estate? It does not seem to us a sufficient answer to say that the corporation, in the latter case, has seen fit, in the due exercise of its power, to capitalize

such earnings, rather than pay them out in cash dividends. What has the capitalization of the earnings to do with their ownership as between life tenant and remainderman, or how can the change of form affect the title of those persons? Can the corporation, after earnings have been made and ascertained, give them to one person by this procedure or to another by that procedure? Certainly not. * * * The life tenant of corporate stock is entitled to the undiminished benefit of its net earnings in any and every contingency; less than that would not allow him the full use of the life estate."

In Hite's Devisees v. Hite's Executor, 93 Ky. 257–266, 20 S. W. 778, 780 (19 L. R. A. 173, 40 Am. St. Rep. 189), the court said:

> "Where a dividend, although declared in stock, is based upon the earnings of the company, it is in reality, whether called by one name or another, the income of the capital invested in it. It is but a mode of distributing the profit. If it be not income, what is it? If it is, then it is rightfully and equitably the property of the life tenant. If it be really profit, then he should have it, whether paid in stock or money."

This doctrine is further expounded, and the authorities supporting it are cited in 2 Cook on Corporations (7th Ed.) § 554, and in Thompson on Corporations (2d Ed.) § 5410.

In such a case as this the court will ascertain whether the giving of the stock dividend or the money dividend to the life tenant reduces the value of the corpus of the estate as it existed at the time of the death of the testator, or in this case of Mrs. Duffill, the testatrix. The intrinsic value as shown by the books of the corporation (and in this case by the stipulation) is to be taken into consideration. This establishes that which the remainderman is entitled to have preserved for ultimate distribution to him. Smith's Appeal, 140 Pa. 344, 21 Atl. 438, 23 Am. St. Rep. 237. As is well said by learned counsel for Harry Duffill:

> "When a share of stock in a corporation is issued it represents a pro rata interest in all the property of the corporation, and a board of directors has no power to declare any particular share, or class of shares, to be representative of any particular part of the corporate assets, in the absence of clear legislative authority for such a declaration.
>
> "When a board of directors declares a stock dividend out of surplus earnings, they mean only that they increase the outstanding stock of the corporation to correspond with an equal amount of the increase of the corporate assets; the stock when issued is not limited for its value to such increased amount of assets, but derives its value from the entire assets of the concern. No form of words declaring the dividend can alter this fact.
>
> "The shares received as stock dividends by the estate of Mrs. Duffill since her death represent profits accruing to such estate because of its interest, as a holder of stock owned by her at the time of her death, in the aggregate of all the assets of the Grasselli Corporation, and not of any particular part of those assets; and such stock dividends are income of her estate, if their issuance does not reduce the value of the shares owned by her at the time of her death."

That they do not reduce the value of said shares is clear. Mrs. Duffill died January 7, 1916. The surplus and undivided profits of the corporation at that time, as will be seen by reference to the figures quoted above from the stipulation of the parties, were more than $7,000,000. After her death two stock dividends were declared of 10 and 3½ per cent., respectively, directed to be paid out of the surplus accumulated prior to March 1, 1913. A later stock dividend of 4.15 was payable, according to declaration of the directors, out of the earnings of the year 1917. The total amount of these dividends was less than 19 per cent. Deducting all the cash and cash dividends declared after Mrs. Duffill's death, the company had on January 1, 1918, surplus and undivided profits amounting to more than $10,000,000—an increase of more than 40 per cent. in surplus and undivided profits against an augmentation of the outstanding capital stock of less than 19 per cent. This demonstrates that the stock dividends were actually paid out of the earnings of the corporation, after Mrs. Duffill's death.

[5] In the brief of the appealing executor and its associates the two methods of apportioning dividends which are in use in America are discussed. These are called by Cook, in his work on Corporations (7th Ed.) § 553 et seq., "the American or Pennsylvania rule" and "the Massachusetts rule." According to the American rule, if it be found that the fund out of which the dividend is paid accrued before the life estate arose, it is held to be principal belonging to the corpus of the estate. But when it is found that such fund was earned after the life estate arose, then it is income belonging to the life tenant. Of the other rule, known sometimes as "the rule in Minot's Case," which prevails in Massachusetts, Georgia, Rhode Island, and Illinois, the learned author says:

> "It regards cash dividends, whether large or small, as income, and stock dividends, whenever earned and however declared, as capital, and the rule, accordingly, is a simple one. Cash dividends belong to the tenant for life and stock dividends to the corpus. There is little doubt, however, that this rule works great hardship and injustice in many cases. Hence the rule is not rigidly adhered to, but the court, in deciding whether the distribution is a stock or a cash dividend, may consider the actual and substantial character of the transaction, and not its nominal character merely."

That we adopt the American or Pennsylvania rule is evident from the foregoing discussion and the cases cited. In re Osborne, 209 N. Y. 450–477, 103 N. E. 723, 823, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915A, 298, is an excellent example of the application of the rule which there was stated as follows:

"(1) Ordinary dividends, regardless of the time when the surplus out of which they are payable was accumulated, should be paid to the life beneficiary of the trust. (2) Extraordinary dividends, payable from the accumulated earnings of the company, whether payable in cash or stock, belong to the life beneficiary, unless they intrench in whole or in part upon the capital of the trust fund as received from the testator or maker of the trust or invested in the stock, in which case such extraordinary dividends should be returned to the trust fund or apportioned between the trust fund and the life beneficiary in such a way as to preserve the integrity of the trust fund."

Tested by this rule, the decision of the probate court distributing one-half of the stock dividends to Harry Duffill must stand.

That part of the judgment from which the executor and trustee and its associates appeal, therefore, should be affirmed.

[6] We will now consider the appeal of Harry Duffill from certain parts of the decree, and hereinafter in this opinion we shall refer to him as "the appellant." His appeal is from so much of the decree of distribution as upholds any part of the trust scheme set forth in the will of his mother. Appellant's counsel contend that the two trust schemes, one chiefly for the supposed benefit of himself and the other to provide an income for his son Albert, and to distribute half the accumulated fortune to the latter after his minority, are so intimately interwoven in one testamentary scheme that the destruction of one trust involves the other. The appellant, therefore, asks the court to decide that his mother died intestate, and that he, as heir at law, is the sole inheritor of her estate. In this behalf a number of cases are cited, including Estate of Fair, 132 Cal. 523–540, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70, Carpenter v. Cook, 132 Cal. 621–625, 64 Pac. 997, 84 Am. St. Rep. 118, Hofsas v. Cummings, 141 Cal. 525, 75 Pac. 110, Estate of Dixon, 143 Cal. 511, 77 Pac. 412, and Estate of Whitney, 176 Cal. 12, 167 Pac. 399. Without analysis of these authorities in detail it is enough to say that each is dependent for the conclusion reached by the court upon the peculiar facts appearing from the record. In the case now before us the two trust provisions are easily sustainable, and the will may be upheld as a substantial declaration of the testamentary intent after eliminating the unlawful conditions.

We have in this opinion discussed the terms of the trust relating to Harry Duffill. But it will be necessary again to examine the fifth clause of the will in order to have in mind the substantial parts of the trust in favor of the grandson of testatrix. The trustee is by the will ordered to invest and reinvest the property, "and to apply and distribute the income and principal" as thereinafter directed. The trustee also is to pay $3,000 a year to Alfred, during minority; to pay appellant $4,000 a year during his son's minority (said annuity to be reduced in case of the prohibited marriage taking place) and then follows this language:

"When my grandson Albert Duffill shall attain the age of twenty-one years, said trustee shall segregate said trust fund, and any accumulations thereof, into two equal parts and transfer and convey one of said parts to my son Harry Duffill."

This is followed by the void condition regarding marriage. After Albert's majority, the portion distributable to his father having been first subtracted from the corpus of the trust estate, the distribution is to be as follows:

"Said trustee shall pay to said Albert Duffill the entire income from said portion of said trust estate so distributable to said grandson Albert Duffill, and shall distribute to the said Albert Duffill said portion of said trust estate so distributable to him under the terms hereof in such portions, and at such times as it, in its discretion, deems for the best interests of my said grandson Albert Duffill, after said Albert Duffill shall have reached said age of twenty-one years with the limitation that said entire portion shall have been distributed by said trustee to my said grandson on or before the time when said grandson shall have attained the age of twenty-five years."

The decree of distribution provides as follows:

"That the provisions of said paragraph fifthly in restraint of the marriage of the said Harry Duffill with said Mrs. Alice McNamara are, and each of them is, null and void, and also that each and every the directions, trusts and provisions of said paragraph fifthly for the accumulation of the income of testatrix's residuary estate, except in so far as such accumulation is directed to be made for the benefit of said minor, Albert Duffill, and only during his minority, are altogether in contravention of the statutes of the state of California in such case made and provided, and are void; that the devise and bequest of all the rest, residue, and remainder of the estate of the decedent to the Los Angeles Trust & Savings Bank, in trust, as provided in said paragraph fifthly of said will, constitute a valid trust, and should be enforced according to the provisions of said will, except in the particulars wherein said provisions have hereinbefore been found and declared to be illegal and void."

The other portions of the decree relate to the carrying out of the details of this general order of distribution.

It is conceded that the implied directions for the accumulation of the income except in the trust estate of the minor are void. But only such directions are made void by the statute. Section 723, Civ. Code; Estate of Pforr, 144 Cal. 121, 77 Pac. 825. But the gift of the income does not fall with the invalid direction for accumulation. Section 733 of Civil Code is as follows:

"When, in consequence of a valid limitation of a future interest, there is a suspension of the power of alienation or of the ownership during the continuation of which the income is undisposed of, and no valid direction for its accumulation is given, such income belongs to the persons presumptively entitled to the next eventual interest."

The courts of New York under a similar statute have consistently held that the void trust for accumulation of income does not invalidate the gift of the principal. Kilpatrick v. Johnson, 15 N. Y. 322; Pruyn v. Sears, 96 Misc. Rep. 200, 161 N. Y. Supp. 58; Cochrane v. Schell, 140 N. Y. 516, 35 N. E. 971; Manice v. Manice, 43 N. Y. 303–376; Matter of Ossman v. Von Roemer, 221 N. Y. 381, 117 N. E. 576; Cook v. Lowry, 95 N. Y. 103.

The testatrix intended that appellant should receive one-half of the income, but upon the void condition that it should be accumulated during Albert's minority. He receives it under the decree freed of the void condition against accumulation. Being the person entitled to the next eventual interest he is entitled to it, and the trust itself is not destroyed in other respects. The decree avoids the direction for accumulation only, and distributes to the intended object of the bounty of testatrix. So, with the void condition against marriage. The result of eliminating it is the same as if it were valid, but had never been violated. The decree does, in our opinion, substantially carry out the wishes of the testatrix in so far as they were not in contravention of law. The fact that the carrying out of the wishes of Mrs. Duffill in the matter of the prohibition of her son's marriage would have changed the distribution of a large part of the property is immaterial. The law strikes out the immaterial provision with reference to marriage, but the gift stands. So, with the accumulations. Undoubtedly the testatrix intended the income to be retained and to go with the corpus of the trust estate in final distribution. Her intent was by the decree only frustrated as to the time when her son Harry should receive his part of the income, and this result was reached because of her unlawful wish for accumulation of that portion.

As was said by Mr. Justice Henshaw in the opinion in Estate of Yates, 170 Cal. 254–256, 149 Pac. 555, 556, in speaking of legacies given in trust for accumulations of principal and interest until the beneficiary should reach the age of 25 years:

> "The direction in these trusts for accumulations beyond the age of the minority of the legatees is unquestionably void. Civ. Code, §§ 723, 724. But this fact does not in law operate to destroy the trust in its creation, but merely to avoid the provision for the illegal accumulations (Civ. Code, § 725), with the result that the legatees after maturity would be entitled to receive the incomes of the trust funds."

We cannot agree with appellant in his contention that the whole testamentary scheme failed, and that the decree of the superior court sitting in probate amounted to the fabrication of a new will.

No other subjects discussed in the briefs require further analysis or comment.

That part of the judgment attacked in the appeal of Harry Duffill (L. A. No. 5907) is affirmed.

That part of the judgment from which the executor and trustee and its associates appeal is affirmed.

We concur: ANGELLOTTI, P. J.; SHAW, J.; OLNEY, J.; LAWLOR, J.; WILBUR, J.; LENNON, J.

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181 Cal. 22

FROST v. CITY OF LOS ANGELES et al.

(L. A. 4443.)

(Supreme Court of California. Aug. 11, 1919.)

1. Nuisance 🔑72 — Public Nuisance — Who may Sue to Enjoin.

To entitle a private party to sue to enjoin a public nuisance, he must allege and prove facts showing that it causes special injury to himself in person or property, and of a character different in kind from that suffered by the general public.

2. Waters and Water Courses 🔑182 — Water Companies — Statutes — Constitutionality.

St. 1913, p. 793, providing that every person, private corporation, or municipality engaged in furnishing water for human consumption, and having over 250 surface connections, shall be guilty of maintaining a nuisance, unless the water being supplied is the purest and most healthful securable, under all circumstances and conditions, is unreasonable and unconstitutional, amounting to an absolute prohibition of a lawful business.

3. Constitutional Law 🔑81 — Police Power.

The state Legislature is possessed of the entire police power, except as its power is limited by the provisions of the Constitution; but it cannot, under the guise of the police power, unreasonably interfere with a lawful and useful occupation or business, which is not inherently, or because of the manner in which it is carried on, injurious to persons or property, or to the public health, convenience, safety, or morals.

4. Statutes 🔑270 — Amendment — Effect on Pending Suits.

The amendment of an unconstitutional statute, making it constitutional, does not have retroactive effect so as to affect the validity of a judgment determining such statute unconstitutional, rendered before the amendment, and such a judgment will not be reversed on appeal by reason of such amendment.

5. STATUTES ⟹64(2) — PARTIAL INVALIDITY.

St. 1913, p. 793, providing for a permit for supplying water which must be the purest and most healthful obtainable, and that furnishing water without a permit is a public nuisance, being in part unconstitutional, the court could not grant an injunction against a city furnishing pure water without a permit by eliminating the unconstitutional part, requiring that the purest water be furnished.

6. INJUNCTION ⟹24—FURNISHING WATER SUPPLY WITHOUT PERMIT—INCONVENIENCE AS GROUND FOR REFUSAL.

It must be presumed that the Legislature, when it granted permission, under St. 1913, p. 793, to any citizen or consumer using the water, the right to enjoin a water company or municipality from supplying water without a permit from the State Board of Health, did not intend to change in any other respects the principles of equity regarding injunctions; and hence where the water furnished is wholesome and sanitary, an injunction will not issue to protect the technical unsubstantial right of the consumer that a permit be obtained, where the effect of issuing an injunction and stopping the city from supplying its inhabitants will cause the greatest imaginable inconvenience to the city and its inhabitants, and will be of no benefit to the plaintiff consumer.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Edgar M. Frost against the City of Los Angeles and certain officers constituting its board of public service. Judgment for defendants, and plaintiff appeals. Affirmed.

Ingle Carpenter and Charles W. Fourl, both of Los Angeles, for appellant.

Albert Lee Stephens, City Atty., W. B. Mathews, and W. B. Himrod, all of Los Angeles, for respondents.

SHAW, J. This is an action to enjoin the city of Los Angeles and certain officers constituting its board of public service from continuing to supply water from the Los Angeles aqueduct to its inhabitants for domestic uses. The court, after an elaborate trial, gave findings and judgment for the defendants. The plaintiff appeals.

The complaint sets forth that the city has constructed an aqueduct whereby it carries water from the Owens river, in the counties of Mono and Inyo, for a distance of 200 miles, to Los Angeles, and there distributes the same for domestic use to its inhabitants including the plaintiff and his family; that said water is polluted and unfit for human consumption, and that the city is so furnishing it without having obtained any permit to do so from the board of health of the state of California. The claim of the plaintiff is twofold: First, that the supplying of unfit water such as that described, for domestic use, is per se a public nuisance; and, second, that the city is without authority to furnish any kind of water for public use unless it has first obtained a permit from the state board of health. For the latter point plaintiff relies on the statute providing that the continuation of such supply may be enjoined at the suit of any person who receives water of that character for domestic use from the person sought to be enjoined. Stats. 1913, p. 793.

The court expressly found that the water furnished and supplied by the city through its aqueduct and distributing system "is safe, wholesome, sanitary, healthful, potable, and fit for human consumption"; and, further, that the city was not supplying to the plaintiff for domestic or other uses any water that was not fit for human consumption. These findings are fully supported by the great preponderance of the evidence. Indeed, it may be said that the evidence to the contrary is so inconsiderable that there is no serious conflict.

[1] In view of these findings, it is clear that the court was justified in refusing to grant any relief based upon the theory that the plaintiff as a private individual was maintaining an action to abate or enjoin a condition which constituted a public nuisance. "A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise." Civ. Code, § 3493. To entitle a party to sue to enjoin a public nuisance, he must allege and prove facts showing that it causes special injury to himself in person or property, and of a character different in kind from that suffered by the general public. Brown v. Rea, 150 Cal. 174, 88 Pac. 713; City Store v. San Jose, etc., Co., 150 Cal. 279, 88 Pac. 977; Spring V. W. W. v. Fifield, 136 Cal. 15, 68 Pac. 108; Code Civ. Proc. § 731. Since the plaintiff is not injured at all, either specially or otherwise, he cannot under the general law maintain any action with respect to the continuance of the water service. Further, in that aspect the case is entirely without merit, since the thing complained of, the supplying of water unfit for public use, does not exist.

The only foundation upon which the plaintiff can sustain his action is found in the act of 1913 aforesaid. This act makes it unlawful for any person or corporation, private or municipal, to furnish water to any person, for domestic uses, "which is polluted or dangerous to health." It requires any person or corporation desiring to furnish water for domestic use, or, being already engaged in that business who desires to continue so doing, to apply to the state board of health for permission to do so; directs that an investigation of the plant and water supply may be made, and that hearings may be had at the expense of the petitioner, whereupon, if the board finds that the water to be furnished is of a character which does not endanger the lives or health of human beings, and that it is, under all the circumstances and conditions, the purest and most healthful water obtainable or securable, it shall grant permission for such applicant to furnish, or continue to furnish, such water. The clause upon which the right of the plaintiff to maintain this action depends is, in effect, that any person or corporation whose supply of water for human consumption or domestic use is taken or received from any person or corporation, municipal or private, engaged in such water furnishing business, without having an unrevoked permit to do so as provided in the act, may maintain an action to enjoin such water furnishing person or corporation from furnishing or continuing to furnish water for such purposes, or that it or he may be enjoined at the suit of the state board of health in the same manner.

The respondent contends that this act is unconstitutional so far as it applies to Los Angeles, and also that it is unconstitutional on general grounds as an unreasonable exercise of the police power.

With respect to the first proposition it is argued that any municipal corporation is authorized by the Constitution to establish and operate public works for supplying its inhabitants with water (article 11, § 19); that the Los Angeles charter confers upon that city the power to make all regulations necessary and expedient for the preservation of health and prevention of disease within the city, and to establish a health department with power to enforce such regulations; also to establish and operate waterworks for the purpose of supplying its inhabitants with water, and, in short, with full powers over the entire water system pertaining to that city; and that the subject of providing and furnishing water by the city for its inhabitants is a municipal affair, with respect to which the charter is the exclusive law. In this behalf attention is called to the fact that by an amendment of the charter approved on January 16, 1917, adopted under the provisions of sections 6 and 8 of article 11 of the Constitution as amended in 1914, the city has become entirely independent of the state with respect to its municipal affairs, so that a general law is of no force therein, as to such affairs, whether the charter of the city contains provisions regarding it or not. Civic Center Ass'n v. R. R. Comm., 175 Cal. 441, 166 Pac. 351. The claim is that the supplying of water to the inhabitants of the city of Los Angeles is a municipal affair, and therefore a matter in which the Legislature cannot interfere, even for the purpose of protecting the health of the inhabitants of other portions of the state. It is also claimed that the provision is in violation of section 13, art. 11, of the Constitution, which prohibits the Legislature from delegating to any special commission power to perform any municipal function, and that it is likewise void as a delegation of legislative power to the state board of health. These several contentions would open an interesting field of inquiry, but, because of our views upon another objection about to be mentioned, we do not think it necessary to determine whether they are well taken or not.

[2] We are of the opinion that the statute of 1913, so far as it provides for the injunction aforesaid, is unconstitutional, because it authorizes an unreasonable exercise of the police power of the state. It provides that every person, private corporation or municipality engaged in furnishing water for human consumption, and having over 250 service connections, shall apply to the state board of health for permission to continue the service; that if the board is, for any cause, unable to proceed at once it shall issue a temporary permit, which shall be good until its final action, and that it shall make a thorough investigation of all the conditions and circumstances, and may allow the applicant to be heard. At the close of the investigation the board must determine the matter, and if it "shall determine, as a fact, that the water being furnished or supplied to such human beings is such, that under all the circumstances and conditions, it does not endanger the lives or health of human beings *and that under all the circumstances and conditions the water being supplied is the purest and most healthful obtainable or securable under all the circumstances and conditions* [*sic*], it shall grant to petitioner a permit authorizing the petitioner to furnish or continue to furnish or supply such water to such human beings." Section 2, subd. b. It further declares that the furnishing of water without such a permit is a public nuisance, and that it is the duty of the officers of the state to immediately abate the same in the manner provided by law. Subdivision "a" of section 2 requires the board of health to refuse a permit if it determines that the water being supplied may constitute a menace or danger to health or is unhealthful or unsanitary, and no power is given to the board to issue a permanent permit at all, except after it has determined that the water being supplied is the purest and most healthful obtainable under the circumstances.

The act gives the board no discretion. No matter how pure and healthful, short of absolute perfection, the water supply may be, nevertheless, if better water can be obtained by any expenditure of money and effort of which the purveyor to the public use is capable, the permit must be refused; the board has no power to grant any permission; the continuance of the water service at once becomes a public nuisance; it is the bounden duty of the proper state officials to immediately stop it; and any consumer forthwith is invested with the right and power to maintain an action to enjoin the continuance of such water service.

It seems obvious from the mere statement of the case that such a law, at least so far as it applies to a water service already in operation, must be held to be unreasonable and invalid. The climate of this state is so arid, the rainfall so light and variable, and the intervals of drought so long, that the denizens of practically every community, from a village having 250 service connections up to the largest city, have and can have no private water supply, but are compelled to depend upon some kind of public water service. It is safe to say that in the majority of such places the water served is not detrimental to the health of the inhabitants. There can be little doubt that in a large number of such cases it would be possible for those engaged in the public water service to find, somewhere available, water of a better quality than that which is being supplied. If such fact could be established, and even if it could not be shown that better water was not obtainable, then, under this law, no permit to continue the original service could be issued by the board, and any consumer could at once enjoin the further service and immediately deprive himself and all other inhabitants of the region of any water from that source, until the better quality of water was secured and delivered to them. In the practical result the inhabitants would be deprived of any water at all in all such cases. Apparently this part of the law is based on the theory that it is better for the urban population of the state that they should die of thirst than that they should quench it with ordinary healthful water, which is not the very purest that can possibly be obtained. The law in this respect amounts to absolute prohibition of a business lawful in itself, and not injurious to health.

[3] The Legislature is possessed of the entire police power of the state, except as its power is limited by the provisions of the Constitution. But it cannot, under the guise of the police power, unreasonably interfere with a lawful and useful occupation or business which is not inherently, or because of the manner in which it is carried on, injurious to persons, or property, or to the public health, convenience, comfort, safety, or morals. Ex parte Whitwell, 98 Cal. 73, 81, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152; Ex parte Sing Lee, 96 Cal. 354, 31 Pac. 245, 24 L. R. A. 195, 31 Am. St. Rep. 218; Los Angeles v. Hollywood Cem. Ass'n, 124 Cal. 349, 57 Pac. 153, 71 Am. St. Rep. 75; Ex parte McCapes, 157 Cal. 29, 106 Pac. 229; In re Dart, 172 Cal. 59, 155 Pac. 63, L. R. A. 1916D, 905, Ann. Cas. 1917D, 1122. A statement of the precise points decided in some of these decisions will show the practical application of the rule. In Ex parte Whitwell an ordinance forbidding any person to maintain a hospital for insane persons in any building not constructed of brick, iron, or stone, or in any building not surrounded by a high brick or stone wall, or within 400 yards of any dwelling or school, was held to be an unreasonable exercise of the police power. It was said that the restrictions had no reasonable relation to the object of protecting the public interest or the safety, convenience, or comfort of the persons concerned. In the Sing Lee Case it was declared that an ordinance prohibiting the carrying on of a public laundry in a town, except in certain specified blocks thereof, without a written permit from the trustees, was void. In Los Angeles v. Hollywood, an ordinance prohibiting the establishing of cemeteries within the limits of a county without the permission of the board of supervisors was held void. In the McCapes Case it was held that a statute prohibiting any person from building a fire on his own land for burning brush or any other purpose without a written permit from some state or district fire warden was an unreasonable restriction upon the right to use property. The business of furnishing water for the domestic use of inhabitants of any particular territory is a lawful one. To say that a person who is engaged in furnishing such water shall immediately cease doing so, although the water he is furnishing is healthful and safe, until he shall have procured some better quality of water which it is possible for him to obtain, is an unreasonable restriction upon a lawful occupation, and it is a case in which the restriction has no relation whatever to the preservation of the public health, comfort, or convenience, which is obviously the object to which the statute is directed; but, on the contrary, its enforcement would cause far more inconvenience and distress to persons and injury to the public interest than the thing at which it was aimed. Upon the principles we have just discussed, this feature of the law is clearly void.

[4] The subsequent policy of the Legislature indicates that it was of the opinion that this particular prohibition of the law was invalid. The Legislature of 1915 amended the law (St. 1915, p. 1282) by eliminating the clause providing that no permit shall be granted unless the water being furnished was the purest and most healthful obtainable under the circumstances and conditions. To the suggestion that the amendment of the law would affect the action pending so as to allow an injunction which otherwise should have been refused, the answer is that amendments to the law do not operate upon an existing suit in a case like the present, nor have retroactive effect so as to affect the validity of a judgment rendered before the new law came into existence. Vanderbilt v. All Persons, 163 Cal. 513, 126 Pac. 158; Ex parte Sparks, 120 Cal. 400, 52 Pac. 715. The

judgment appealed from was rendered before the amendment of 1915 was enacted.

[5] The appellant answers the objections to this clause of the law by the suggestion that if it should be found unconstitutional that clause can be eliminated without destroying the entire section, and that without it the statute is valid and enforceable. This point is without merit. It cannot be supposed that the state board would issue a permit in the face of such an imperative mandate against it, or that any municipality or person in the state would expect to be able to obtain a permit from a state board which was forbidden to issue it under the circumstances existing. To direct that an injunction should issue under such circumstances, because by eliminating a material portion of the law it could be made valid, would be in the nature of judicial legislation of a retroactive character.

[6] There is another reason which fully justifies the affirmance of the judgment. We have said that a private person cannot maintain an action to enjoin a public nuisance unless it is specially injurious to himself. The plaintiff in this case is taken out of the operation of this rule solely because of the permission given to him by the state in this act to maintain this action on its behalf, without showing special injury to himself. The state may, of course, grant this permission to any citizen to act in its behalf. But it must be presumed that the Legislature did not intend to change in any other respect the principles of equity regarding injunctions, and consequently that when a citizen applies to a court of equity for relief, under such authority, his rights are no greater with respect to the merits of the case, and the duty of a court of equity to grant relief, than in any other action of equitable cognizance. The general principles of equity governing the issuance of injunctions in such a case must be the same and like reasons must be shown as in other cases of the same character. The primary object of the act of 1913, under which the plaintiff sues on behalf of the state, was to prevent the supplying of water for human use which was unhealthful and unsanitary, and thereby to preserve and protect the general health of the people of the state. The power to grant or refuse a permit was given to the state board of health solely with the object of preventing the use of water detrimental to health. The substance of any action to enjoin such supply must therefore be the prevention of the use of water which is dangerous to health. As we have already shown, the plaintiff wholly failed to prove such a case. The water which is the subject of this controversy is found by the court, upon evidence which is full and satisfactory, to be safe, wholesome, sanitary, and fit for human consumption. So far as the substantial merits of the action is concerned, it is wholly without foundation. The plaintiff is driven to rest exclusively upon his technical right under the act to enjoin the continuance of the water supply, simply because the state has issued no permit therefor. The established fact is that there is no occasion for interference by the state or by any other person. The only right is the bare technical right to insist that a permit be obtained before the city delivers any more water to its inhabitants for human consumption. It is obvious, therefore, that the issuance of an injunction by the court to stop the city from supplying such water to its inhabitants would cause the greatest imaginable inconvenience both to the city and to its inhabitants, and would be of no benefit whatever to the plaintiff. The refusal of such injunction would deprive the plaintiff of no right beneficial to himself or others, and would put him to no inconvenience whatever. Under these conditions a court of equity is not bound to grant an injunction. "When an injunction to restrain a nuisance will produce great public or private mischief, a court of equity is not bound to grant it merely for the purpose of protecting a technical unsubstantial right." 2 Beach on Injunctions, § 1067. "The court may properly be guided by the consideration of the relative convenience of the parties; and if it appears that the benefit resulting to the plaintiff from the granting of the writ will be slight as compared to the injury to the defendant, the relief may be denied, and the plaintiff left to the pursuit of his remedy at law." 2 High on Injunctions, § 740. Further authorities are set forth in Peterson v. Santa Rosa, 119 Cal. 391, 51 Pac. 557. See, also, Jacob v. Day, 111 Cal. 571, 44 Pac. 243.

In this case the right of the plaintiff, such as it is, is wholly technical and unsubstantial, and to enforce it would produce very great mischief, both public and private, not only to himself, but to many of his fellow citizens within the city, and to the municipality as well. The court in its discretion was fully authorized to deny the injunction under such circumstances.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; LENNON, J.; MELVIN, J.; LAWLOR, J.

181 Cal. 32

HART v. CITY OF LOS ANGELES et al.
(L. A. 4444.)

(Supreme Court of California. Aug. 11, 1919.)

INJUNCTION 🔑9—FURNISHING WATER SUPPLY WITHOUT PERMIT—WHO MAY SUE TO ENJOIN.

A resident of a city, who was not a user of water which came from a source from which the city had not been given a permit by the state board of health to obtain water, as provided by St. 1913, p. 793, could not maintain an action under such statute to enjoin the city from using the water.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Henry A. Hart against the City of Los Angeles and certain officers constituting its board of public service. Judgment for defendants, and plaintiff appeals. Affirmed.

Ingle Carpenter and Chas. W. Fourl, both of Los Angeles, for appellant.

Albert Lee Stephens, W. B. Mathews, and Wm. B. Himrod, all of Los Angeles, for respondents.

SHAW, J. This is an appeal by the plaintiff from a judgment in favor of the defendants. The facts in the case, with a single exception, are the same as those more fully set forth in the case of Frost v. Los Angeles, L. A. No. 4443 (183 Pac. 342 this day decided). The difference consists only in the fact that the plaintiff in this action is not a user of water which comes from the source which is alleged to be contaminated and unfit for use, and which the court found to be safe and healthful. The plaintiff, therefore, does not come within the provisions of the act of 1913 (St. 1913, p. 793), under which alone, in view of the findings of the court, he could maintain an action to enjoin a public nuisance. Consequently he had no right to maintain the action.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; LENNON, J.; MELVIN, J.; LAWLOR, J.

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42 Cal. App. 73

SCHULTHEISS BROS. CO. et al. v. STEINBERG et al. (Civ. 2853.)

(District Court of Appeal, Second District, Division 1, California. July 3, 1919.)

1. APPEAL AND ERROR 🔑773(4)—ARGUMENT—NECESSITY.

Where no argument is presented for or against an appellant, judgment will be affirmed as to him.

2. APPEAL AND ERROR 🔑757(1)—BRIEFS—PRINTED TESTIMONY.

Where a case is appealed under the alternative method, court will not refer to portions of the record not printed in the brief but merely indicated by reference to pages of typewritten transcript.

3. MECHANICS' LIENS 🔑163—LIABILITY OF OWNER—EXTENT.

The liability for mechanic's lien claims of an owner failing to file his building contract and bond as required by Code Civ. Proc. § 1183, is not limited to the contract price, even as to contracts made before the Supreme Court had clearly announced such liability.

4. MECHANICS' LIENS 🔑157(1)—DEFECT IN NOTICE.

A mechanic's lien notice stating that contract payments were due 30 days from delivery, while contract made them payable 10th of following month, *held* fatally defective under Code Civ. Proc. § 1187, requiring time of payment to be stated, despite section 1203, providing that certain mistakes should not invalidate liens.

Appeals from Superior Court, San Diego County; W. A. Sloane, Judge.

Mechanic's lien proceedings by the Schultheiss Bros. Company and others against Harry H. Steinberg, the Richardson & Fisher Company, Will J. Thayer, and others. From a judgment the named plaintiff and named defendants appeal. Affirmed.

Hoff & Chatterson and Will J. Thayer, all of San Diego, for appellants.

Miller, Thornton, Miller & Watt, of San Francisco, for respondents.

JAMES, J. [1, 2] Several actions brought to enforce liens for labor and material furnished in the erection of a building in the city of San Diego, of which defendant Thayer was the owner, were consolidated and tried together. Certain of the lien claims were allowed and judgment entered thereon, and certain of them were disallowed. Defendant Thayer, the owner of the building, appealed from the judgment entered in favor of Schultheiss Bros. Company. Other appeals were taken by various of the lien claimants who were denied relief, as well as by the defendant Bonding & Surety Company, but dismissals were made by several of the appellants, and the only remaining appeals appear to be those of Steinberg, Richardson & Fisher Company, and Thayer, the owner. No argument was presented on behalf of or against Steinberg, and there is therefore nothing before the court from which it can be determined that the judgment as to him was in any wise erroneous. Attention may be now called to the fact that the appeal is under the alternative method, which requires the parties to print in their briefs such portions of the record as they desire to call to the attention of the court. In examining the matter the court will not, therefore, refer to any portions of the record which are merely indicated as by page of the transcript.

[3] We will first consider the appeal of the owner Thayer. He states, as evidently was the fact, that as to the judgment in favor of Schultheiss Bros. Company, the court allowed recovery for an amount which, added to other payments made, exceeded the total contract price. He insists that by so doing the constitutional guaranty against the impairment of the obligation of contract was violated. In elaboration of this contention he argues that our Supreme Court, prior to the time of the making of this contract, had held that the Legislature could not legally require the owner of a building to respond to a lien claim in an amount exceeding the contract price. He concedes that by comparatively recent decision the Supreme Court has held that an owner may be required to so respond without there being violated any constitutional right, but insists that the contract was made while the law was as established by the former decisions, and that such adjudications became a part of the law of the state under which the rights of such a contracting owner should be measured. He admits that while there was a written contract and a bond given, neither the contract nor bond was filed with the county recorder, as section 1183, Code of Civil Procedure, requires. The adverse decision to which he refers is that of Roystone Co. v. Darling, 171 Cal. 526, 154 Pac. 15. At the time of the rendering of that decision the lien law was, in comparative particulars, as it was at the time of the making of the contract by the owner here. In Roystone Co. v. Darling, Mr. Justice Shaw makes a very careful review of all of the former decisions, and his determination seems to be that those decisions are not inconsistent with the holding finally announced at the conclusion of the Roystone appeal. He points out that while it had been said that the Legislature could not directly provide that a lien claimant could recover from an owner an amount in excess of the original contract price, that those decisions in nowise denied to the Legislature the right to regulate the making of a contract as to its form, as to its being filed and as to security by bond being required to be taken and filed; that such regulations were reasonable; and that as a penalty for their nonobservance the owner might be required to suffer judgment to be had against him for an amount exceeding the total sum which he had agreed to pay to the original contractor. We think the case last referred to is determinative of the question presented on the appeal of Thayer, and that the judgment of Schultheiss Bros. Company should be affirmed.

[4] The appeal of Richardson & Fisher Company presents a question as to the sufficiency of the notice of lien which was filed by the claimant. The superior court held that the notice was insufficient, in that there was a variance between the contract of the claimant as made with the original contractor and the statement of the terms of that contract as contained in the notice of lien; this particularly as to the time and terms of payment. The notice of lien stated, referring to the matter of payment, "that payment shall be made on or before 30 days from deliveries." The statement in the proposal which resulted in the contract, was that the materials were "subject to 2 per cent. cash discount, payments to be made on or before the 10th of the month following deliveries." Under the proposal or contract it seems quite plain that payments were due on the 10th of the month following deliveries in any event, and that if the charges were paid within that time they were subject to 2 per cent. discount. This was quite different from the time stated in the notice—that payments should be made "on or before 30 days from deliveries." Under the contract, payments might become due, dependent upon the time of delivery, within 11 days, or more than 30 days, as the case might be. Section 1187, Code of Civil Procedure, requires that the notice of lien shall make a statement of the following matters: (1) Statement of demand, after deducting all just offsets and credits; (2) the name of the owner or reputed owner; (3) the name of the person by whom employed, or to whom the material was furnished; (4) statements of the price and when payable and of the work agreed to be done. It is true that section 1203, Code of Civil Procedure, provides that—

> "No mistake or errors in the statement of the demand, or of the amount of credits and offsets allowed, or of the balance asserted to be due to claimant, nor in the description of the property against which the claim is filed, shall invalidate the lien."

We do not think that the saving effect of this section goes far enough to relieve the claimant from making, as section 1187, Code of Civil Procedure, provides, "statement of the price and when payable. * * *" The case of California Cement Co. v. Wentworth Hotel Co., 16 Cal. App. 713, 118 Pac. 103, 113, we think is directly in point, and that the court was justified under that decision in determining the matter of this claim in the way it did. The claimant must comply with reasonable accuracy to the requirements of the statute in making out his notice of lien, and there would seem to be little room for excuse, where the contract under which he is working states expressly the terms of payment, for a complete misstatement to be made in that particular.

The several judgments appealed from by Harry H. Steinberg, Richardson & Fisher Company, and W. J. Thayer are affirmed.

We concur: CONREY, P. J.; SHAW, J.

42 Cal. App. 67

CLOHAN v. KELSO. (Civ. 2643.)

(District Court of Appeal, Second District, Division 1, California. July 2, 1919.)

1. Appeal and Error 🔑933(4)—Granting New Trial—Presumptions.

Where the evidence is such that it would have sufficiently supported findings in favor of the party against whom decision was given, and the trial court grants a motion for new trial made upon various grounds, including insufficiency of evidence, without in terms excluding such ground in its order, it will be presumed, on appeal, in favor of such order, that the court changed its opinion as to the effect of the evidence and reached a conclusion favorable to the party moving for new trial.

2. Appeal and Error 🔑933(4)—New Trial—Presumptions.

On appeal from an order granting a new trial for insufficiency of evidence, the presumption is against the findings of the jury and not in their favor.

3. Appeal and Error 🔑867(2)—Grant of New Trial—Opinion.

On appeal from an order granting a new trial, the appellate tribunal will consider, not the correctness of the opinion of the lower court uttered upon granting the new trial, but the propriety of the order.

4. New Trial 🔑70—Grounds—Evidence—Personal Injuries.

Where the jury found in favor of a motorist who ran down plaintiff at a much-traveled corner, where there was evidence that the motorist was proceeding at a speed of 25 miles an hour, and his claim was that plaintiff stepped back into his path to avoid another car proceeding in the same direction at an equal or greater speed, *held*, that an order granting a motion for new trial on the ground that the motorist was proceeding at a negligent rate of speed was proper.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Frank E. Clohan against Albert P. Kelso. There was a verdict for defendant, and from an order granting plaintiff new trial defendant appeals. Order affirmed.

B. P. Gibbs, of St. Paul, Minn., and Duke Stone, of Los Angeles, for appellant.

Geo. M. Harker, of Los Angeles, for respondent.

CONREY, P. J. This was an action by the plaintiff against the defendant on account of the alleged negligence of the defendant in driving his automobile against the plaintiff on or about June 30, 1914, at or near the intersection of West Twelfth street and Flower street in the city of Los Angeles, whereby the plaintiff received personal injuries. In answer to special interrogatories, the jury found that immediately preceding the collision the defendant was operating his automobile at the rate of 25 miles per hour, and that in the judgment of the jury such rate of speed was not negligent. A general verdict was rendered in favor of the defendant, who now appeals from an order granting a new trial.

One of the grounds upon which the motion for new trial was based was that the evidence is insufficient to justify the verdict of the jury that the defendant was free from negligence. Appellant contends that the verdict of the jury in his favor was so clearly in accord with the evidence that there was an abuse of discretion in the trial court in granting a new trial. This raises the only question in the case on this appeal.

[1, 2] "Where the evidence is such that it would have sufficiently supported findings in favor of the party against whom the decision was given, and the trial court grants a motion for new trial made upon various grounds, including that of insufficiency of evidence, without in terms excluding such ground in its order entered on the minutes, we must presume, in favor of such order, 'that the court changed its opinion as to the effect of the evidence, and reached a conclusion upon the hearing of the motion favorable' to the party making the motion." Pollitz v. Wickersham, 150 Cal. 238, 244, 88 Pac. 911. This rule is equally applicable whether the case be tried by a jury or by the court without a jury. On appeal from an order granting a new trial the presumption is against the findings and not in their favor. Condee v. Gyger, 126 Cal. 546, 59 Pac. 26.

[3, 4] The accident in question occurred in the middle of the afternoon, on a much-traveled street. A witness whose place of business was at the same corner stated that it is very seldom that you could see a block in either direction free of cars. Assuming, as did the court below, that the rate of speed permitted was controlled by the state law, and not by a city ordinance limiting to 10 miles per hour the rate of speed at that street intersection, it was the duty of the defendant to drive his automobile "at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the highway." Motor Vehicle Act of 1913 (St. 1913, p. 649) § 22, subd. b. At the time of the accident, the plaintiff was walking toward the west across Flower street on the south side of Twelfth street, and the defendant was driving north on Flower street. Defendant, according to his testimony, saw the plaintiff and his companion walking across the street, when defendant was 150 feet from them. Then, he says:

Before the accident "Mr. Clohan hesitated and started on, facing me, with his hand in this position (indicating), as much as to say, 'I have plenty of time.' Suddenly, as he got to a point beyond my clearance, he stepped back as though something unforeseen had caused him to step back—my recollection is that a car passed me and went on ahead of me."

The argument of counsel for appellant is directed principally to criticism of an opinion filed by the court when the order granting a new trial was made. Whether that opinion is correct or not is not the issue to be determined here. The appeal is, as it must be, from the order, and not from the opinion. We may say, however, that if by its order the court intended to determine (as presumably it did and as stated in the opinion), that, "for the defendant to approach the crossing at the speed it was found by the jury he did, alongside of another automobile, also proceeding at the same or a greater rate of speed, while pedestrians were crossing the street, was, as a matter of fact, clearly negligence," we think that the evidence was sufficient to support that conclusion.

The order is affirmed.

We concur: SHAW, J.; JAMES, J.

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42 Cal. App. 61

SCHMOHL v. JOHN SIMPSON & CO.

(Civ. 2829.)

(District Court of Appeal, Second District, Division 1, California. July 2, 1919.)

CONTRACTS 🔑198(2)—CONSTRUCTION—BUILDING CONTRACT.

A contract to furnish all material and labor necessary to put in place ornamental plaster work according to specifications, which required waterproofing with a certain material, requires the builder do such waterproofing, in absence of evidence showing that such work was not a process customarily included in ornamental plastering.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by H. R. Schmohl against John Simpson & Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

Haas & Dunnigan, of Los Angeles, for appellant.

Ferguson & Gahan, of Los Angeles, for respondent.

CONREY, P. J. By contract between the parties the plaintiff agreed to furnish and install all material and labor necessary to put in place all ornamental plaster and staff work according to plans and specifications on file for the Southern Counties building on the exposition grounds at San Diego. Under the head of "Ornamental Plastering" in the specifications, it was provided that—

> "The tops of all parapet walls, cornices, belt courses and the washes of all mouldings, sills, etc., shall be waterproofed with one (1) coat of Toch Bros. R. I. W., in which shall be imbedded one (1) thickness of coarse muslin and then covered with another coat of R. I. W."

By this action the plaintiff seeks to recover the sum of $653.70 as the balance claimed to be due on the contract. At the trial it was stipulated that the work described in the foregoing quotation from the specifications was not performed by the plaintiff; that if by the terms of the contract the plaintiff was obligated to do said work, then the defendant would have been indebted to the plaintiff by reason of the contract in the sum of $15.96, and that if the plaintiff was not by reason of said contract obligated to perform said work then the defendant was indebted to the plaintiff in the amount sued for herein. It was further stipulated that prior to the commencement of this action the defendant tendered to the plaintiff said sum of $15.96, in full settlement of the contract, and that the plaintiff refused to accept the same. These stipulations, together with the contract and specifications, constitute all of the evidence in the case. Judgment was entered in favor of the plaintiff, and the defendant appeals therefrom.

It is sought to justify this judgment upon the ground that there is nothing in the contract to show that the plaintiff undertook and agreed to do that part of the work in question here and which it is stipulated that he did not do. In their brief counsel for respondent assert that the putting on of the described materials is a separate trade or business and not a part of the business of putting in place ornamental plaster and staff work, and that there is nothing in the contract to show that the material was to be supplied. A sufficient reply is that there is no evidence to show that the putting on of those materials is part of any separate trade or business, or not a part of the business of doing such work as that described in the specifications; and the contract itself provides that the plaintiff agreed "to furnish and install all material and labor necessary to put in place," etc. Not disputing the contention of respondent that the intention of the parties as expressed in the contract must govern, and that in the absence of express provision in the contract the plans and specifications cannot add to the terms of the contract, it seems clear to us that these principles have no application to the case. There being no evidence tending to show that the waterproofing was not a process customarily and usually included in the work of ornamental plastering, this fact and the specifications, taken together, fairly convey the inference that the waterproofing was a part of the work which the plaintiff agreed to do.

The judgment is reversed and the trial court is directed to enter judgment, on the agreed case as stipulated, in favor of the plaintiff, for the sum of $15.96, without interest and without costs; appellant to have judgment for his costs of this appeal.

We concur: SHAW, J.; JAMES, J.

42 Cal. App. 121

VAN DEGRIFT v. MULLEN. (Civ. 2642.)

(District Court of Appeal, Second District, Division 1, California. July 8, 1919.)

1. CUSTOMS AND USAGES 🔑12(1) — CONTRACTS—KNOWLEDGE.

In order to read a custom into an agreement, it is necessary to show that the party attempted to be bound had actual or constructive knowledge of the custom.

2. CUSTOMS AND USAGES 🔑13—PRESUMPTIONS—WRITTEN INSTRUMENTS.

Where there is a statutory form (Civ. Code, § 2948) for a written instrument, it is logical to infer that parties making an agreement which is silent as to a form to be used had the legal form in view, rather than another form customarily used.

3. CUSTOMS AND USAGES 🔑13—SUFFICIENCY OF EVIDENCE—MORTGAGE FORMS.

In purchaser's action to recover a purchase price installment, evidence that a mortgage form containing conditions not found in the statutory form (Civ. Code, § 2948) was generally used in the county, etc., *held* insufficient to show that parties contracted with reference to such custom or intended purchaser should execute such a mortgage, instead of statutory form, for balance of purchase price.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by S. E. Van Degrift against J. B. Mullen. Judgment for plaintiff, and defendant appeals. Affirmed.

Loeb & Loeb and W. A. Alderson, all of Los Angeles, for appellant.

Delphin M. Delmas, of Los Angeles, for respondent.

JAMES, J. The plaintiff was successful in this action, which was brought to recover judgment for a sum of money alleged to have been paid to the defendant on account of the purchase price of certain real property. The defendant has appealed from the judgment.

[1-3] In consideration of the payment to him of a certain sum of money, defendant issued to plaintiff a writing, which was subscribed by him, covering the terms of purchase of a certain tract of land. This writing contained the following paragraph:

> "I agree to furnish an unlimited certificate of title vested in the buyer's name showing clear of all incumbrances and to accept for said real property the sum of $11,700.00 net to me, to be paid in the following manner: The balance of $11,050.00 Van Degrift Realty Co. agrees to pay as follows, one-fourth (¼) cash on delivery of deed, balance mortgage 1, 2 and 3 years at 7% interest, payable semiannually."

The preliminary payments were made in accordance with the terms stated, and the parties met together for the purpose of completing final papers, including the execution of a mortgage. The defendant then presented a mortgage which contained various terms, including those for the compounding of interest, the payment of street liens and assessments, insurance on the property, attorney's fees in case of foreclosure, a condition that the mortgage might determine upon default of any payments of the principal or interest, etc. The plaintiff presented and offered to execute a mortgage in the form prescribed by section 2948, Civil Code. This mortgage the defendant refused to accept, and announced that he would accept no other mortgage than that which he had prepared. This suit was then brought by the plaintiff to recover back the money already paid out under the agreement. The sole question presented is as to whether the defendant, under the terms of the agreement, had the right to exact from the plaintiff the execution of the mortgage in the particular form determined upon by the defendant. This form contained many conditions not mentioned in the Code section to which we have referred; in fact, nearly all of the particular conditions which we have noted it did contain constitute no part of the mortgage form prescribed in the section cited. However, it is the contention of the defendant that the contract was made with reference to a custom prevailing in the county of Los Angeles; that by that custom the form of mortgage offered by the defendant was the one generally adopted and in use. Several witnesses were examined and testified that the form prepared by the defendant was the one most generally in use, although it was admitted that the shorter or statutory form was found occasionally on the books of the county recorder. A printer of legal and commercial blanks testified that there were some five or more different forms furnished to the trade, but he did not dispute the statement made by the other witnesses to the effect that the long form containing conditions similar to those inserted in the mortgage by the defendant was the one most generally made use of. It will be noted from the paragraph which we have quoted from the agreement or writing signed by the defendant that no form of mortgage is referred to. In order to have read into an agreement a custom or practice it is necessary, not only to show that such custom prevails, but that the contract was made with reference to the custom. Where no express words are relied upon as referring to the custom at the time of making the agreement, it must then be shown that the party attempted to be bound had knowledge, actual or constructive, of the custom itself. Parsons on Contracts (9th Ed.) vol. 2, p. 696; Page on Contracts (vol. 2) p. 926. We find no evidence quoted from which it would appear that the plaintiff had any actual knowledge of the existence of the custom as to the form of mortgage used, and we do not think that under the facts the plaintiff should be constructively charged with notice of any such custom. Where there is a statutory form for the execution of written instruments, then, if we are to look for a presumption in the construction of contracts, it would be logical to infer that the parties, making an agreement which was silent as to a form to be used, had in view the legal form and not some other form as to which the writing was silent. Hale Bros. v. Milliken, 5 Cal. App. 344, 90 Pac. 365. Our conclusion is that the evidence as here presented was insufficient to show that the contract was entered into having in view the custom prevailing in Los Angeles county as to the form of mortgage to be used. The judgment of the court as entered was therefore right.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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42 Cal. App. 70

GUSTAFSON v. WASSON. (Civ. 2890.)

(District Court of Appeal, First District, Division 2, California. July 3, 1919.)

1. Appeal and Error ⚷934(1) — Review —Presumption.

That the judgment was correct must, in the absence of satisfactory showing to the contrary, be assumed by the appellate court.

2. Appeal and Error ⚷757(1)—Briefs—Setting Out Record.

It is appellant's opening brief, and not his closing brief, in which, under Code Civ. Proc. § 953c, should be set out the portions of the record desired to be called to the court's attention.

3. Appeal and Error ⚷757(1)—Briefs—References to Transcript.

References to pages of the transcript do not satisfy requirement of Code Civ. Proc. § 953c, that the portions of the record desired to be called to the court's attention be set out in the briefs.

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Action by J. G. Gustafson against Louis Wasson. Judgment for plaintiff, and defendant appeals. Affirmed.

W. F. Cowan and Carl Barnard, both of Santa Rosa, for appellant.

E. M. Norton, of Healdsburg, and J. R. Leppo, of Santa Rosa, for respondent.

HAVEN, J. [1] Defendant appeals, by the alternative method, from a judgment against him. In the appellant's opening brief it is stated that in the action the plaintiff claimed an easement to the flow of rainwaters in a certain ditch on lands of the defendant and damages caused by the overflow from the ditch on the lower lands of the plaintiff. An extremely condensed summary of the claims of the defendant is contained in the opening brief, and a stipulation between the parties is set forth in full. This stipulation provided for the continuance of the trial; that, upon performance of the conditions and agreements of the stipulation by the defendant the plaintiff by proper conveyance should release to the defendant the right to maintain the ditch mentioned in the amended complaint; that the defendant should pay plaintiff's costs, including a surveyor's charge; that the defendant should construct a new ditch and cause the easement in the same to be conveyed to the plaintiff, failing in which the defendant was to reconstruct, restore, and reconvey to the plaintiff the ditch mentioned in the amended complaint; that the plaintiff should release to the defendant all claims for possible damages; and that, if the defendant should fulfill the preceding terms of the stipulation, the action should be dismissed; otherwise that the plaintiff should not be bound by any of the stipulations and might proceed to trial of the cause in the same manner as if the stipulation had never been made. Following the stipulation in the appellant's opening brief are numerous statements of fact referring to pages of the reporter's typewritten transcript. From the brief it appears there were supplemental pleadings of some sort, but from nothing contained in the brief can it be ascertained what the original, amended, or supplemental pleadings were. The statement is made that the court, without the introduction of any evidence and without any proceedings other than certain admissions of both parties in open court, proceeded to enter judgment. There is no statement in the brief concerning the admissions which were made, nor what the appellant's claims are in regard to them. The opening brief wholly fails to meet the requirements of section 953c of the Code of Civil Procedure and rule 8 of the Supreme Court (176 Pac. ix). Because of the failure of the appellant's opening brief to show those parts of the record upon which he relied, the argument presented in the brief is of academic interest only. The appellant failed to show error on the part of the trial court, without which showing the judgment must necessarily be affirmed. "We are bound to assume, in the absence of satisfactory showing to the contrary, that the judgment of the trial court was correct." Lutz v. Merchants' National Bank of San Diego, 177 Pac. 158, 160.

The respondent rests on the failure of the appellant to comply with section 953c of the Code of Civil Procedure, and rule 8 of the Supreme Court, and in his brief no argument is presented upon the merits of the cause.

[2] In the appellant's closing brief the claim is made that section 953c of the Code of Civil Procedure does not expressly require that the portions of the record referred to be incorporated in the opening brief, and therefore it is stated that the portions of the record on which the appellant relies are printed in the closing brief.

The rules of the court provide for the appellant to file an opening brief to be answered by the respondent, and for one further brief to be filed by the appellant, the purpose of which is to enable the appellant to so answer new matter in the respondent's brief. If it were permissible for the appellant to disclose a part only of his case in his opening brief, and, after its insufficiency had been pointed out by the respondent, to set up his entire case in his closing brief, common fairness would require that the respondent be permitted to file another brief, which in turn would be replied to by the appellant, so that five or perhaps more briefs would be filed instead of the necessary three. The law does not permit this piecemeal presentation of the appellant's case. It is a familiar rule that appellate courts ordinarily will not consider new points made in the appellant's closing brief. Wong Ah Sure v. Ty Fook, 174 Pac. 64, 65. The same reasoning applies to a new record presented in the closing brief. It is to inform the respondent quite as much as it is to inform the court that the statute requires the appellant in his opening brief to set up the parts of the record upon which he relies. "The purpose of the statute requiring the matters relied upon to be printed in the brief is not only for the benefit of the appellate court, but also for the benefit of the respondent." Pasadena Realty Co. v. Clune, 34 Cal. App. 33, 34, 166 Pac. 1025, 1026.

[3] The matters set forth in the closing brief are too incomplete to inform the court with regard to the relationship of the findings and judgment to the pleadings and what in the appellant's brief are designated as "minor stipulations." "Numerous references are made to the pages of the transcript filed, but it has been repeatedly held that the appellate courts will not examine the transcript documents in order to determine whether there is merit in the contentions made by the appellant. Many opinions of this court and the Supreme Court reiterate the rule. A collection of the cases so holding will be found grouped in the case of Barker Bros. v. Joos et al., 171 Pac. 1085. Not having properly before us sufficient of the record to illustrate the various contentions made on behalf of the appellant, we are compelled to hold that no error is shown as against the judgment." Borba v. De Mello, 172 Pac. 1113, 1114.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

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42 Cal. App. 115

ROUSH v. KIRKMAN et al. (Civ. 2845.)

(District Court of Appeal, First District, Division 1, California. July 8, 1919.)

1. Reformation of Instruments 🔑44 — Evidence—Admissibility.

In proceedings to revise a written instrument, evidence of the agreement's purpose and of negotiations leading to its execution *held* admissible.

2. Contracts 🔑99(3) — Mistake — Evidence—Sufficiency.

Conflicting evidence *held* to sustain trial court's finding that a written instrument should be reformed upon ground of mutual mistake, although the parties to the contract had not met until they executed it.

3. Guaranty 🔑100 — Bills and Notes — Payment—Reimbursement.

Where the guarantor of a note, through an indorsee acting as his agent, paid the face value of a note to the payee, there was a payment precluding guarantor's subsequent recovery against the maker by means of suit by indorsee, in view of contract limiting guarantor's right of reimbursement to selection of nursery trees from maker's nursery at a stipulated price.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by C. V. Roush against J. A. Kirkman and others, who filed a cross-complaint against E. H. Miller and another. From a judgment for defendants, plaintiff and cross-defendants appeal. Affirmed.

Harris & Harris, of Fresno, for appellant Roush.

Short & Sutherland, of Fresno, for respondents.

WASTE, P. J. Plaintiff brought this action to collect a note for $3,000 made by the defendants, who are engaged in the nursery business, to the First National Bank of Sanger, and which note was by the bank assigned to plaintiff. Defendants, answering, admitted the execution of the note, and alleged that the note, as delivered, contained on its back a guaranty of payment by the cross-defendants, E. H. Miller and Herbert Askin. Defendants deny that the bank sold, assigned, or delivered the note to plaintiff, or delivered the same to any other person than Miller or Askin, deny that the plaintiff owns the note, and likewise deny that the note is unpaid, alleging that it has been fully paid by Miller and Askin.

By cross-complaint, by which said Miller and Askin are made cross-defendants, the defendants allege the making of an agreement of even date with the note, between themselves and the said Miller and Askin. In the agreement, which is set out in full, it is recited that the said cross-complainants are in need of certain money to carry on their nursery business; that said defendants and cross-complaints will obtain $3,000 for that purpose from the First National Bank of Sanger, by means of the promissory note in litigation here, a copy of the note, together with the guaranty by Miller and Askin, being set up in the agreement; that, in consideration of the guaranty by Miller and Askin, defendants and cross-complainants agree to furnish "free gratis" to Miller and Askin 2,000 trees of any variety which they may choose, then growing in the nursery of defendants and cross-complainants. In the event the nursery people have no available funds with which to dig and properly deliver the trees to Miller and Askin, the agreement continues, Miller and Askin are to advance the same. Furthermore, in case the latter advance any money for payment of interest on the note, they "shall, at their option, select from said nursery stock so many trees as may be equivalent to the amount of money so advanced by them, allowing" the nursery people, defendants and cross-complainants, 20 cents per tree for each and every tree selected and taken by said parties, as therein provided. There is another stipulation to the effect that, if the nursery people pay the note, Miller and Askin shall be entitled to receive, and shall receive, 2,000 trees only, and shall have the option of purchasing more trees for their personal use at a stipulated sum. It is agreed that, if Miller and Askin are unable to accept the trees, the nursery people may continue to care for them until such time as, prior to August 1, 1916, Miller and Askin pay the sum of $60 per 1,000 therefor. The latter are also given the right on default of the nursery people, to enter the premises and select and secure the trees to which they may be entitled.

After setting forth the contract, the cross-complainants allege that it was the agreement of the parties, and that they intended that the agreement should mean, and its legal consequences be, that if Miller and Askin should advance any sums of money for the payment of the interest accrued, or the principal of the note, or for the digging and delivery of the trees, they "should reimburse themselves for such payment by selecting from the nursery stock of the cross-complainants so many trees as should be equivalent to the amount of money so advanced by them, at the rate of 20 cents per tree for each and every tree selected by the cross-defendants (Miller and Askin), and that the cross-defendants should be entitled to reimbursement for moneys so advanced in the manner above stated, and in no other manner; * * * that the cross-defendants should reimburse themselves for all payments made to the First National Bank of Sanger on account of the promissory note, described in the agreement or advanced to the cross-complainants as therein provided, only by the selection of nursery stock then and there owned by the cross-complainants as recited in the agreement; that the only option, or choice, intended to be given to the cross-defendants by said agreement was the option to select the varieties or kinds of trees to be taken"; that the words "at their option," hereinbefore quoted in referring to the agreement as pleaded, should have been omitted therefrom. The answers to the cross-complaint do not deny the execution of the agreement relative to the guarantee, but deny the alleged mutual mistake.

The trial court reformed the contract in accordance with the prayer of the cross-complaint. It found that the note was executed and delivered to the bank, bearing the indorsement and guaranty of Miller and Askin, in conformity with the real agreement of the parties; further, that Miller and Askin paid the same after maturity, and thereupon became entitled to select trees from the cross-complainants' nursery stock, which trees defendants have always been ready to and have offered to deliver. This appeal is by the plaintiff and the cross-defendants, Miller and Askin, from the judgment entered in favor of the defendants in accordance with the findings.

[1, 2] Appellants claim, first, that the evidence does not show a mutual mistake. "In revising a written instrument, the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be." Civ. Code, § 3401. Evidence of the purpose of the agreement, and of the negotiations leading up to its execution, is admissible for the purpose of showing what the parties intended. Owsley v. Matson, 156 Cal. 401, 104 Pac. 983; Horton v. Winbigler, 175 Cal. 150, 165 Pac. 423. From the testimony quoted by the appellants in their opening brief, it appears that respondents J. L. Kirkman and J. A. Kirkman, W. M.

Barr, cashier of the First National Bank of Sanger, to whom the parties went to negotiate the loan, and who was first requested to draw the contract, and Monte Kirkman, son of one of the respondents, each testified that the contract intended by all the parties to be executed was the contract as found and reformed by the court. In opposition to their evidence, we find only the testimony of Mr. Miller, one of the cross-defendants. His more or less positive denial as to the intention of the parties raised merely a contradiction in the evidence, which was passed upon by the trial court.

It is true, as argued by appellant, that the evidence making out the mistake to the satisfaction of the court must be clear and convincing. "But where the evidence which tends to prove fraud or mistake, if standing alone, uncontradicted, is sufficiently clear and convincing, we cannot reverse the judgment on the ground that such evidence is contradicted by other evidence, because the right to pass upon the credibility of witnesses is not vested in this court. The only question which we have to decide in respect to the sufficiency of the evidence is whether that which tends to prove the alleged fraud or mistake, if standing alone without contradiction, would make out a prima facie case." De Jarnatt v. Cooper, 59 Cal. 703. "Where the very issue in the action is the mutuality of the mistake, the trial court is compelled to decide upon conflicting evidence; and if a mere denial of the defendant that he was mistaken is to suffice, it must result in every case that where such denial is made the plaintiff must fail of relief. Such, * * * however, is not the law." Home & Farm Co. v. Freitas, 153 Cal. 685, 96 Pac. 310.

It appears that at no time prior to the execution of the contract were all the parties thereto together. Appellant asserts therefore, that, since no contract was made before the date upon which the parties signed the written contract, there could have been no mistake, as claimed by defendants, and, furthermore, that the evidence of the mutuality of the mistake must relate to the time of the execution of the instrument. This contention has been decided adversely to appellant. Sullivan v. Moorhead, 99 Cal. 157, 33 Pac. 796.

[3] The trial court found that the plaintiff, Roush, acted as the agent of Miller and Askin for the purpose of paying the note. The circumstances, briefly, under which the bank was paid, were: In the fall of 1915, which was after the maturity of the note Miller, one of the guarantors and cross-defendants, asked plaintiff to "buy the note for him," telling plaintiff where the note was. Plaintiff stated he would do so, provided Miller "would guaranty I [plaintiff] would not lose anything on it." This Miller did, and plaintiff went to the First National Bank of Sanger, and gave his personal check for $3,300 to the bank, and recovered the note which was indorsed on the back, "Pay to the order of C. V. Roush without recourse on us. First National Bank of Sanger, by W. D. Mitchell, President." Plaintiff further testified that he bought the note at the request of Miller, and that the latter did not agree to repay, and had not repaid, the money he paid for it. The testimony of Roush to the effect that he bought the note "for" Miller and "at his request" is uncontradicted, and supports the court's finding as to plaintiff's agency.

The lower court found that the bank did not sell or deliver the note to plaintiff, and that the note has been fully paid by the cross-defendants Miller and Askin, by and through plaintiff, as their agent, and that such payment was made in conformity with the guaranty and contract hereinbefore set out. Appellant's contention in this regard is that, even under the agreement as reformed, Miller and Askin agreed to take their pay in trees, only, if they paid the note; that they were not payors or makers of the note, but were merely guarantors of performance by the respondents, who were the sole makers; that Miller and Askin were liable on their guaranty, and not on the note; that, even though plaintiff was agent for Miller, the latter had the right to buy the note and proceed against the respondents for collection. We do follow appellants so far. The contract was not between the bank and Miller and Askin, but between the latter and respondents. The question of liability to the bank was not involved in the agreement. The real subject-matter of the agreement was what should be done in the event Miller and Askin advanced any sums of money for or on behalf of respondents, for the payment of the account of interest which might accrue on the note, principal thereof, or the digging and delivery of the trees.

The court, having found that the money paid to the First National Bank of Sanger by plaintiff for the note was paid by him as the agent of Miller, one of the parties jointly liable on the guaranty, was correct in holding that the transaction amounted to a payment under, and in accordance with, the terms of the reformed contract.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

42 Cal. App. 19

PEMBERTON v. ARNY. (Civ. 2908.)

(District Court of Appeal, Second District, Division 2, California. June 28, 1919.)

1. Municipal Corporations 🔑661(2) — Charter — Plenary Control Over All Uses of its Streets.

A charter, giving a city "plenary control over all uses of its streets," authorizes a traffic ordinance regulating the manner in which vehicle drivers should turn street corners.

2. Municipal Corporations 🔑592(1)—Regulation of Use of Streets—Ordinances —Validity—Conflict with Statute.

A city ordinance requiring vehicle drivers to turn street corners as near the right-hand curb as possible is not invalid, because conflicting with the Motor Vehicle Act, requiring such vehicles to keep to the right of the center of intersecting highways, since the ordinance merely extends the statutory regulation.

3. Trial 🔑256(12) — Instructions — Language of Statute—Requests.

An instruction that an automobile driver, desiring to change his course, must first see that there is sufficient space, etc., in substantially the language of Motor Vehicle Act, § 20, subd. (j), *held* not error, in absence of a request to interpret the statutory language.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Amy Pemberton against Edward Arny. Judgment for plaintiff, and defendant appeals. Affirmed.

Phil M. Swaffield and Roland G. Swaffield, both of Long Beach, for appellant.

Charles W. Fourl and Ingle Carpenter, both of Los Angeles, for respondent.

SLOANE, J. In this appeal, which involves an automobile accident, we are satisfied that there can be no justification for setting aside the verdict and reversing the judgment on the ground of insufficiency of the evidence. The testimony was conflicting, but, if the jury believed the story as told by plaintiff and her witnesses, it was justified in finding both that defendant was guilty of negligence and that plaintiff was not guilty of contributory negligence, particularly if the traffic ordinance of the city of Long Beach and the instructions relating thereto were properly submitted to the jury's consideration. The only question requiring examination arises upon the admission and submission of the ordinance and instructions over defendant's objections.

The injury complained of occurred in the city of Long Beach, and was occasioned by the defendant, in the nighttime, driving his automobile to the right, around a corner, into an intersecting street, and running upon the plaintiff on the crosswalk of the street into which defendant turned, at a point near the center of the crossing. The court admitted in evidence that portion of the traffic ordinance of the city of Long Beach which provides as follows:

> "The driver of any vehicle, in turning to the right from one street to another, shall turn the corner as near the right-hand curb as possible."

In connection therewith the court gave the following instruction to the jury:

> "The court instructs the jury that the violation of a city ordinance of itself constitutes negligence, and if such violation proximately contributed to the injury complained of, it warrants a recovery for plaintiff, unless you further find plaintiff guilty of contributory negligence; and if in this case you find that the defendant did turn his automobile to the right from Third street into said Atlantic avenue in the city of Long Beach, and did not turn his automobile as near the right-hand curb as possible, and that said negligence proximately caused the injury complained of, then you must find for the plaintiff, unless you should further find that plaintiff was guilty of contributory negligence, in which event you will find for the defendant."

Appellant assigns as error the admission in evidence of this ordinance and the giving of the instruction predicated thereon.

[1, 2] It is contended that the ordinance in question had been superseded by the state law known as the Motor Vehicle Act (St. 1913, p. 647, § 20, subd. [g]), and which covers the act of driving to the right around a corner from one street to another, in the following language:

> "All vehicles approaching an intersection of a * * * highway, with the intention of turning thereat, shall in turning to the right keep to the right of the center of such intersection."

If appellant is correct in his contention that the city ordinance is in conflict with this provision of the state law, and that the state law controls, we think it clear that the admission of the evidence and giving of the instruction complained of would be prejudicial error. Under the state of the evidence the jury might well have reached the conclusion that the defendant had made the turn to the right of the center of the intersection, but that he had not made the turn as near the right-hand curb as he might have done.

The city of Long Beach is operating under a freeholders' charter, which gives it "plenary control over all uses of its streets." This language is broad enough to include the regulation of traffic thereon as to the manner of their use. We do not think there is anything in the context to limit the power to a determination of merely the kind or nature of the use, as appellant contends. The ordinance in question was one which the city had power to enact under its charter, and unless it is in conflict with the state law on the same subject, or superseded by it, was properly presented to the jury in this case. The question as to the right of a municipality under a freeholders' charter to regulate street traffic as a purely "municipal affair" has not yet been specifically decided by the Supreme Court. It is not, however, necessary in this case to determine whether the statute or the ordinance controls, in the event of conflict, for the reason that under the rule laid down in Ex parte Snowden, 12 Cal. App. 521, 107 Pac. 724, Ex parte Hoffman, 155 Cal. 114, 99 Pac. 517, 132 Am. St. Rep. 75, Mann v. Scott, 28 Cal. App. Dec. 171, and by the Supreme Court in an opinion just handed down, affirming the decision last cited (182 Pac. 281), there is no necessary conflict arising from the mere fact that the municipal ordinance has added further and more exacting conditions than are prescribed by the state law. In affirming the decision of this court in Mann v. Scott, supra, the Supreme Court says:

> "Where the Legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipality with subordinate power to act in the matter may make such new and additional regulations in aid and furtherance of the purpose of the general law as may seem fit and appropriate to the necessities of the particular locality, and which are not in themselves unreasonable. * * * In other words, we believe that by extending the operation of the act in terms to the traffic upon city streets, the Legislature did no more than to prescribe obviously necessary safeguards for travel upon such streets, viewed as part of the public highways of the state, in which all of the people of the state are essentially interested, and that it did not thereby intend to prohibit the enactment of such new and additional police regulations in furtherance of the purpose of the act as might appear reasonable and proper in a given locality."

The case of Mann v. Scott, supra, involved the provisions of the state law requiring that the driver of an automobile when passing a street car shall operate his automobile "with due care and caution so that the safety of passengers alighting from or boarding such car shall be protected, and for that purpose said vehicle shall be brought to a full stop if * * * necessary to attain the object." St. 1913, p. 648, § 20, subd. (k). The city ordinance there in question requires that the driver of an automobile must in all instances stop to enable passengers to safely alight from or board a street car, before passing the same. It does not attempt to minimize the protection which the state law prescribes, but simply extends and enlarges it. The conditions in the present case are the same in principle; the city ordinance requiring, not only the precaution prescribed by the state law, of turning to the right of the center of the street intersection, but, further, that the turn shall be made as near as possible to the curb line of the street. We fail to see the force of the distinction between the two cases which counsel for appellant attempts to point out. In both instances the city ordinance increases the limitation placed by the state upon the driver's freedom of discretion in handling his machine. At any rate, such a variance as appears in the two laws involved in this case is upheld under the affirming opinion of the Supreme Court as quoted. We think the cases cited are authority for holding that the statute and ordinance involved here are not in conflict.

[3] Appellant has also taken exception to the action of the trial court in giving an instruction substantially in the language of subdivision (j) of section 20 of the Motor Vehicle Act of 1913 (Stats. 1913, p. 648), instructing the jury that the statute law of the state requires the driver of an automobile before changing his course "to first see that there is sufficient space for such movement to be made in safety." The language marked as quoted is the part of the instruction complained of. Appellant urges that the instruction goes beyond prescribing the degree of diligence to be used in looking for or investigating conditions, and makes the party responsible for actually visualizing the situation as it exists, before attempting to make a turn in the street. The answer is that the instruction follows the language of the statute in this respect, and there was no error in giving the instruction in the words of the law itself. Wirthman v. Isenstein, 28 Cal. App. Dec. 465;[1] Mt. Olive & S. Coal Co. v. Rademacher, 190 Ill. 538, 60 N. E. 888. If the terms of the statute are ambiguous, and open to conflicting constructions, appellant might have asked the court to interpret it to the jury. But we do not understand that counsel base their objection on the ground of uncertainty as to the meaning of the words used. They insist that the meaning is all too apparent. We are not attempting to pass upon that point, but are satisfied that, in the absence of any request by appellant for an interpretation of the words as used in the legislative enactment, there was no error in incorporating the precise words of the statute in the instruction.

Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

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[1] Rehearing granted by Supreme Court.

41 Cal. App. 739

RANDOLPH et al. v. HUNT.
(Civ. 1938; Sac. 2773.)

(District Court of Appeal, Third District, California. June 25, 1919. On Rehearing in Supreme Court, in Bank, Aug. 21, 1919.)

1. Highways 🔑177—Automobiles—Speed—Statute.

Under St. 1915, pp. 406, 409, §§ 20, 22, automobiles must be driven on highways in a prudent manner, at a reasonable speed not exceeding 30 miles per hour.

2. Highways 🔑184(3)—Automobile Accident—Sufficiency of Evidence.

Evidence that defendant's automobile, while running at a high rate of speed on a highway, overtook and killed a pedestrian, etc., made the driver's negligence a jury question.

3. Highways 🔑184(2)—Automobile Accident—Burden of Proof.

Where a defendant's automobile overtook and killed a pedestrian on a highway, defendant has the burden of proving deceased was guilty of contributory negligence.

4. Appeal and Error 🔑999(3)—Negligence 🔑136(9)—Jury Question—Conclusiveness of Finding.

Where reasonable minds may draw different conclusions on the question of negligence, the issue is for the jury and its finding conclusive.

5. Highways 🔑184(3)—Automobile Accident—Jury Question.

Evidence regarding circumstances under which an automobile, traveling at high speed on a highway, ran down a pedestrian, *held* to make the pedestrian's contributory negligence a jury question, although he was on left-hand side of road.

6. Highways 🔑184(1)—Automobile Accident—Complaint.

A complaint that an automobile, owned and occupied by defendant, ran down a pedestrian on a highway, is not fatally defective, in absence of a special demurrer for uncertainty, for failure to allege that defendant was either driving the car, or retained control of its operation, especially where complaint was regarded as sufficient upon trial and such issue was raised by answer.

7. Master and Servant 🔑330(1)—Presumptions—Use of Automobile.

An automobile is presumably operated for the owner's benefit.

8. Master and Servant 🔑330(3)—Automobile Accident—Sufficiency of Evidence.

The presumption that an automobile was being operated for owner's benefit, although opposed by testimony that owner had loaned the car to the person who was driving it when a pedestrian on a highway was injured, *held* to warrant a jury finding in favor of presumption and against testimony.

9. Highways 🔑183—Automobile Accident—Duty of Owner.

An automobile owner who lends his machine to another, but becomes a passenger in it, must, if possible, prevent the driver from operating the machine in a reckless manner.

10. Appeal and Error 🔑1066—Harmless Error—Instructions.

An abstractly erroneous instruction may be harmless when applied to the particular facts.

11. Appeal and Error 🔑1066—Harmless Error—Instructions.

Instruction that defendant automobile owner was liable for the negligent running down of a pedestrian on a highway, if he had not parted with right to control machine's operation, does not constitute reversible error, because implying that the right, instead of exercise, of control was vital question, where there was no evidence that defendant attempted to exercise any control over driver.

12. Trial 🔑187(1)—Instruction—Credibility of Witness.

In an automobile accident case, an instruction that presumption the car was being used for owner's benefit is not destroyed by testimony that the car had been loaned to the driver unless such testimony is believed by the jury, etc., *held* not to erroneously assume the testimony mentioned was false.

13. Trial 🔑296(3)—Instructions—Construction with Other Instructions.

In an automobile accident case an instruction that defendant automobile owner's failure to control the machine's operation, if he had a right to do so, did not relieve him from liability, *held* not erroneous, in view of other instructions and evidence that defendant did not exercise control although he had the opportunity of doing so.

14. Negligence 🔑72—Contributory Negligence—Acts in Emergency.

An instruction that if deceased, who was struck by an automobile, was suddenly put in peril by defendant's fault, he might be excused for omitting some precautions or making an unwise choice, and running directly into danger while bewildered, *held* correct.

15. Trial 🔑295(6)—Instructions—Construing Charge as a Whole.

In an automobile accident case an instruction that plaintiff could not recover unless the automobile driver had been employed by defendant automobile owner, *held* not reversible error, when charge was considered as a whole, because conflicting with other instructions allowing recovery if defendant did not attempt to restrain the reckless driving.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by Carrie Belle Randolph and others, by Carrie Belle Randolph, their guardian ad litem, against Alvis G. Hunt. Judgment for plaintiffs, and defendant appeals. Affirmed.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

John S. Partridge, of San Francisco, and Elmer W. Armfield and Arthur B. Eddy, both of Woodland, for appellant.

Arthur C. Huston and Harry L. Huston, both of Woodland, for respondents.

BURNETT, J. There is substantial evidence justifying the following statement of the facts as made in the brief of respondents: The deceased, Samuel T. Randolph accompanied by his son, Ansel Randolph, was driving a cow south on the state highway leading from Woodland to Davis, in Yolo county. The country is level and the view unobstructed. The two Randolphs were in a buggy, and, because of the difficulty in thus driving the cow, the deceased left the vehicle and proceeded down the highway on foot, the son following immediately behind in the buggy. After going a short distance, an automobile horn was sounded, and a machine came along and passed them without accident, the buggy being on the right-hand side of the road looking south, the cow on the right-hand side of the paved portion of the highway, and the deceased, Randolph, on the extreme east side of the road. This car did not belong to the defendant. After it passed, the elder Randolph started from the east side of the road toward the cow on the other side to continue driving her south. As he reached the left-hand portion of the paved highway, an automobile owned by the defendant, traveling at a high rate of speed, estimated to be not less than 40 miles per hour, passed the buggy in which young Randolph was sitting, and which was following along behind the cow and the elder Randolph. As it passed the buggy, an occupant of the automobile sounded an alarm by calling to Mr. Randolph, who was standing on the road facing south. Mr. Randolph, hearing the machine, possibly became confused; in any event, he jumped from the paved portion of the road easterly, supposing probably, that the automobile would pass down the pavement and between him and the cow. Almost simultaneously the automobile struck the deceased, throwing his body 34 feet from the point of contact with the machine. The automobile turned to the left with both brakes locked and continued between the paved portion and the highway for a distance of 10 posts, or about 80 feet. After passing 10 posts it collided with the fence bordering the highway, cutting 4 posts squarely in two and almost cutting the fifth one. It then traveled a distance of 35 posts, or about 250 feet, before it stopped, thus clearly indicating its great rate of speed at the time of the accident. Mr. Randolph lived about two weeks, dying on the 20th of April, and he left a surviving widow and 10 children, who are all respondents herein.

The foregoing facts reveal a case of negligence on the part of the driver of the automobile, which may be said to be the proximate cause of the death of Mr. Randolph.

[1, 2] The duty of a driver of an automobile in relation to the rights of others traveling upon the highway is set forth in sections 20 and 22 of the statutes of 1915, p. 397, and it is sufficient to say that they require that he shall drive the car in a careful and prudent manner, and at a rate of speed not greater than is reasonable and proper, and under no circumstances to exceed 30 miles per hour. In a case somewhat similar to this, the Supreme Court in Raymond v. Hill, 168 Cal. 475, 143 Pac. 748, construing the rule of reasonable precaution which the law enjoins, declared that it includes "the necessity of making certain that foot passengers are aware of the rearward approach of the vehicle, that the vehicle itself is at such a distance from the pedestrian as to avoid running over him in his sudden panic from surprise at knowledge of its unexpected approach, and, finally, that the vehicle is under such control as that it may be stopped promptly." The testimony of the witnesses for plaintiffs shows that none of these conditions was observed by the driver, and hence that he violated a duty he owed to the deceased and was chargeable with actionable negligence.

[3-5] Nor can it be maintained that the only rational inference is that deceased was guilty of contributory negligence. The burden, of course, was upon defendant to establish this defense. Where reasonable minds might draw different conclusions upon the question of negligence, the question is for the jury and its finding is conclusive. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 Pac. 513. The argument of appellant is based largely upon the assumption that the testimony of his witnesses is true and should have been accepted by the jury. His witnesses do indeed make a strong showing in favor of the contention that the only negligence in the case was that of the deceased, but a very different aspect is presented by the evidence of the plaintiffs, and we think it cannot be doubted that there is ground upon both of these questions for a rational inference adverse to appellant.

It may be added that the claim of contributory negligence by reason of the fact that deceased was on the east side of the highway is, in our judgment, without merit. It is, of course, true that a pedestrian has the right to use all parts of a road or street, being chargeable with the exercise of a reasonable degree of care, to be determined under all the circumstances of the case. In the Raymond Case it is said:

> "It was legally permissible for the defendant to use the easterly or left-hand side of the highway as he undertook to use it, and no negligence could be predicated merely upon such use, it appearing that the roadway was of ample

width to permit that use with safety to pedestrians and a clear passage to approaching vehicles."

See, also, Stohlman v. Martin, 28 Cal. App. 338, 152 Pac. 319. Herein there was a reasonable excuse for the presence of deceased on the east side; it is a fair inference that the traveled portion of the road was clear; that there was ample room for the appellant to pass without endangering or injuring anyone; that the driver did not sound the horn or give any warning of his approach until he passed the buggy; that deceased was not aware of his approach until the machine was virtually upon him; and that, under the stress of sudden peril, he was excusable for jumping as he did to escape the danger. Blackwell v. Renwick, 21 Cal. App. 131, 131 Pac. 94.

The case seems to have been tried with care, the fullest opportunity was given to both parties to support and vindicate their contentions, and no complaint is made of any ruling of the court as to the admissibility of evidence. Appellant does, however, assail the action of the court in overruling the demurrer to the complaint and in giving certain instructions to the jury. And these considerations will receive our attention.

[6] The complaint alleged:

"That on or about the 7th day of April, 1916, while the said Samuel T. Randolph was driving a cow on the public highway in the said county of Yolo, assisted by his son, Ansel Randolph, a plaintiff herein, who was at said time in a buggy drawn by a horse, an automobile owned and occupied by the defendant herein was, at said time, so carelessly and negligently driven on said public highway that it collided with the said Samuel T. Randolph, inflicting injuries which resulted in his death on the 20th day of April, 1916; that said automobile so owned and occupied by the said defendant was not driven in a careful manner, with due regard for the safety and convenience of pedestrians and of all other vehicles or traffic upon said highway; that the same was not at said time operated or driven in a careful or prudent manner and at a rate of speed that was reasonable and proper, having regard to the traffic and use of the said highway; that at said time said automobile was operated and driven at such a rate of speed as to endanger the life and limb of the said Randolph; that by reason of the said negligence and carelessness of the said defendant in so operating and driving the said automobile the same collided with the said Randolph as aforesaid, inflicting injuries causing his death; that the death of the said Randolph was due to the negligence and carelessness of said defendant herein, as aforesaid."

There was no special demurrer to the complaint, but the contention of appellant is that a cause of action was not stated for the reason that the complaint does not allege that the automobile was operated by the defendant. The gravamen of the charge consists, manifestly, in the speed and recklessness with which the machine was run. A material fact, therefore, was the responsibility of appellant for this want of care in the operation of the machine. Appellant, to be liable for the consequences of this misconduct, must have been driving either personally, or through his agent, or must have had the right to direct and control the movements of the machine. Hence it is claimed that there should have been an express averment to that effect, and that it was not sufficient to aver that appellant was the owner and occupant of the automobile. But the most that can be said is that there is a defective allegation of appellant's connection with the driving of the car. It does appear indirectly, rather by way of recital, it is true, that defendant operated and drove the car. This was sufficient in the absence of a demurrer for uncertainty. Moreover, the issue was directly tendered by the answer in the following averment: "But in that behalf this defendant alleges that the said automobile was not in the possession or control of this defendant but was at said time in the possession and control of one Evans Triggs." It may be added that no objection was offered to the introduction of evidence, and the complaint was treated at the trial as though it were sufficient. It is quite apparent, therefore, that appellant suffered no prejudice by reason of said defect, if we admit that it existed. The question is thoroughly considered in Slaughter, Adm'r, etc., v. Goldberg, Bowen & Co., 26 Cal. App. 318, 147 Pac. 90, and Boyle v. Coast Imp. Co., 27 Cal. App. 714, 151 Pac. 25, and each is decisive of the controversy here.

[7, 8] One of the important points in the case is whether there was in fact sufficient evidence to hold appellant responsible for the acts of the colored man, Triggs, in driving the car. We have already called attention to the averment of the answer in that respect, and we may state that the driver, appellant, and his son all testified substantially that Triggs borrowed the car to go to Sacramento in quest of employment, and that he invited appellant to go along to recommend him at a certain garage in said city. But, notwithstanding this testimony, respondents contend that there are two theories, upon either of which the verdict of the jury may be justified. The first is that the jury was warranted in rejecting the story as untrue, and holding that there was no such arrangement between Hunt and Triggs whereby the car was loaned to the latter. The second is that, if said car was borrowed, appellant did not part with control of it, and that it was his duty, as owner and occupant, to see that it was operated in a careful and prudent manner, and that he is responsible for the consequences of his violation of this duty.

As to the first of these contentions, it cannot be said here that the jury was bound to accept the statement of said witnesses as true. Being the exclusive judges of the weight of the evidence and the credibility of the witnesses, if the testimony did not carry conviction to their minds they had the legal right to reject it. We must assume that they did not believe the story, and we cannot say, in the absence of any showing to the contrary, that the jury acted arbitrarily, or otherwise than in good faith and with an honest purpose. We would not be justified by the record in branding the statement of these witnesses as false, although there are certain circumstances that tend somewhat to discredit it, but we are not in a position to interfere with the jury's discretion in that particular.

But it is said by appellant that there was no evidence to the contrary, and therefore it was the duty of the jury to find upon this issue in his favor. It is not disputed that from the ownership of the automobile the presumption arises that it was being used for appellant's purposes. West v. Kern, 88 Or. 247, 171 Pac. 413, 1050, L. R. A. 1918D, 920; McWhirter v. Fuller, 35 Cal. App. 288, 170 Pac. 417. But it is claimed that this presumption was no longer of any effect, after the introduction of testimony by witnesses to the contrary, and that the jury could not legally be influenced by it in finding a verdict. It amounts to the contention that said presumption would be sufficient to support the verdict if there were no evidence to the contrary, but it is insufficient in the presence of adverse evidence. We cannot understand how a presumption can be thus changed in its character as evidence. If it is legally sufficient to support a verdict, it must be legally sufficient to create a conflict in the evidence. We may add that appellant's view is opposed to the law as provided in subdivision 2 of section 2061 of the Code of Civil Procedure, and as interpreted by the Supreme and Appellate Courts of this state.

In commenting upon a certain statement made by the Supreme Court in the case of Adams v. Hopkins, 144 Cal. 36, 77 Pac. 712, this court, in Keating v. Morrissey, 6 Cal. App. 171, 91 Pac. 680, said:

> "The rule as thus stated is undoubtedly sound and applicable to all disputable presumptions of fact. In truth, their very characterization * * * as 'disputable presumptions' carries with it necessarily the right to controvert them by other evidence, and the complete exhaustion of their force when evidence has been introduced sufficient to destroy the verity of the facts for which, until then, the law, for reasons of expediency, makes them responsible vouchers. The presumption of a consideration is, indeed, enough to support the note, in the absence of evidence to the contrary. But in whom is vested, under our system, the exclusive province of determining when there is evidence to the contrary? There must be, as counsel will concede, a determination by somebody that there is in fact 'evidence to the contrary.' The fact that the record here seems to show 'evidence to the contrary' is not enough, so far as our power over the verdict and findings is concerned. It must have been 'evidence to the contrary' to which the proper tribunal has given such weight as to enable it to say that such 'evidence to the contrary' has overcome and dispelled the presumption."

It may be added that the Supreme Court declined to order the case up.

The same principle is declared in Ruth v. Krone, 10 Cal. App. 770, 103 Pac. 960; Reclamation District No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277; Estes v. Ballard, 22 Cal. App. 344, 134 Pac. 361; Pac. Portland Cement Co. v. Reinecke, 30 Cal. App. 501, 158 Pac. 1041; Phillips v. Huffaker, 35 Cal. App. 531, 170 Pac. 431; People v. Milner, 122 Cal. 171, 54 Pac. 833; Osgood v. Los Angeles, etc. Co., 137 Cal. 280, 70 Pac. 169, 92 Am. St. Rep. 171; Sarraille v. Calmon, 142 Cal. 651, 76 Pac. 497; Collins v. Maude, 144 Cal. 289, 77 Pac. 945; Cody v. Market St. Railway Co., 148 Cal. 90, 82 Pac. 666; Bellus v. Peters, 165 Cal. 112, 130 Pac. 1186; Lenninger v. Lenninger, 167 Cal. 297, 139 Pac. 679; Hitchcock v. Rooney, 171 Cal. 285, 152 Pac. 913; Pabst v. Shearer, 172 Cal. 239, 156 Pac. 466.

Apt quotations might be made from all the foregoing decisions to the effect that a presumption is evidence; that it will produce a conflict with other evidence introduced to rebut it, and that it is for the trial court or jury to determine whether or not such evidence is sufficient to overcome the presumption.

We have been at pains to restate the doctrine and to cite the large number of decisions, because it is so earnestly contended by appellant that the rule is otherwise. In support of his contention he cites quite a number of cases, three of which we may briefly notice.

In Potts v. Pardee, 220 N. Y. 431, 116 N. E. 78, the court of appeals declare:

> "The automobile was owned by the defendant, and this fact was prima facie evidence of her responsibility for the manner in which it was driven. Ferris v. Sterling, 214 N. Y. 249 [108 N. E. 406, Ann. Cas. 1916D, 1161]; Kellogg v. Church Charity Foundation of L. I., 203 N. Y. 191 [96 N. E. 406, 38 L. R. A. (N. S.) 481, Ann. Cas. 1913A, 883]. The presumption growing out of a prima facie case, however, remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and unless met by further proof there is nothing to justify a finding based solely upon it."

It is to be observed, though, in that case that the evidence in opposition to the presumption was offered by the plaintiff himself, and, of course, he could hardly rely upon the presumption when he had vouched for the credibility of a witness who virtually testified that there was no place for the operation of such presumption.

We find a similar situation in the case of Brown v. Chevrolet Motor Co. of California, 179 Pac. 697; the court citing as authority the Potts Case, supra, and another New York decision, Matter of Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507, Ann. Cas. 1918B, 540.

The more recent case is Maupin v. Solomon, 183 Pac. 198. Therein it seems to have been conceded by respondent, however, that the evidence against the presumption was "clear and convincing," and therefore it was just that he should not be allowed to urge the presumption. In support of the court's conclusion, quotation is made from Savings & Loan v. Burnett, 106 Cal. 514, 39 Pac. 922, as follows:

> "Presumptions * * * are allowed to stand not against the facts they represent, but in lieu of proof of them. The fact being proven contrary to the presumption, no conflict arises; the presumption is simply overcome and dispelled."

But the limitation of this principle is correctly prescribed by the Supreme Court in the later decision of People v. Milner, supra, in an opinion written by the same justice. Therein it is said:

> "By section 2061, subd. 2, of the Code of Civil Procedure, jurors are to be instructed 'that they are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds.' In this is a distinct recognition of the facts: (1) That a presumption is evidence; and (2) that it is evidence which may outweigh the positive testimony of witnesses against it. It has been said that disputable presumptions are allowed to stand, not against the facts they represent, but in lieu of the proof of the facts, and that when the fact is proven contrary to the presumption no conflict arises, but the presumption is simply overcome and dispelled. Savings & Loan Soc. v. Burnett, 106 Cal. 514 [39 Pac. 922]. This is true. Against a proved fact, or a fact admitted, a disputable presumption, has no weight; but, where it is undertaken to prove the fact against the presumption, it still remains with the jury to say whether or not the fact has been proven; and, if not satisfied with the proof offered in its support, they are at liberty to accept the evidence of the presumption. In the Burnett Case, supra, both parties testified to a state of facts contrary to the presumption. It was like an admission; it relieved the question from conflict."

Such must be the rule if we are to give effect to the fundamental doctrine that clothes the jury with the authority to pass upon questions of fact. A case might arise, of course, where an appellate court would be justified in setting aside a verdict upon the ground that a jury had accorded too much weight to a mere presumption, but, ordinarily, such error can only be corrected by the trial judge on motion for a new trial.

[9] Again, if the owner of an automobile lends his machine to another, and on invitation becomes a passenger therein, in the absence of any agreement to the contrary the owner has the right, and, indeed, it is his duty to prevent, if possible, the driver from operating the machine in a reckless and dangerous manner and in violation of law. He cannot sit idly by and refrain from remonstrance at least while knowing that the driver in thus endangering the lives of others. If he has the opportunity to restrain the driver, and fails to take advantage of it, he should be held responsible for the consequences. This is the just view, and it is supported by the authorities. The general rule is stated in 28 Cyc. 38, as follows:

> "Where an injury is inflicted by the use or operation of a motor vehicle upon the public highway the owner thereof is liable to respond in damages therefor if the vehicle was being operated by such owner or was under his control. * * * In all cases where the owner is present he will be responsible for injuries sustained by third persons unless the operator disobeys instructions as the owner is in law in control of the vehicle."

We have an illustration of the principle in Crittenden v. Murphy, 173 Pac. 595, wherein it is said:

> "The owner owes the duty to the traveling public to see to it that his car, when driven on the streets with his permission and for the purposes for which the car was purchased, should be driven carefully and with due consideration to their rights; and the owner should not in good conscience be allowed to disclaim his responsibility on the ground that the use thus contemplated and authorized by him is permissive only."

Viewing the case in the light of the admitted facts, we must conclude that it was apparent to Triggs and to appellant that the situation was dangerous to the elder Randolph. They saw a man driving a cow followed by a buggy. At a considerable distance they were aware of the peculiar condition. They had abundant opportunity to observe the presence of the Randolphs and to bring the car under control and to pass them without injury to any one. Under the circumstances, both the driver and the owner were properly chargeable with responsibility for driving at a great rate of speed and without proper control of the motor into this perilous situation. It is not unreasonable to infer that, if appellant had given proper direction to the driver, the accident would have been averted; and it is not unjust to hold the owner to this measure of responsibility.

We think the foregoing may be summed

up in these propositions: (1) The question of the alleged agreement with Triggs was submitted to the jury; it was resolved against appellant on conflicting evidence, and this finding cannot be reviewed by this court; (2) assuming the existence of the arrangement as claimed by appellant, there was nothing therein whereby appellant surrendered the right to control the car while he was a passenger therein; (3) the law imposed upon him the duty not to allow the driver to operate the machine in violation of the statute; and (4) under the circumstances it was his duty to direct and insist that the driver operate the machine with ordinary care and due regard to the safety of pedestrians.

Appellant attacks certain instructions given by the court, but we think the law was correctly given in the careful and comprehensive charge to the jury.

[10, 11] One of these is as follows:

> "You are instructed that the defendant, Hunt, as the owner and occupant of this automobile, had the right to control the same, in the absence of some agreement or arrangement, express or implied, whereby he parted with such right of control at the time of the accident. Whether or not such an agreement or arrangement was made is a question of fact for the jury to determine. If you find from the evidence that the defendant, Hunt, had not parted with such right of control, and that the deceased was killed as the result of the negligent operation of the car, as alleged in the complaint, your verdict must be for the plaintiffs."

The principal criticism of the instruction is that it implies that the right of control, rather than the exercise of control, was the vital question. The instruction could not have been misleading, however, under the evidence. There was no showing that appellant did exercise, or attempt to exercise, any control over the driver. Hence his responsibility for the accident depended upon the question, after all, whether he had such right, or it was his duty to control or endeavor to control, the operation of the machine. Of course, an instruction is sometimes abstractly erroneous and yet perfectly harmless when applied to the facts of the particular case.

[12] We can see no valid objection to the following instruction:

> "You are instructed that it is admitted by the pleadings that the defendant, Hunt, was the owner and one of the occupants of the automobile at the time of the collision. This is prima facie proof that the driver was engaged in the owner's service, and a presumption arises that the car was in use for the owner's benefit. Testimony that the automobile was loaned to Triggs does not, as a matter of law, destroy the presumption unless it is believed by you. The truth or falsity of this testimony is for you to determine. The jurors are the exclusive judges of the credibility of the witnesses and the weight of the testimony. Therefore, if you do not believe that the said automobile was loaned to said Triggs, or in his possession, as claimed by the defense, then I instruct you that, if you find that the death of Randolph was the result of the negligent operation of the car, your verdict must be for the plaintiffs, unless you further believe that the deceased was guilty of contributory negligence."

This instruction assuredly does not assume that the testimony as to the car being loaned to Triggs was untrue, but, according to the requirement of the law, it directed the jury to determine whether it was true or false. It must be so that a presumption is not destroyed by other evidence not believed by the jury, or else the presumption is not evidence at all.

[13] Another instruction to the effect that appellant is not relieved from responsibility because he failed to exercise control of the machine, if he had such right, is criticised by appellant. But taken in connection with the other instructions, and in view of the evidence, it cannot be considered erroneous. There is no ground for the contention that appellant did exercise control or that he did not have the opportunity of so doing. Indeed, appellant relied entirely upon the positions that the driver was not negligent, but that, if he was, he was in complete control of the machine, and appellant was not, therefore, liable, and, furthermore, that deceased was guilty of contributory negligence. Upon this particular issue therefore, the only real question was whether appellant had the right to control the operation of the machine.

[14] The following was given:

> "You are instructed that, if the deceased was suddenly put in peril without having sufficient time to consider all the circumstances, he is excusable for omitting some precaution or making an unwise choice under this disturbing influence, although if his mind had been clear he ought to have done otherwise. This is especially true if the peril is caused by the defendant's fault. In such case, even if in bewilderment he runs directly into the very danger which he fears, he is not at fault."

As an abstract proposition this is vindicated by the authorities. Braly v. Fresno City Ry. Co., 9 Cal. App. 417, 99 Pac. 400; Blackwell v. Renwick, supra; Schneider v. Market Street Ry. Co., 134 Cal. 482, 66 Pac. 734; Raymond v. Hill, supra.

There was evidence making the instruction pertinent, and, being in the hypothetical form, it does not invite criticism.

[15] Complaint is made that some of the instructions are irreconcilably conflicting. But we are satisfied that, when the whole charge is considered, there is no just reason for concluding that the jury was misled.

This instruction was given:

"You are further instructed that the burden is upon plaintiffs to establish by a preponderance of the evidence that Triggs was a servant or employé of Mr. Hunt, and acting within the scope of his employment—that is, doing the business for which he was employed—before Mr. Hunt can be liable. If the plaintiffs have failed to establish to your satisfaction, as reasonable men, that Triggs was an employé of Mr. Hunt, and acting on Mr. Hunt's business at the time of the accident, then your verdict must be for defendant."

It might be contended with some plausibility that this instruction eliminated from the case the question of control by appellant by virtue of being the owner and occupant of the machine. Taken alone, the instruction virtually told the jury that plaintiffs could not recover in any event unless they established the fact that Triggs was acting as the servant of appellant. As we have seen, there was the other theory also available to respondents. But appellant has not complained of this instruction, as, indeed, he could not, since it is more favorable to him than he was entitled to. However, the instruction was understood, no doubt, as referring simply to the question of responsibility of appellant by reason of the agency of Triggs.

When so many instructions are given upon various phases of negligence, and addressed to all possible theories that can find support in the evidence, it is almost unavoidable that some uncertainty and some minor inconsistencies will appear. But we think there is no sufficient showing here to justify a reversal of the judgment. Indeed, we might assume that all the instructions were given at the request of appellant, since nothing appears to the contrary. It is, at least, quite manifest that the larger part of them was given at his instance.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

On Rehearing in Supreme Court.

PER CURIAM. In denying a rehearing in this case we deem it proper to say that we limit our approval of the opinion of the District Court of Appeal, on the question of the liability of the owner, to the first of the reasons assigned therein as cause for affirmance of the judgment; that is to say, the reason summarized therein as follows: "(1) The question of the alleged agreement with Triggs was submitted to the jury; it was resolved against appellant on conflicting evidence, and this finding cannot be reviewed by this court."

As to the soundness of the other reasons set forth by the district court for the existence of such liability we express no opinion.

The petition for rehearing is denied.

ANGELLOTTI, C. J., and SHAW, WILBUR, MELVIN, LENNON, and OLNEY, JJ., concur.

42 Cal. App. 50

BARROW v. BARROW. (Civ. 2903.)

(District Court of Appeal, Second District, Division 2, California. July 2, 1919.)

1. DIVORCE ⚷130—EVIDENCE—SUFFICIENCY.

Conflicting evidence *held* to sustain the trial court's action in denying a divorce upon grounds of extreme cruelty, although ten witnesses testified for plaintiff against three for defendant, in view of Code Civ. Proc. § 2061, providing that the greater number of witnesses is not conclusive, etc.

2. DIVORCE ⚷239—FINDINGS—ISSUES.

In action for divorce and for division of alleged community property, where defendant denied the allegations as to community property, alleging the property to be his own separate property, a finding by the court that the property was defendant's separate property did not convert the cause of action for divorce to one to quiet title, but was a finding upon an issue invited by plaintiff by proper allegation in her complaint, which allegation was denied by the answer.

3. DIVORCE ⚷250—FINDINGS—MONEY LOANED BY WIFE TO HUSBAND.

In divorce suit, where divorce was denied plaintiff wife, findings were not erroneous in failing to refer to money loaned by plaintiff to defendant, since, if anything was due her and she had not slept on her rights, she had an adequate remedy for recovery thereof in an action at law.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Divorce action by Alice J. Barrow against James T. Barrow. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Appeal from order denying new trial dismissed, and judgment affirmed.

William Lewis, of Los Angeles, for appellant.

T. K. Kase, of Los Angeles, for respondent.

THOMAS, J. This is an action for divorce, for attorney's fees, for division of alleged community property, and for general relief, brought by plaintiff against defendant on the ground of extreme cruelty. The material allegations of the complaint were denied by defendant's answer. While admitting the formal parts of the complaint in his answer,

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

he denied, as aforesaid, all the material allegations contained therein as to community property—alleging this as his own separate property—and as to the alleged extreme cruelty. He also admitted that he had received from plaintiff money which was used by him in the improvement of his own property. Upon the issues thus presented, the court denied plaintiff's application for divorce, etc., refused to divide the said real property, and found that it was the separate property of defendant, subject to existing mortgages. There was a motion for new trial, which was denied by the court. From the judgment and order denying her motion for new trial, plaintiff appeals.

Appellant urges, in support of her contention that the judgment herein should be reversed, the consideration by this court of the following points, viz.:

> (1) "Whether or not plaintiff proved the material allegations of her complaint, and, if so proven, was there shown by the evidence any just cause for the refusal to the plaintiff by the lower court of a decree of divorce as prayed?"
>
> (2) "In the absence of a decree of divorce to either party, had the lower court jurisdiction, in a divorce action, to pass upon property rights of the parties thereto, i. e., to convert an action for divorce into an action to quiet title; and, if so, did the lower court err in not taking into consideration the money advanced by plaintiff to defendant for the erection of improvements upon the separate real estate of defendant, admitted by the pleadings and evidence, and also in not taking into consideration money borrowed during coverture for the purpose of erecting improvements upon other real estate of the defendant?"
>
> (3) "Did the lower court err in denying plaintiff's motion for a new trial?"

[1] The answer to the first point is that, while it is shown from the record here that ten witnesses testified for plaintiff and but three for defendant, and that there was a conflict in the evidence, the trial court having settled that conflict in favor of the defendant, this court will not interfere. The courts "are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds." Section 2061, Code Civ. Proc.

[2, 3] The second proposition advanced is based upon a state of facts not borne out by the record here. There was no conversion of a cause of action for divorce to one to quiet title. All that the court did here was to find upon an issue invited by plaintiff herself, by proper allegation in her complaint, and which allegation was denied by the answer; said denial being not only supported by the evidence of the defendant, but likewise by the evidence of plaintiff herself. Allen v. Allen, 159 Cal. 197, 113 Pac. 160; Johnston v. Johnston, 17 Cal. App. 241, 119 Pac. 403. There was no error in not referring in the findings to money loaned to defendant by plaintiff. If there is anything due her from defendant, and she has not slept upon her rights, she has an adequate remedy for the recovery of the same in an action at law.

The evidence amply supports the findings of the court. For these reasons, then, it inevitably follows that there was no error in denying plaintiff's motion for a new trial.

The appeal from the order denying plaintiff's motion for a new trial is dismissed, and the judgment affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

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42 Cal. App. 48

BARROW v. BARROW. (Civ. 2962.)

(District Court of Appeal, Second District, Division 2, California. July 2, 1919.)

DIVORCE 🔑169—JURISDICTION—HOMESTEAD RIGHTS OF WIFE.

A court, which had denied a wife's application for divorce, is without jurisdiction to restrain her from entering her husband's separate property, which she had selected for homestead purposes, pursuant to Civ. Code, §§ 1238, 1262, et seq.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Divorce action by Alice J. Barrow against James T. Barrow. From an order excluding plaintiff from defendant's dwelling house, she appeals. Order reversed.

William Lewis, of Los Angeles, for appellant.

Thomas K. Kase, of Los Angeles, for respondent.

THOMAS, J. This is an appeal from an order made by the lower court after a judgment, made and entered herein April 1, 1916, had been so made and entered, excluding the wife—appellant here—against whom the court entered such judgment, from the dwelling house of the husband, respondent here, which was decreed by the court in that action to be the separate property of this respondent. The order appealed from is as follows:

> "Whereas, on the 1st day of April, 1916, the above-entitled court made and filed its findings of fact and conclusions of law herein, and gave and caused to be entered its judgment in the above-entitled action in favor of the defendant above named; and

"Whereas, said court then found, determined, and decreed to be the sole and separate property of James T. Barrow the real property hereinafter described:

"Now, therefore, motion having been duly made this day, after notice thereof was given as required by law, and good cause appearing therefor, it is ordered that Alice J. Barrow, plaintiff above named, forthwith vacate and abandon her occupation, use, and possession of the real property hereinafter described, and that she forthwith deliver the possession thereof to said defendant; and the said plaintiff, Alice J. Barrow, her attorneys, agents, representatives, and all others acting in aid or assistance of her, are hereby enjoined, restrained, and prohibited from further occupation, use, or possession of said real property and the improvements thereon, and all or any part thereof.

"The real property hereinbefore referred to consists of lots 278 and 279 of the Central Avenue Home Tract No. 2, in the city of Los Angeles, state of California, as per map recorded in Book 4, page 75, of Maps in the office of the county recorder of the county of Los Angeles, and the improvements thereon are known and numbered 1230 E. 57th St. and 1234-1236 E. 57th St., in said city of Los Angeles, state aforesaid.

"Further ordered that said plaintiff leave all furniture, bedding, and personal property of defendant in said house, and refrain from injuring or destroying any part thereof.

"Dated this 15th day of May, 1916.

"Fred H. Taft, Judge."

From the said judgment so entered an appeal was taken, which appeal has this day been decided contrary to the contentions of appellant there, who is likewise appellant here. See Barrow v. Barrow (L. A. No. 2903) 183 Pac. 364. The decision in that case, we think, disposes of the present appeal.

The plaintiff, appellant here, contends that the lower court erred in making the order apealed from, and for reversal thereof urges:

(1) "That the lower court, by its final judgment and decree denying a divorce and the entry thereof, lost jurisdiction of the action, and had no authority to make the order from which this appeal is taken."

(2) "That the order in question was made by the lower court without authority to make the same, by reason of the express prohibition of the statute providing that neither husband nor the wife can be excluded from the dwelling of the other."

(3) "That the premises in question having been selected by the wife as a homestead, in the absence of a decree of divorce the lower court had no authority in a divorce action to interfere with the homestead or the possession thereof."

We think there is merit in these contentions. The judgment to enforce which it is claimed by respondent that this order was issued was a final judgment, which left the parties, so far as the court was concerned, in the same condition as when the action was commenced, namely, husband and wife. The marriage was not dissolved. True, the court found that the property described by plaintiff in her complaint was the separate property of the defendant. In such a case, however, the rights of the parties continue undisturbed. One of these rights is the right to file a declaration of homestead (Civ. Code, § 1262 et seq.); and the homestead may be so selected from the separate property of the husband (Civ. Code, § 1238). It follows, we think, that plaintiff having exercised her homestead right in the property involved, and the court having by said final judgment denied the divorce, the making of the order here in question was error; the court having lost its jurisdiction to make the same.

The issue presented by the pleadings in the divorce action on which the court found that the property involved was defendant's separate property, was not essential or necessary therein; but the finding, under the circumstances, was a proper one. This fact, however, in connection with an action for divorce, gave the court no more authority to issue the said order than it would have had, were the judgment entered in an independent action between husband and wife to quiet title.

The order appealed from is reversed.

We concur: FINLAYSON, P. J.; SLOANE, J.

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42 Cal. App. 131

FERNANDEZ v. ABURREA. (Civ. 2852.)

(District Court of Appeal, First District, Division 1, California. July 9, 1919. Rehearing Denied by Supreme Court Sept. 4, 1919.)

1. Bastards 🔑37 — Supporting Child — Limitations.

Father's obligation to support his illegitimate child is a continuing duty, against which statute of limitations does not run while child needs its father's support.

2. Parent and Child 🔑3(1)—Supporting Child—Release.

A minor's right to support and maintenance by its father may not be limited or contracted away by the parents.

3. Bastards 🔑17 — Constitutional Law 🔑145 — Obligation of Contract — Enforcing Support of Bastard.

A judgment requiring a father to support his illegitimate child, pursuant to Civ. Code, § 196a, does not impair contract obligations, in violation of Const. art. 1, § 16, because father had previously given mother a lump sum for an instrument releasing him from further obligations.

4. Bastards 🔑17½ New, vol. 12 Key-No. Series—Action to Enforce Support—Parties.

Under the direct provisions of Civ. Code, § 196a, a mother may sue in her own name on behalf of her illegitimate child, to require the child's father to contribute to its support.

5. Parties 🔑76(1) — Plaintiff — Waiving Objections.

The objection that an action is not brought by the proper party plaintiff is waived by failure to raise the point by demurrer or answer.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Mary Ardanaz Fernandez against Martin Aburrea. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. L. Brown, of San Francisco, for appellant.

Frank A. Duryea, of San Francisco, for respondent.

KERRIGAN, J. This is an action brought by the plaintiff, under the provisions of section 196a of the Civil Code, against the defendant, the putative father, for the support of her minor illegitimate child. The trial resulted in a judgment in favor of the plaintiff for the sum of $115, for the support of the child from the date of the filing of the action until the entry of judgment, and for the further sum of $15 per month thereafter until the further order of the court. The defendant appeals.

The section of the Civil Code in question reads as follows:

> "The father, as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor illegitimate child, by his mother or guardian, and in such action the court shall have power to order and enforce performance thereof, the same as under sections one hundred and thirty-eight, one hundred and thirty-nine and one hundred and forty of the Civil Code, in a suit for divorce by a wife."

[1] The action was commenced more than three years after the enactment of this section, and for this reason the defendant claims that it is barred by the provisions of section 338, Code of Civil Procedure. The obligation of a father to support his child, whether legitimate or illegitimate, is a continuing duty, against which the statute of limitations will not run during the time that the child needs such care and support. Denham v. Watson, 24 Neb. 779, 40 N. W. 308.

[2, 3] Prior to the enactment of said section 196a the plaintiff and defendant entered into an agreement, by the terms of which the defendant claims that he was released of all obligations to the plaintiff and to their child. It provides that in consideration of the sum of $325 the plaintiff discharges the defendant "of all obligations which he may have toward said Maria Ardanaz for her pregnancy and its consequences." Upon this purported release the defendant contends that to enforce section 196a of the Civil Code against him would be in violation of section 16, article 1, of the Constitution of the state, prohibiting the enactment of laws impairing the obligation of contracts. Assuming that this paper, which is in the form of a receipt, is broad enough to include within its terms an undertaking on the part of the plaintiff to relieve the defendant of any obligation devolving upon him at that time, or to which he might thereafter be subjected, to support his child, still it would have no binding force or effect, for it is settled law in this state that a minor's right to support and maintenance by his father may not be limited or contracted away by his parents. Lewis v. Lewis, 174 Cal. 336, 163 Pac. 42. And it follows that, the plaintiff being without power to release the defendant from his obligation to support his minor child, so much of the agreement between the parties as purports so to release him is void, and, consequently, created no contractual right between him and the plaintiff which could be impaired by subsequent legislation.

[4, 5] Defendant also attacks the complaint on the ground that the action was not brought by the proper party plaintiff. The institution of the action by the mother in her own name on behalf of the child is expressly authorized by the statute; but, even if it were not, the defendant having failed to take advantage of the point either by demurrer or answer, the objection will be deemed waived. Taylor v. Miller, 2 Lea (Tenn.) 153; Chase v. Jamestown St. Ry. Co., 15 N. Y. Supp. 35;[1] Bollinger v. Bollinger, 154 Cal. 695, 699, 99 Pac. 196.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

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[1] Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 60 Hun, 582.

42 Cal. App. 111

MITCHELL et al. v. KIM et al. (Civ. 2011.)

(District Court of Appeal, Third District, California. July 8, 1919.)

1. Venue 🔑22(1) — Personal Actions — Place of Trial.

Under Code Civ. Proc. § 395, providing that a personal action must be tried in the county in which the defendant or some one defendant resides, where there are several defendants residing in different counties, plaintiff has his election.

2. Appeal and Error 🔑1024(3)—Review—Motion for Change of Venue.

Where there was a direct conflict between the verified complaint and affidavits presented by plaintiffs and affidavits of one of the defendants as to whether parties joined as defendants, who resided in the county where action was brought, were joined for any purpose other than to lay the venue in that county, denial of motion for change of venue will not be disturbed.

3. Venue 🔑72 — Motion for Change — Scope of Hearing.

On motion for change of place of trial, the court will not go into the merits.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by A. N. Mitchell and another against C. L. Kim and F. M. Porter, copartners as Kim & Porter, and P. B. Cross. From an order denying a motion of defendant Cross for change of place of trial, he appeals. Affirmed.

Frank Freeman, of Willow, and Bacigalupi & Elkus, of San Francisco, for appellant.
W. T. Belieu, of Willow, for respondents.

CHIPMAN, P. J. Motion to change the place of trial. The motion was denied, and defendant Cross appeals from the order.

The action was commenced in the superior court of Colusa county. The motion was made "upon the grounds that defendant P. B. Cross is, and at the time of the commencement of the above-entitled action was, a resident of the city and county of San Francisco." It is alleged in the complaint that Kim and Porter, at the times mentioned in the complaint and at the commencement of the action, were copartners; that defendants became indebted to plaintiffs in the sum of $4,960.01 "for the building and construction of a certain ditch and lateral work on what is known as Baker creek, in the counties of Glenn and Colusa, for the defendants," at their special instance and request and for their benefit; that said defendants promised and agreed to pay plaintiffs for said construction work as soon as it was completed; that said work has been completed, and demand made upon defendants to pay plaintiffs for the same, but defendants have failed and refused so to do.

In support of the motion, defendant Cross made and filed an affidavit stating that at the commencement of the action he was a resident of the city and county of San Francisco; denied that he at any time ever entered into any transaction with plaintiffs, or either of them, for construction work, or any other kind of work, "to which said agreement or contract C. L. Kim or F. M. Porter, individually or as copartners, were a party to or associated with me." He further states:

> "I believe, and therefore allege, that plaintiffs have joined said C. L. Kim and F. M. Porter as joint defendants, full knowing that they are in no way associated with me in any contract or transaction had by myself with them, and that they have so joined said defendants for the purpose, and for the purpose only, of attempting to keep the place of trial of the case in Colusa county, knowing full well that I am a resident of the city and county of San Francisco, and that they hoped thereby to perpetrate a fraud upon the court and upon the law, and that there is a dispute between said plaintiffs, the California Midland Realty Company, and myself over certain construction work, but that I have never had any dealings with said plaintiffs to which said defendants C. L. Kim or F. M. Porter were parties."

Defendant Kim made affidavit in which he stated that he had not at any time entered into any contract with or had any construction work done by plaintiffs to which said contract defendant Cross was a party; that he did not contract with nor employ plaintiffs, or either of them, to do any of the work set forth in the complaint; and denied that he was indebted to plaintiffs in connection with said work. He further states:

> "I verily believe that I have been joined with said defendant P. B. Cross in order that plaintiffs could show in their pleadings that there were defendants residing in Colusa county, although said plaintiffs well knew that said P. B. Cross was not a resident of Colusa county, and that said plaintiffs well knew that they had no claim against me, but that they joined me herein as a defendant herein in order to permit a fraud upon the court."

Affiant also joins in the demand for a change of the place of trial. Defendant Porter made affidavit in like terms.

The complaint is verified by plaintiff Harlan, and in his affidavit he states that "he has read the complaint and knows the contents thereof; that the same is true of his own knowledge." The affidavit of H. J. Barceloux was filed and considered by the court. Affiant stated as follows:

> "That he is a resident of Glenn county, California; is personally acquainted with the plaintiffs above named, and all the defendants above named; that he is personally acquainted with

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the facts connected with the controversy between the plaintiffs and the defendants in the above-entitled action; that he has read the affidavits of said defendants herein, and is acquainted therewith; that wherein said affiants, and each of them, state that the said defendants had no dealings or transactions with the plaintiffs for the doing and performing of the work and labor set out and described in plaintiff's complaint, is untrue and false; that affiant was personally present when the said defendant hired and employed plaintiffs to do and perform said work and labor as set out in plaintiffs' complaint; and that pursuant thereof the said plaintiffs did do and perform the same in Colusa county and Glenn county, and the said defendants and each of them did promise to pay plaintiffs therefor."

[1] In a personal action, such as this, "the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action. * * * If any person is impliedly joined as a defendant, or has been made a defendant solely for the purpose of having the action tried in the county where he resides, his residence must not be considered in determining which is the proper county for the trial of the action." Code Civ. Proc. § 395. In such an action a defendant is entitled to have the action tried in the county of his residence; but where there are several defendants, if one defendant resides in one county and a codefendant in another county, the plaintiff may have the case tried in either county. O'Brien v. O'Brien, 16 Cal. App. 193, 116 Pac. 696; Hellman v. Logan, 148 Cal. 58, 82 Pac. 848.

The averments of the complaint, if true, furnish a complete answer to the charge made that Kim and Porter were made parties defendant for the purpose of imposing upon the court and to cause the venue of the action to remain in Colusa county. The averments of the complaint show unequivocally that all of the defendants were parties to the contract under which plaintiffs did the alleged work, and the effect of the verification of the complaint is that these averments are true. The affidavit of Barceloux is corroborative of these statements.

[2] It may be an open question whether or not a court would be authorized in any case to determine that the affidavits presented to it upon a motion of this nature would be sufficient to overcome the allegations of the complaint, or to permit those allegations to be determined by affidavit (Lakeshore Cattle Co. v. Modoc Land, etc., Co., 108 Cal. 261, 41 Pac. 472); but, as was said in that case, and in Bowers v. Modoc Land, etc., Co., 117 Cal. 50, 48 Pac. 979, it is sufficient to say that there is a direct conflict between the affidavits filed in support of the motion and in the verified allegations of the complaint and the affidavit of Barceloux. See Quint v. Dimond, 135 Cal. 574, 67 Pac. 1034. Under these circumstances the decision of the court cannot be disturbed.

[3] A consideration of the issues presented by the affidavits in support of the motion would involve to a considerable degree the merits of the action. The court will not go into the merits of the action on a motion to change the place of trial. McKenzie v. Barling, 101 Cal. 459, 36 Pac. 8; O'Brien v. O'Brien, 16 Cal. App. 193, 116 Pac. 696.

The order is affirmed.

We concur: HART, J.; BURNETT, J.

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42 Cal. App. 97

BRUNER v. HEGYI. (Civ. 2143.)

(District Court of Appeal, Second District, Division 2, California. July 5, 1919.)

1. CONTRACTS 🔑282—CONSTRUCTION—"SATISFACTORY TO OWNER."

In action for tile work done under a contract providing work must be "satisfactory to the owner," evidence that tiling was done in a workmanlike manner, but that cracks developed, due probably to settling of building, sustains a recovery, since quoted words only required contractor to complete his work in a manner satisfactory to a reasonable man.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Satisfactory.]

2. EVIDENCE 🔑441(7) — PAROL EVIDENCE — ADMISSIBILITY.

An oral agreement that certain tile work for defendant's residence should be done according to a sample *held* inadmissible, as an attempt to vary and modify by parol a subsequent written contract governing the work.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by S. A. Bruner, doing business under the fictitious name and style of the S. A. Bruner Tile Company, against Gabor Hegyi. Judgment for plaintiff, and defendant appeals. Affirmed.

Marshall & Preston, of Los Angeles, for appellant.

Hollzer & Greenberg and Albert M. Norton, all of Los Angeles, for respondent.

FINLAYSON, P. J. This is an appeal from a judgment in favor of plaintiff for $810, and interest, for work performed and materials supplied in setting in place the tile work for defendant's residence.

[1] The agreement, which was in writing, executed by defendant and plaintiff, provides that the "work must be satisfactory to the owner." The court found that the tile furnished by plaintiff was of the best quality,

and that the work was done in a good, workmanlike manner. It seems, however, that after the tile was set in place, and through no defect in the workmanship or material, but probably because, as was intimated by one of the witnesses, the building contracted and expanded, the tile cracked or checked—became what is known to the trade as "crazed." For this reason the work was not performed to defendant's satisfaction. The court found, however, that it is the nature of all tile to craze; that the crazing of the tile on this job was not caused by any defects in the material or by any fault in workmanship; and that, though the work was not performed to defendant's satisfaction, it nevertheless was performed "reasonably satisfactorily," and was "a satisfactory piece of work."

Each of the court's findings is supported by evidence amply sufficient for the purpose. There are cases that hold that, where the contract requires the work to be done to the satisfaction of the person contracting for it, and the work is of a kind that involves fancy, taste, sensibility, or judgment, and no benefit passes under the contract unless the work be accepted, as where, for illustration, a portrait is to be painted, the promisee's refusal to pay for the work cannot be called in question, provided only that his refusal is in good faith and not from mere caprice. In cases of that character, the question is not whether the one complaining of the work ought to be satisfied, but solely as to the good faith of the dissatisfaction alleged. Where, however, as in this case, the work contracted for goes into a building, the fruits of the labor of the contractor being retained by the owner, the rule is that a stipulation in the contract to perform to the satisfaction of the owner calls for only such performance as is satisfactory to a reasonable person. It is sufficient if the contractor completes his work in accordance with the contract in such a manner that the owner, as a reasonable man, ought to be satisfied with it. Gladding, etc., Co. v. Montgomery, 20 Cal. App. 276, 279, 128 Pac. 790; Bryan Elevator Co. v. Law, 31 Cal. App. 204, 160 Pac. 170; Erickson v. Ward, 266 Ill. 259, 107 N. E. 593, Ann. Cas. 1916B, 497; Doll v. Noble, 116 N. Y. 230, 22 N. E. 406, 5 L. R. A. 554, 15 Am. St. Rep. 398; Handy v. Bliss, 204 Mass. 513, 90 N. E. 864, 134 Am. St. Rep. 673.

[2] The claim of a prior oral agreement that the tile should be according to sample furnished by plaintiff was clearly an attempt to vary and modify by parol the terms of a written contract. This, of course, is not permissible. Gladding, etc., Co. v. Montgomery, supra. Moreover, the court found that the tile furnished by plaintiff actually was according to the sample furnished.

We find no error in the record, and think the judgment should be affirmed. It is so ordered.

We concur: SLOANE, J.; THOMAS, J.

42 Cal. App. 124

PEOPLE v. DREVOIR. (Cr. 473.)

(District Court of Appeal, Third District, California. July 9, 1919. Rehearing Denied by Supreme Court Sept. 4, 1919.)

1. Escape 🔑9—Information—Sufficiency.

Where evidence shows defendant and a fellow prisoner in a county jail assaulted a deputy sheriff and escaped, etc., an information against defendant for aiding the other prisoner to escape is not fatally defective for failure to allege that defendant knew his companion was in legal custody.

2. Criminal Law 🔑564(1)—Venue—Sufficiency of Evidence.

Evidence that defendant assisted a fellow prisoner while both were confined in a certain county jail, etc., *held* to sufficiently establish the venue in a prosecution for aiding a prisoner to escape.

3. Criminal Law 🔑1172(1) — Reversible Error—Requested Instructions.

In a prosecution for aiding a prisoner to escape, refusing a requested instruction that defendant must have known the prisoner was in legal custody, etc., is not reversible error where the fact was so apparent that defendant must have known it.

4. Escape 🔑5—Aiding Escape—Legality of Confinement.

In a prosecution for aiding a prisoner to escape, it is immaterial whether accused knew that the custody of the prisoner was legal.

5. Criminal Law 🔑322—Presumptions—Imprisonment—Legality.

There is no presumption that a prisoner in a county jail is illegally restrained.

6. Escape 🔑11—Instructions.

In a prosecution for aiding a fellow prisoner to escape, an instruction *held* to give defendant the benefit of every principle of law to which he was entitled.

7. Escape 🔑10—Evidence—Sufficiency.

In a prosecution for aiding a fellow prisoner to escape, evidence that accused and his companion assaulted a deputy sheriff, that both escaped from jail, and that only accused was recaptured, etc., *held* to sustain a conviction against defendant's explanation that he was aiding sheriff to prevent the other prisoner from escaping.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

A. R. Drevoir was convicted of aiding a prisoner to escape, and from the judgment and an order denying new trial he appeals. Affirmed.

James T. Matlock, of Red Bluff, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was informed against by the district attorney of the county of Tehama for aiding one Patrick Riley (with sundry aliases) to escape from the custody of Deputy Sheriff C. A. Lange of said county. The information sets forth with much particularity the facts and circumstances attending the crime charged, showing that on January 21, 1919, said Riley was confined in the county jail of said county on a commitment for the crime of forgery.

> "That the said A. R. Drevoir on or about the 21st day of January, 1919, at and in the county of Tehama, state of California, and prior to the filing of this information, and at a time when the said Patrick Riley, alias Jack Brennan, alias Jack Hayes, was attempting to escape from said jail, and while he was struggling with the deputy sheriff, C. A. Lange, who was then trying to restrain him from escaping, did willfully, unlawfully, and feloniously grapple with the said C. A. Lange, and pull him away from the said Patrick Riley, alias Jack Brennan, alias Jack Hayes, and by so doing did permit and cause the said Patrick Riley, alias Jack Brennan, alias Jack Hayes, to escape from the said county jail in the city of Red Bluff, and by means thereof the said Patrick Riley, alias Jack Brennan, alias Jack Hayes, did then and there escape and go at large whithersoever he would."

A demurrer for insufficiency of facts was overruled, and defendant went to trial. He was found guilty, and judgment of conviction was accordingly entered. He appealed from the judgment and from the order denying his motion for a new trial. The objections urged in supporting the appeal are: (1) There is no allegation in the information setting forth that the defendant had knowledge that the prisoner whom the defendant was assisting to escape was in legal custody, for which reason, it is contended, the demurrer should have been sustained; (2) that the venue was not proved; (3) that the court erred in modifying, and giving as modified, an instruction requested by defendant; (4) "that there is no evidence which shows any criminal intent or liability, in the light of the evidence and all the circumstances in the case, on the part of the people, but what is flatly contradicted."

Section 109 of the Penal Code provides as follows:

> "Any person who willfully assists any * * * prisoner confined in any prison or jail, * * * or any person in the lawful custody of any officer or person, to escape, or in an attempt to escape from such prison or jail, * * * is punishable as provided in section 108 of the Penal Code."

[1] 1. In support of defendant's first point, the case of State v. Lawrence, 43 Kan. 125, 23 Pac. 157, is relied upon. In reviewing that case the court stated that the acts set forth fully, and sufficiently showed that an offense had been perpetrated by one Spencer, for which he was duly committed to the county jail until the day fixed for the examination; that under the warrant the under-sheriff took the prisoner into custody, "and placed him in charge of a guard until the prisoner could be taken to and confined in the county jail"; that while he was in charge of the guard the defendant, Lawrence, "unlawfully and feloniously aided and assisted him to escape"; that it sufficiently appeared that the prisoner was in lawful custody,

> "But, while it alleges that the defendant aided in the escape, it fails to charge that he had knowledge that Spencer was in legal custody, and does not set out the acts done which aided the prisoner to escape. In the absence of these allegations, the information was defective, and the motion to quash was properly sustained. An indispensable ingredient of the offense sought to be charged is the knowledge of the accused that the person assisted was in legal custody; and unless this knowledge is alleged, or the acts charged to have been done by the defendant necessarily imply knowledge, an offense is not adequately pleaded."

The court points out many things which might be done by a person which in fact might aid a prisoner in an escape without any criminal intent. As, for example, to entertain one for a night without knowing that he was a fugitive criminal, or to overtake one on the highway and innocently give him a ride. But, continued the court:

> "If the acts done by way of assistance were alleged, as they should be, they might be of such a character that guilty knowledge would necessarily be inferred, and an express allegation of such knowledge might not be essential. For instance, if the defendant had furnished a prisoner confined in the jail instruments which only could have been intended to facilitate an escape, or had broken the prison door, or had forcibly assaulted or obstructed an officer who had a prisoner in charge, an express allegation of knowledge that the prisoner was in legal custody might not be necessary; but where the acts done are in their nature innocent, such knowledge should be stated. * * * In the present case the prisoner was not in jail, nor yet in the immediate charge of one known as a public officer. He was in charge of a private individual, designated for the time-being as a guard, and hence there was a still greater necessity that the acts done by the defendant to aid in the escape, or that the defendant had knowledge that Spencer was in legal custody, should be alleged."

We have stated somewhat fully the opinion of the court in the Lawrence Case for the reason that it shows quite clearly that knowledge on the part of the defendant need not in all cases be alleged.

What are the facts here? The escaping prisoner was in jail and in the custody of deputy sheriff Lange. Defendant was also a prisoner in the same jail. Riley, the prisoner, attacked the deputy sheriff in an effort to escape from the jail, and defendant joined in the assault, and by his aid the prisoner escaped. Defendant also escaped, but was later captured by the deputy sheriff. We think that the acts alleged were sufficient to lead to the irresistible inference not only that the prisoner Riley was in legal custody, but that defendant had knowledge of the fact when he aided in the escape. The case is quite similar to the examples given in the case of State v. Lawrence, supra, illustrating when, and under what circumstances, the direct charge of knowledge by the defendant that the prisoner was in legal custody need not be stated in the information or indictment.

[2] 2. We think the venue sufficiently appeared. The record shows that the prisoner had a preliminary examination before a magistrate in Red Bluff, Tehama county, state of California, and that he was committed to the county jail in that county, and was in the immediate keeping of the deputy sheriff at the said county jail, and it was in that jail that both the defendant and prisoner were being confined when the assault upon the deputy sheriff was made, and both the prisoner and defendant escaped, the latter only being recaptured.

Tehama county is a legal subdivision of the state, and its boundaries are prescribed by statute. Part IV, tit. II, Pol. Code. Red Bluff is the county seat of Tehama county, and is so recognized. Section 3975b, Pol. Code. While the direct question usually put to the prosecuting witness, "Did these acts take place in Tehama county, state of California?" or its equivalent, was not asked of any witness, the fact, we think, sufficiently appears that they did so take place.

[3] 3. Defendant requested an instruction that, before the jury can convict the defendant, they must believe beyond a reasonable doubt the facts charged in the information, that defendant was legally committed "to await a trial upon a charge of forgery, and was in legal custody"; that defendant "unlawfully and feloniously aided the said Patrick Riley to escape; and that the said defendant did grapple with said C. A. Lange, and pull him away from the said Patrick Riley, and by so doing did permit and cause said Patrick Riley to escape from the said county jail in the city of Red Bluff, and by means thereof the said Patrick Riley did then and there escape"; concluding as follows: "And that said defendant had knowledge that the said Patrick Riley, alias Jack Brennan, alias Jack Hayes, was in legal custody." The court gave the instruction, striking out the concluding sentence.

The court instructed the jury "that the basis of the offence is found in section 109 of the Penal Code, which provides as follows: Any person who willfully assists any * * * prisoner confined in any prison or jail, * * * in an attempt to escape from such prison or jail, * * * is punishable," etc. The court also gave the following instruction: "Before you can convict the defendant of the crime charged in the information, you must believe that the defendant doing whatever he did do, if anything, to assist Jack Brennan to escape, acted knowingly and with intent to then and there assist Jack Brennan to escape, and that said Jack Brennan did escape, and that he was assisted in said escape by the defendant." Then follows the said instruction requested by defendant.

For the reasons, among others, advanced in support of the sufficiency of the information, we do not think the court erred. The fact that the prisoner was in legal custody was fully proved, and was so apparent that defendant's knowledge of the fact could not have been a matter of doubt or uncertainty in defendant's mind. They were fellow prisoners in the county jail, and in the custody of a person known to be the deputy sheriff. Defendant's knowledge that the prisoner was in legal custody may well have been inferred from all the facts and circumstances without direct evidence that he knew the fact. It was held in People v. Ah Teung, 92 Cal. 421, 28 Pac. 577, 15 L. R. A. 190, that a departure from an unlawful imprisonment or custody is not an escape, within the meaning of the law; and that one who, without violence, assists a person who is confined without authority or process of law to depart from his place of confinement, is not guilty of the crime of assisting a prisoner to escape.

[4-6] In the present case the prisoner was shown to have been legally committed to jail and was there being held in legal custody. Whether or not defendant knew this fact is immaterial, for he could not justify his assistance in the prisoner's escape only, if at all, by showing that the prisoner was being illegally confined. There is no presumption that a prisoner held in a county jail is being illegally restrained. The presumption, if presumption could be indulged, is that the officer who has him in custody and is confining him in jail is acting in obedience to some duty developed upon him and under legal process. The prisoner was in legal custody and in the county jail. The jury were told substantially in the language of the statute that "any person who willfully assists any person confined in any prison or jail in an attempt to escape from such prison or jail is punishable," etc.; also that before the jury

can convict the defendant they must believe from the evidence beyond a reasonable doubt that defendant "feloniously and unlawfully aided the said Patrick Riley to escape," etc. The instruction gave defendant the benefit of every principle of law to which he was entitled for the guidance of the jury. Defendant's ignorance of the fact that the prisoner had been legally committed to the custody of the sheriff and was in jail under lawful process cannot shield him from the consequences of his acts, unless it appeared as the fact that the prisoner was not thus held.

[7] 4. Defendant's fourth point is without merit. The only controverting testimony came from defendant himself, who testified that his intention was to aid the officer in preventing the prisoner's escape. In view of the fact that defendant also tried to escape, his explanation is unworthy of credence.

The judgment and the order are affirmed.

We concur: HART, J.; BURNETT, J.

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42 Cal. App. 133

McEWEN v. NEW YORK LIFE INS. CO.

(Civ. 2640.)

(District Court of Appeal, Second District, Division 1, California. July 9, 1919. Order of Modification July 25, 1919. Rehearing Denied by Supreme Court Sept. 4, 1919.)

1. Insurance 🔑646(3)—Answers in Application—Presumptions—Burden of Proof.

Answers to questions contained in a life insurance application are presumably true, and defendant insurance company has the burden of proving the contrary.

2. Insurance 🔑665(3)—Truth of Insured's Declarations—Sufficiency of Evidence.

Evidence *held* to sustain jury finding that an answer in a life insurance application regarding the date applicant had last consulted a physician was true.

3. Appeal and Error 🔑195 — Reserving Grounds for Review — Questions Not Raised Below.

Where defendant insurance company amended its answer, so as to allege false representations by insured, without objection by plaintiff, and evidence was received on the issue without objection, the point that the incontestable clause of the policy eliminated such defense cannot be first raised on appeal.

4. Insurance 🔑586—Beneficiary—Vested Interest.

Where a life insurance policy authorizes insured to change the beneficiary, the beneficiary ordinarily has no vested interest in the policy until insured's death.

5. Evidence 🔑276—Declarations Against Interest.

In a beneficiary's action on a life policy, which authorized insured to change his beneficiary, statements made by insured, inconsistent with his representations to defendant insurer, are ordinarily admissible as declarations against the insured's interest.

6. Gifts 🔑10 — Insurance 🔑586 — Life Policy—Gift.

A life policy, which authorized insured to change his beneficiary, may be given to the beneficiary, so as to give her an absolute vested interest in the policy while insured is still living.

7. Evidence 🔑276 — Declarations After Parting with Interest.

Where a life policy, authorizing an insured to change his beneficiary, is given by insured to the beneficiary, statements made by insured inconsistent with his representations to defendant insurer are inadmissible in an action by the beneficiary on the policy.

8. Insurance 🔑665(3)—Evidence—Sufficiency.

Evidence *held* to sustain jury finding that insured's statement in his life insurance application that he had never spat blood was true.

9. Insurance 🔑297—Application—Intoxicating Liquors.

Where a question in a life insurance application regarding applicant's daily consumption of wines, spirits, or malt liquors was answered by "No daily habit—occasional beer," the response is not a representation that applicant did not drink whisky, but merely that he did not use it daily.

10. Insurance 🔑297 — Intoxicating Liquors—"Excess."

In a life insurance application, in question whether applicant had ever used intoxicating liquors to "excess," the quoted word is largely a matter of opinion, depending upon the individual's capacity, etc.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Excess.]

11. Insurance 🔑668(7) — Intoxicating Liquors—Excessive Use.

Whether insured used intoxicating liquors to excess, contrary to his representation to the insurer, is a question of fact for the jury.

12. Insurance 🔑665(3)—Evidence—Sufficiency.

In an action on a life insurance policy, conflicting evidence *held* to sustain jury findings that the insured was not addicted to the daily use of intoxicating liquors and had never used them to excess.

13. Insurance 🔑668(6)—Insured's Representations—Law or Fact.

The materiality of representations made by a life insurance applicant presents a question of law and not of fact.

14. Insurance 🔑669(7)—Life Policy—Instructions.

In action on a life policy, an instruction that insured's representation regarding his previous diseases and accidents was false, if a certain accident not mentioned in the application occurred and had a tendency to affect his length of life, *held* prejudicial error, because allowing the jury to disregard the false answer, if they considered it did not affect deceased's longevity.

15. APPEAL AND ERROR ⚷1068(1)—HARMLESS ERROR—INSTRUCTIONS.

Any error in instructing the jury that their verdict depended on whether statements made by insured were false, instead of charging that any one false statement would avoid the policy, *held* not ground for reversal, where the jury found all the statements true.

16. TRIAL ⚷349(2)—SPECIAL VERDICT—REFUSING INTERROGATORIES.

Since the court may refuse to submit questions for a special verdict, under Code Civ. Proc. § 625, error cannot be predicated on its refusal to submit certain requested interrogatories.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Rachel A. McEwen against the New York Life Insurance Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

See, also, 23 Cal. App. 694, 139 Pac. 242.

Edwin A. Meserve and Shirley E. Meserve, both of Los Angeles (Paul H. McPherrin, of Los Angeles, of counsel), for appellant.

Murphey & Poplin, of Los Angeles, for respondent.

SHAW, J. On a former appeal had in this case by defendant, the judgment in favor of plaintiff was reversed. A second trial was had, which likewise resulted in a judgment in favor of plaintiff, from which, and an order denying its motion for a new trial, defendant has again appealed.

The action was instituted by the mother of Charles B. McEwen, deceased, to recover the amount of an insurance policy on his life, issued by defendant on July 7, 1910, upon a written application made therefor by deceased on June 29, 1910. The insured, who was 28 years of age, died on November 20, 1910. Defendant's action in resisting payment of the policy is based upon the alleged ground that the insured procured the issuance of the policy by means of fraud, concealment, and misrepresentations made by him in answer to written questions propounded to him by the defendant, the truth of which answers it believed, and upon the faith thereof accepted the application and issued the policy. In the answer to the complaint it is alleged that the answers to the following questions were and are untrue:

(1) "What is your occupation? (Full details.) A. Proprietor of collection agency."

(2) "How long have you been engaged in your present occupation? A. Ten years."

(3) "What was your previous occupation? A. Cattle business."

(4a) "What is your daily consumption of wine, spirits, or malt liquors? A. No daily habit—occasional beer."

(4b) "Have you at any time used any of them to excess? A. No."

(6) "Have you ever raised or spat blood? A. No."

(7) "What illnesses, diseases, or accidents have you had since childhood? (The examiner should satisfy himself that the applicant gives full and careful answers to this question.) A. Typhoid pneumonia. One attack in 1891; duration two months; severe; complete recovery."

In addition to these questions, the answers to which are alleged to be untrue, defendant, after the first trial and on April 6, 1915, filed an amendment to its answer, wherein it alleged that the answers to the following questions were also untrue:

(8) "How long since you consulted or have had the care of a physician? A. 1891; Dr. Thomas, Bucyrus, Ohio."

(9) "If so, for what ailment; name and address of physician? A. Typhoid pneumonia."

At the close of the questions and answers McEwen stated in writing:

"I declare, on behalf of myself and of any person who shall have or claim any interest in any insurance made hereunder, that I have carefully read each and all of the above answers; that they are each written as made by me; that each of them is full, complete, and true."

In addition to a general verdict, the jury were instructed to render special verdicts as to the truth of the answers given to the foregoing questions numbered 1, 4a, 4b, 6, and 7, and also the answers given to questions numbered 8 and 9, referred to as being contained in the amended complaint, each and every one of which answers are conceded by counsel for both parties and the trial court to have been material representations. In response to another question, which we will designate as 10:

"What do you find the facts to be with relation to the use of wines, spirits or malt liquors by the deceased?"

—they answered:

"He was not an habitual drinker. We find no evidence to show that the deceased did indulge in wines, spirits, or malt liquors to excess, prior to application for insurance; therefore said deceased's answers were full, complete, and true."

By their general verdict the jury found in favor of plaintiff.

[1-3] 1.[1] In response to question 8, "How

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[1] The court, by an order of modification dated July 25, 1919, inserted this paragraph in place of subdivision 1 of the opinion as originally written, which subdivision was by such order stricken out.

long since you consulted or have had the care of a physician?" McEwen's answer was, "1891; Dr. Thomas, Bucyrus, Ohio;" and in response to question 9, "If so, for what ailment; name and address of physician?" the answer was, "Typhoid fever." The verdict that the answers to these questions were true is attacked by appellant upon the ground that the evidence is insufficient to support the same. The declarations made by the appellant in response to the questions are presumed to be true, and hence the burden was upon defendant to prove the contrary. The only evidence adduced on the part of defendant tending to overcome the presumption so attaching to the answers given by McEwen, was the testimony of one Hosick to the effect that McEwen, after an occasion when he was said to have been drunk, told him that he had been under a doctor's care ever since, and the testimony of Dr. Garrett that on August 18, 1909, McEwen stated to him, while acting in the capacity of medical examiner for an accident insurance company, that he (McEwen) was under treatment from Dr. Taylor, which fact of being under Taylor's treatment McEwen also stated in the notice of an injury sustained which he gave to the accident insurance company. It thus appears that, in determining the issue, all that the jury had before it was the declaration of McEwen made in his application to defendant, to which a presumption of its truth attached, and subsequent inconsistent declarations therewith made by McEwen. We cannot say that in considering the evidence thus adduced the jury was not warranted in finding the subsequent declarations insufficient as evidence to overcome the presumption of truth attaching to the answers made by McEwen in his application for the policy. In this connection respondent insists that, even though it should be conceded the answers to questions 8 and 9 constituted material false representations, appellant is in no position to avail itself of the defense based upon such fact, for the reason that the policy provides that "this policy shall be incontestable after one year from its date of issue, except for nonpayment of premium." The alleged false answers to these questions were, by an amendment made to the answer, pleaded as a ground of contest some five years after the policy was issued. No objection, however, was interposed by plaintiff to the filing of the amendment, nor any motion thereafter made to strike it out, nor objection made to the introduction of evidence upon the issue so raised. Hence, if there was merit in plaintiff's contention, she is in no position upon this record, where she appears as respondent, and in the absence of any objection on her part to the proceedings had thereunder, to now for the first time, on appeal by her opponent, raise the objection.

[4-7] 2. As alleged in the original complaint plaintiff sought to recover upon the sole ground that she was named as the beneficiary in the insurance policy. Nevertheless, as held on the former appeal (23 Cal. App. 694, 139 Pac. 242), she, by virtue of such fact, since the insured by the terms of the policy reserved the right to change the beneficiary, had no vested interest therein until his death, and therefore statements made by deceased which were inconsistent with the representations to defendant were competent evidence upon the ground that they were declarations against interest. Upon going down of the remittitur, plaintiff filed an amendment to her complaint, the effect of which, if the allegations thereof were found true, rendered the evidence incompetent. This amendment was that in July, a few days after the issuance of the policy, McEwen made a gift thereof to plaintiff, named as beneficiary therein. At the trial, for the purpose of showing the falsity of applicant's answers to the inquiry as to his use of wine, spirits, or malt liquors, evidence was received showing that on October 22, 1910, in the trial of a case wherein McEwen was charged wih committing a criminal offense, he testified in extenuation of the act that he was at the time of its commission intoxicated, and that up to about 10 days prior to the giving of the testimony he was a heavy drinker and drank liquor to excess, resulting at times in a condition of prolonged intoxication. Having admitted this evidence, the court directed the attention of the jury to the fact that it was a declaration made by the insured after the alleged gift of the policy to his mother, which evidence, if they found the allegation as to the gift of the policy to be true, they should disregard; otherwise, they should consider it in arriving at their verdict.

In so instructing the jury, appellant, while conceding that a life insurance policy may be the subject of a parol gift, insists the court committed prejudicial error. Its contention is that, since the donee was named as beneficiary in the policy, with power of revocation reserved to the insured, together with the right to designate a new and different beneficiary, the policy could not be deemed the subject of gift to her, since she took it subject to the provision contained therein that the insured might change the beneficiary; that the purported gift vested her with no right other than what she theretofore had, which was an interest in expectancy only. We are not in sympathy with this ingenious argument. Prior to the alleged gift, the mother, named as beneficiary therein, had no vested interest in the policy. Her interest was merely one of expectancy, and subject to the power of the insured to name another to receive the benefits thereunder. The evidence as to the making of the gift is very meager, and entirely consistent with the fair inference that the policy was handed to her as the beneficiary therein named, as the then party interested, for safe-keeping only, and not with the purpose or intent of vesting her with a donee's interest or rights other than those which she had as beneficiary. Assuming, however, that the evidence was sufficient to show a gift of the policy was made to the mother, she by virtue thereof and in addition to her expectancy acquired an absolute vested interest therein. Notwithstanding the power of revocation reserved in the policy, he by making the gift surrendered it and divested himself of all right to exercise such power. Had he, after making the gift, substituted the name of his sister for that of his mother, named as beneficiary therein, and at his death a contest arose between the two as to who was entitled to the proceeds of the policy, such contest would involve no question in which the insurance company was concerned, and, upon trial of the issue between mother and sister, the mother, conceding the gift to have been made, could not have been deprived of her rights thereunder because of the fact that the policy contained the power of revocation.

In their argument counsel for appellant lay much stress upon the statement of this court made in deciding the case of Waring v. Wilcox, 8 Cal. App. 317, 96 Pac. 910, which involved the right of the insured to change the beneficiary in a policy which contained a clause similar to the one under consideration. In that case it was found by the trial court that the insured delivered the policy to his mother, named therein as beneficiary, with the intent and purpose that it should belong to her and be her property. Thereafter, at his request, she gave the policy back to him, and he, exercising his right so to do under the terms of the policy, designated another as beneficiary. In the course of its opinion the court said:

> "Nor can we attach any importance to a finding that the policy was delivered with the intent that it should become the property of the original beneficiary; for it contained the reserved right of substitution and vested no right other than one to receive the benefit in the event the insured did not elect before his death to change the beneficiary. 'It was a part of the contract, as entered into in the beginning, that the assured, of his own free, unrestrained will, might at any time make the substitution he desired.'"

While in that case the policy had been given to the beneficiary with the intent that it should be her property, it was thereafter by her given back to the insured with the purpose and intent that it should be his property, vesting in him all the rights which he originally had, among which was the right to substitute another as beneficiary. The statement that no importance should be attached to the finding that the policy was delivered to the mother with intent that it should become her property should not be construed of general application, but as applicable to the facts presented in that case. It cannot be deemed an authority for holding that, by reason of the power of revocation and right to change the beneficiary named in an insurance policy, the insured may, after making a completed gift thereof to the beneficiary so named, designate a new beneficiary therein, thus rendering the gift null and of no effect.

Our conclusion is that an insurance policy containing the provision under consideration may be the subject of a gift to the beneficiary named therein, whose interest in expectancy, by virtue of the gift, is changed to an absolute interest (in the donee) without qualification, and thereafter the donor, in the absence of some act again vesting him with title, has no power or control over the policy. The interest of the donee, though named as beneficiary, is not by virtue of such fact, but the qualified interest is merged in the absolute interest due to the completed gift. Since there was evidence, though meager, tending to prove the allegation, it was not error on the part of the court to give the instruction of which appellant complains.

[8] 3. The only evidence tending to show the falsity of McEwen's answer, "No," to question 6, "Have you ever raised or spat blood?" is a statement made by him to Dr. Garrett to the effect that he had, following an injury from being kicked or struck in the chest by the foot of a mule, spat blood. The representation made to the insurance company must, in the absence of sufficient proof to overcome the presumption, be deemed to be true, and we cannot say that it is overcome by an inconsistent statement therewith made by McEwen. As to the special verdict rendered in response to this question, no ground appears for complaint, since the jury, in weighing the inconsistent declarations, decided in favor of the one presumed to be true, as against one as to which no such presumption existed.

[9] 4. In response to question 4a, "What is your daily consumption of wine, spirits, or malt liquors?" the answer was, "No daily habit—occasional beer;" and the reply to question 4b, "Have you at any time used any of them to excess?" was, "No." The verdict that the answers to these questions were true is attacked by appellant upon the ground that it is contrary to the evidence, in support of which contention counsel quote extensively from the record. A review of the voluminous testimony touching the subject could serve no purpose; suffice it to say that as to 4a the question was not whether

McEwen had used liquor at all, but assumed as a fact that he did use them. The inquiry is directed solely to the extent of his daily consumption of such beverages. Hence, conceding that, as shown by the evidence, he did at times, varying in intervals of two to four weeks, drink both beer and whisky, such fact is not inconsistent with his answer, "No daily habit—occasional beer." The response made cannot, as urged by appellant, be construed as a representation that he never drank whisky at all; but, as we interpret the question and answer, it was simply a statement to the effect that he was not addicted to its daily use.

[10-12] The reply to question 4b is that he never at any time had used such liquors to excess. No court, so far as we are advised, has undertaken to define what constitutes the excessive use of alcoholic spirits. The cases of Malicki v. Chicago Guaranty Fund Life Society, 119 Mich. 151, 77 N. W. 690, and Brignac v. Pacific Mutual Life Ins. Co., 112 La. 574, 36 South. 595, 66 L. R. A. 331, involved different questions and cannot be deemed authority in support of appellant's contention. The meaning of the word "excess," as here used, is largely a matter of opinion, depending upon the capacity of the individual and liberality of view entertained upon the subject by the individual, whose opinion might again be governed by the time, place and occasion. Clinton v. State, 64 Tex. Cr. R. 446, 142 S. W. 591; Biermann v. Guaranty Mutual Life Ins. Co., 142 Iowa, 341, 120 N. W. 963. In the absence of any standard of measurement, the question is one of fact to be determined by the jurors, whose conclusion, as stated, would depend largely upon their views as to what constitutes excess in the use thereof. It cannot be determined upon the quantity used, because of the fact that an amount which might affect one individual would not be noticeable upon another. The most of the testimony bearing upon the question was given by witnesses from Daggett, near which place it appears deceased was engaged in the operation of a mine, and from which he, from two to four weeks, went to Daggett, at which times he concededly drank more or less whisky and beer. There is little testimony touching the quantity of his libations. Apparently he did not drink sufficiently to interfere with his transaction of business and it fairly appears that there was a conflict of evidence as to the effect upon him of that which he did drink. Under the circumstances shown, we cannot say that the jury, upon the testimony as to his habits of drinking at Daggett, were not justified in their verdict that he did not drink to excess. It appears from the testimony of two witnesses, James Hosick, a police officer of the city of Los Angeles, and a Mrs. Skinner, that McEwen did drink to an extent that resulted in his being drunk, and both of them go into details as to one particular occasion. As to the testimony of these two witnesses, the court instructed the jury that if they believed the same they should find that the applicant's answer to the question was false, but instructed them that the one particular instance referred to would not necessarily justify a verdict that the answer was false; that as to that, if they found their evidence true, they should consider whether or not it was a voluntary intoxication, or an incident where others who were with him succeeded in getting him intoxicated for purposes of their own, in which case they should not consider such act alone as justifying a finding that his answer was false, but that—

> "If you find from the evidence * * * that the deceased was in the habit of using wine, spirits, or malt liquors, and that had persisted for some time, and that he had on more than one occasion used them to excess, then you should find that the representations herein are false."

This last instruction was certainly as fair as defendant could ask, and it is apparent from the verdict that the jury did not believe the testimony of Hosick and Skinner as to repeated acts of drunkenness on the part of McEwen to which they testified. We cannot say that the verdict of the jury that the answers of McEwen to questions 4a and 4b are not justified by the evidence.

[13] 5. In answer to questions 1 and 2 McEwen stated that he was proprietor of a collection agency, in which business he had been engaged for 10 years. These questions called for full details, and, considering the sufficiency of the evidence to justify the verdict, we must bear in mind that McEwen certified that—

> "I declare, on behalf of myself and of any person who shall have or claim any interest in any insurance made hereunder, that I have carefully read each and all of the above answers; that they are each written as made by me; that each of them is full, complete and true. * * *"

At the date of making the application for the insurance, McEwen's chief business appears to have been that of mining. According to plaintiff's testimony, he went to New Mexico in 1904 and was there about a year, and in 1906 he went to Old Mexico, where he was engaged in the brick business and a part of the time in mining. When he returned from Old Mexico in 1906, he engaged in mining near Daggett, and a part of the time prospecting near Fallbrook. He continued in the mining business near Daggett until July, 1909. The evidence shows that he never had an office and was not connected with a collection agency; and while there is some evidence that he made collections for his father, a groceryman, and at times for others in a desultory way, it could in no sense be said that he was or had been for 10 years engaged in such occupation. Indeed, it clearly appears from the evidence that he not only was not the proprietor of a collection agency in any sense of the term, but that during the 10 years preceding the making of the application, and particularly from 1904 to July, 1909, he was engaged largely in mining and business other than that of collecting. In arriving at its verdict upon the answer given to this question, the court instructed the jury that it was to determine whether or not the statement made was substantially true.

> "By substantially true does not mean somewhat true, partially true, on the one hand, nor does it mean true in every possible and immaterial respect, on the other. It means true without qualification in all respects material to the risk."

Considering the character of this evidence, we think it apparent that the jury, under the instruction, believing it was its province to determine whether or not the representation was true "in all respects material to the risk," determined that it was immaterial, and therefore, notwithstanding the falsity of the answer shown by the evidence, rendered their verdict upon such theory. The court did not as to this question, as it did in others, determine the question of the materiality of the answer, but by this instruction clearly submitted to the jury the question of its materiality. The giving of the instruction as to this question was erroneous, since, as stated on the former appeal, "the materiality of the representations was a question of law for determination of the court and not the jury."

[14] 6. In response to question 7, "What illnesses, diseases, or accidents have you had since childhood?" McEwen answered, "Typhoid pneumonia; one attack in 1891; duration two months; severe; complete recovery." It conclusively and without contradiction appears from the evidence that in July, 1909, just a year prior to making the application for the policy, McEwen, at his mine near Daggett, was injured by being struck or kicked in the chest by the foot of a mule, as a result of which his back was strained and one rib broken; that, owing to total disability caused by the injury, he received from an accident insurance company the sum of $25 per week for a period of 16 weeks, amounting in all to $400. The character of the injury was such that it completely rendered him unfit for doing any business whatsoever; that he raised purulent matter and stated to Dr. Garrett that he spat blood, the cause of which, as stated by McEwen and determined by the doctor, was the injury received in this accident, the effect of which was for a time to seriously impair his health. The question not only called for a statement of diseases from which he had suffered since childhood, but as well accidents to which he had been subjected, and from which he had suffered. The answer was in effect that he had had no accidents. Notwithstanding the serious nature of the injury suffered from this accident, which disabled him for a period of nearly 4 months, he concealed from the company all knowledge thereof; the effect of his answer being that he had suffered no such injury from the accident as that shown. That the information was material and suppressed in bad faith admits of little doubt. Metropolitan Life Ins. Co. v. McTague, 49 N. J. Law, 587, 9 Atl. 768, 60 Am. Rep. 661; Metropolitan Life Ins. Co. v. Brubaker, 78 Kan. 146, 96 Pac. 62, 18 L. R. A. (N. S.) 362, 130 Am. St. Rep. 356, 16 Ann. Cas. 267; Bryant v. Modern Woodmen of America, 86 Neb. 372, 125 N. W. 621, 27 L. R. A. (N. S.) 326, 21 Ann. Cas. 365; McCollum v. New York Life Ins. Co., 124 N. Y. 642, 27 N. E. 412; Cooley's Briefs, vol. III, p. 2109; Civ. Code, §§ 2561, 2579. The trial judge appears to have recognized the facts concerning the accident were undisputed. It is impossible to reconcile the verdict of the jury, to the effect that the answer to this question was true, save and except upon the theory that the injury sustained at the time, however severe and serious in character it may have been, did not in the minds of the jurors tend to increase the risk assumed by defendant in insuring McEwen's life. This conclusion, no doubt, was due to an instruction given by the court, which we deem clearly erroneous. The court, after referring to the accident which the evidence established, stated to the jury:

> "No mention is made of this by the deceased in this application. If you find from the evidence that the deceased was struck or kicked by a mule, and that as a result of the injury so received, he was disabled for a number of weeks, and unable to continue his occupation from July 2, 1909, to August 26, 1909, that he was not able to continue in his occupation during that period, that the injury was such as it might have a tendency to affect the longevity of the deceased, then you will find that the answer to that question was false."

In view of the uncontradicted evidence, it is impossible to conceive of the jury reaching the verdict rendered, except upon the hypothesis that the accident and resultant injury therefrom did not "have a tendency to affect the longevity of the deceased." Not only was the instruction erroneous, but it was clearly prejudicial to defendant, in that, except for it, the verdict must, upon the evidence, have been a negative answer. The opinion of the jury upon the question as to whether the injury affected his longevity had nothing to do with the truth of the answer. By asking the question as to accidents, the company fixes its estimate of its importance, and the applicant agrees thereto. Had the answer been true, the information would have afforded means for the company to determine whether the life of one so injured was a desirable risk.

> "It would be a violation of the legal rights of the company to take from it its acknowledged power, thus to make its opinion the standard of what is material, and to leave that point to the determination of a jury." Jeffries v. Economical, etc., Ins. Co., 22 Wall. 47, 22 L. Ed. 833; Hubbard v. Mutual, etc., Ass'n, 100 Fed. 726, 40 C. C. A. 665.

Certainly, considering the nature of the injury sustained by the applicant, the information was material to the company, and it may well be that, had the company received information from the applicant that within the year he had sustained injuries to his chest, resulting in one rib being broken, his back strained, and as a result of which he spat blood and purulent matter, and on account of which he received from an accident insurance company $25 per week for a period of 16 weeks, it would not have assumed the risk upon his life. Indeed, it may be that the injury thus received was the latent cause of his death. For this error, if for no other, we feel that the judgment and order should be reversed.

[15] 7. Appellant complains of the fact that the court throughout the instructions told the jury that their verdict depended upon whether or not they found the "statements" made were false; whereas, the court should have instructed the jury that, if they found any one of the statements false, their verdict should be in favor of the defendant. Since, however, the jury found all of the statements true, the defendant could not have been prejudiced by reason of the instruction given, even if it be conceded erroneous.

[16] 8. Since the court might in its discretion have refused to submit any questions to the jury for a special verdict, no error can be predicated upon the fact that the court refused to submit to the jury certain interrogatories requested by the defendant. Section 625, Code Civ. Proc.; Pigeon v. Fuller, 156 Cal. 691, 105 Pac. 976.

There are other alleged errors; but, in view of what has hereinbefore been said, we deem it unnecessary to discuss them.

For what we conceive to be errors, herein discussed under subdivisions 5 and 6, the judgment and order denying defendant's motion for a new trial are reversed.

We concur: CONREY, P. J.; JAMES, J.

(42 Cal. App. 81)

MENEFEE et al. v. OXNAM et al.

(Civ. 2913.)

(District Court of Appeal, Second District, Division 2, California. July 5, 1919.)

1. JOINT ADVENTURES 🔑4(1) — DUTY OF JOINT ADVENTURERS.

The tendency of modern decisions is to regard the rights of joint adventurers, as between themselves, as practically governed by the rules fixing the rights of partners, and, the relation between joint adventurers being fiduciary in character, each must be held strictly to account to his coadventurers, and will not be permitted to enjoy any unfair advantage.

2. JOINT ADVENTURES 🔑4(1) — RIGHTS OF PARTIES—FRAUD.

The failure of one of several joint adventurers in an enterprise, looking to the purchase of property, to share with his coadventurers any secret advantage given by their vendor for inducing the purchase, is such a breach of confidence as amounts to a constructive fraud, and will entitle his coadventurers either to rescind the contract, or to maintain an action for damages against either or both parties to the secret understanding.

3. JOINT ADVENTURES 🔑4(1)—FRAUD OF COADVENTURER—DAMAGE.

Where one party to a joint adventure, which contemplates the purchase of property, receives an advantage which he does not share with his coadventurers, it is not necessary that those adventurers, complaining of the breach of faith, should have been actually injured; for, while it is a general rule that fraud without injury is no ground for relief, it is unnecessary for the defrauded party to show more than a slight injury, and the very breach of confidence causes injury.

4. JOINT ADVENTURES 🔑8—BREACH OF CONFIDENCE—COMPLAINT.

A complaint by all but one of the parties to a joint adventure, seeking a rescission of contract of purchase on the ground that one of them did not share with his coadventurers the profit from a secret agreement, which he made with the vendor of the property which was purchased, *held* to sufficiently allege damage under the liberal rule of Code Civ. Proc. § 452.

5. JOINT ADVENTURES 🔑7—CONTRACTS—RESCISSION.

Where a vendor of property, which was acquired by joint adventurers, by secret agreement gave one of them an advantage not shared by the others, the vendor was a party to the constructive fraud as much as the adventurer receiving the benefit, and hence upon discovery those adventurers not parties to the agreement were entitled to rescind.

6. JOINT ADVENTURES 🔑7—CONTRACTS—RESCISSION—DELAY.

While parties must promptly rescind on discovery of the facts entitling them to the relief, joint adventurers cannot be held remiss for failing to rescind a contract of purchase until they learned that one of their number was benefited by a secret agreement between himself and the vendor of the property which they acquired.

7. JOINT ADVENTURES 🔑7—CONTRACTS—RESCISSION—NOTICE.

Where joint adventurers, because of the existence of negotiations between the executrix of their vendor and themselves, delayed for five weeks in giving notice of election to rescind the contract, after discovery that one of their number was given advantage of a secret profit, such delay in giving notice of rescission was not unreasonable.

8. CONTRACTS 🔑270(1)—RESCISSION—DELAY—SUIT.

Where plaintiffs' delay in commencing action, after giving notice of their election to rescind the contract, in no wise damaged defendant, the delay is no ground for denial of relief.

9. CONTRACTS 🔑266(2) — RESCISSION — RETURN.

Where, in an action to rescind a contract, a return in specie of all the property received by the plaintiff is rendered impossible by reason of his having parted with a portion of it before discovery of fraud, *held*, under Civ. Code, § 3408, that rescission will not be denied, where there is a return of all property on hand with compensation in money for the remainder.

10. JOINT ADVENTURES 🔑8 — CONTRACTS — RESCISSION—ACTION—COMPLAINT.

A complaint by joint adventurers, seeking rescission of the contract for purchase of a mining claim, *held* not open to demurrer on the ground that there was not an offer to return some of the bullion extracted from the claim while adventurers were in possession, and before they discovered the fraud which entitled them to rescind.

11. JOINT ADVENTURES 🔑8—ACTIONS—COMPLAINT—SUFFICIENCY.

A complaint by joint adventurers seeking to rescind a contract for purchase on ground that the vendor gave one of them an advantage not shared by the others, *held* to state a cause of action and to be good against demurrer.

12. PLEADING 🔑34(1)—CONSTRUCTION—COMPLAINT.

Under Code Civ. Proc. § 452, a complaint should be liberally construed with a view to substantial justice, and the liberal spirit is carried into Const. art. 6, § 4½; hence a complaint, though not a model pleading, is not open to special demurrer, where the facts pleaded disclosed the cause of action.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by A. B. Menefee and others against Mamie Oxnam, as executrix of the estate of T. H. Oxnam, deceased, and W. T. MacDonald, as to whom the action was dismissed before trial. From a judgment for defendant sustaining a demurrer to the amended complaint, plaintiffs appeal. Reversed, with directions to overrule the demurrer.

Dell A. Schweitzer, of Los Angeles, Harry W. Elliott, of Corona, and Schweitzer & Hutton, of Los Angeles, for appellants.

George W. Dryer and Mulford & Dryer, all of Los Angeles, for respondents.

FINLAYSON, P. J. Judgment was entered against plaintiffs upon a demurrer to their third amended complaint. The demurrer was general and special. This appeal is from that judgment.

The complaint shows plaintiffs' case to be substantially as follows: On November 5, 1913, T. H. Oxnam, since deceased, as party of the first part, and these three plaintiffs and defendant MacDonald, as parties of the second part, entered into a written contract whereby Oxnam agreed to sell to plaintiffs and MacDonald an undivided four-fifths of a mine then owned by Oxnam, upon these terms: The parties of the second part, four in number, were given the right to purchase the undivided four-fifths for $20,000. This $20,000 was to be paid in two years, as follows: A promissory note for $7,500, executed by MacDonald, payable on or before October 31, 1915, was to be given to Oxnam, and the balance, $12,500 was to be paid out of the net proceeds from the mining property which, it was agreed, should be worked by the four purchasers. It further was agreed that the purchasers, plaintiffs and MacDonald, should deposit the sum of $22,500 in bank. Of this sum, not less than $15,000 was to be expended by the purchasers in the installation of a new cyanide plant, repairs to the mill, and installation of additional equipment, the balance, if any, to be used as working capital. It also was agreed that, after Oxnam had received from the profits of the mining operations all of the balance of the $20,000 left after subtracting MacDonald's note for $7,500, and after plaintiffs and their associate, MacDonald, had received $30,000 from the proceeds, then, but not before, Oxnam should be entitled to profits on the undivided one-fifth that he retained.

Before entering into the contract with Oxnam to purchase the undivided four-fifths, it was agreed between plaintiffs and MacDonald that if they made the contract with Oxnam they would operate the mine as equal and joint owners and equal active partners. All the details of the purchase and the negotiations leading up to the contract with Oxnam were left to MacDonald. Plaintiffs relied upon MacDonald's honesty and upon his becoming equally interested financially with them in the purchase. Oxnam knew MacDonald represented plaintiffs, and that he was acting for them as an equal partner.

Prior to and in anticipation of the execution of the contract to purchase from Oxnam the undivided four-fifths, MacDonald, notwithstanding he and plaintiffs were coadventurers in the purchase of the property, entered into a secret side agreement with Oxnam, whereby Oxnam agreed with MacDonald that if the operation of the mine did not produce sufficient profits to enable the latter to pay his note to Oxnam for $7,500 within the two years, he should have the right to reconvey to Oxnam his one-fifth interest in the mining property, and Oxnam would thereupon return his note to him. This secret side agreement between Oxnam and plaintiffs' joint associate, MacDonald, was entered into "in consideration of plaintiffs signing the said contract"—the contract of purchase that plaintiffs and MacDonald made with Oxnam. Had plaintiffs known of the secret agreement between their associate, MacDonald, and Oxnam, they would not have entered into the contract of purchase with Oxnam. The existence of this secret side agreement was not discovered by plaintiffs until August 11, 1915, when MacDonald informed them of it.

Plaintiffs and MacDonald entered into possession of the mining property and operated it. Its operation, however, proved unprofitable. MacDonald has never paid any part of his note to Oxnam. In operating the property plaintiffs expended, in all, $32,894.27, of which $22,500 was expended in installing the new cyanide plant and as otherwise provided in their contract with Oxnam; $4,486 was expended in other improvements, which have become a part of the property, and the balance in operating expenses.

Oxnam died February 16, 1915. Thereafter letters testamentary were issued to the defendant and respondent, Mamie Oxnam, who is now the sole defendant, the action having been dismissed as to defendant MacDonald on plaintiffs' motion.

Upon discovering the secret side agreement between Oxnam and MacDonald, plaintiffs, claiming to have been defrauded thereby, and that they had been damaged by reason of the expenditures they had made under their contract with Oxnam during the time when they had no reason to believe the contract tainted with fraud, entered into negotiations with the executrix and her legal advisers, in an endeavor to effect a settlement of their claim for damages. These negotiations, extending over a period of about seven weeks, proving ineffective, plaintiffs served upon the executrix a notice of rescission, and about two weeks thereafter presented to her, as executrix, their verified claim for $32,841.66, the moneys so expended by them under their contract of purchase with defendant's testator. The claim having been retained by the executrix for more than 10 days without being allowed, this action was commenced.

We shall first consider whether the complaint states a cause of action and is good as against the general demurrer.

[1, 2] It is of no consequence whether appellants and their associate, MacDonald, ever became partners, in any strict sense of the term, nor what may be the respective rights and obligations of mining partners, inter sese. Appellants and MacDonald were joint adventurers in a common enterprise—an enterprise that contemplated the purchase of the undivided four-fifths of the mine and the operation of the property, not only for ultimate profit, but as a means of paying to their vendor the balance of the purchase price over and above the $7,500 that MacDonald was to pay pursuant to the terms of his promissory note to their vendor.

The tendency of the modern decisions is to regard the right of joint adventurers, as between themselves, as governed practically by the same rules that govern the relations of partners. 15 R. C. L. 500. The relation between joint adventurers is fiduciary in its character. The utmost good faith is required of each in his dealings with the others. Each will be held strictly to account to his coadventurers. He will not be permitted to enjoy any unfair advantage, or any greater rights than he and his coadventurers are entitled to under the terms of their agreement or understanding. The mere fact that he is intrusted with the rights of his coadventurers imposes upon him the duty of guarding their rights equally with his own. In accordance with the principles of good faith and confidence governing the relations of joint adventurers, a coadventurer may not conceal his interest or his profits from his associates in the enterprise. None will be allowed to obtain by secret agreement any advantage over the others. The consent of each to the joint adventure is usually given, and the money of each obtained, on the understanding and belief that the funds, interest, and aid of each are and will be given to the enterprise within the bounds agreed upon. The failure of one of the several joint adventurers, in an enterprise looking to the purchase of property, to share with his coadventurers any secret advantage given by their vendor for inducing the purchase by the other coadventurers, is such a breach of confidence as amounts to constructive fraud, and will entitle his coadventurers either to rescind the contract, or to maintain an action for damages for fraud and deceit against either or both parties to the secret understanding, or to have the coadventurer receiving the benefit account to his associates in the enterprise. 15 R. C. L. 500–503; 23 Cyc. 452, et seq.; Noble v. Fox, 35 Okl. 70, 128 Pac. 102, 43 L. R. A. (N. S.) 933, and note; Jefress v. Phillips, 31 Okl. 202, 120 Pac. 916; Gilpin v. Netograph Mach. Co., 25 Okl. 408, 108 Pac. 382, 29 L. R. A. (N. S.) 477; King v. White, 119 Ala. 429, 24 South. 710; Kennah v. Hoston, 15 Wash. 275, 46 Pac. 236; Grant v. Hardy, 33 Wis. 668; Lind v. Webber, 36 Nev. 623, 134 Pac. 461, 135 Pac. 139, 141 Pac. 458, 50 L. R. A. (N. S.) 1046, Ann. Cas. 1916A, 1202; Hambleton v. Rhind, 84 Md. 456, 36

Atl. 597, 40 L. R. A. 216, and note; Humburg v. Lotz, 4 Cal. App. 438, 88 Pac. 510; Richards v. Fraser, 122 Cal. 456, 55 Pac. 246; Id., 136 Cal. 460, 69 Pac. 83; Llewelyn v. Levi, 157 Cal. 31, 106 Pac. 2, 19; Denis v. Gordon, 163 Cal. 427, 125 Pac. 1063; Lomita L. & W. Co. v. Robinson, 154 Cal. 36, 97 Pac. 10, 18 L. R. A. (N. S.) 1106; California, etc., Min. Co. v. Walls, 170 Cal. 285, 149 Pac. 595.

As a rule, cases of the character now under consideration are cases where the perfidious joint adventurer, by a secret side agreement, has gained some profit, either in money or property, in which his coadventurers will be held entitled to share. Such was the case in Lomita L. & W. Co. v. Robinson, supra. Or they are cases where the unfaithful coadventurer, by a secret agreement with the vendor of the joint adventurers, has received his share of the property purchased gratuitously, or for less than the amount contemplated by his agreement with his associates. This was the case in Noble v. Fox, supra. Here, however, MacDonald did not receive any secret commission, or any advantage, either in money or property, of such a nature that his coadventurers can share therein; nor was he to receive his undivided interest in the mine gratuitously. However, we think the case clearly falls within the principle announced in the cases cited supra.

[3] In actions of this character it is not necessary that the parties complaining of the breach of faith on the part of their coadventurer should allege or prove that they have actually been injured by his breach of their confidence. Unquestionably it is the general rule that fraud without injury is not ground for relief, either in law or equity; though even under this general rule the injury need not be of such a nature that it can be accurately measured in money, but it will suffice if the defrauded party has been but very slightly prejudiced. Spreckels v. Gorrill, 152 Cal. 383, 388, 92 Pac. 1011. Though it is the general rule that fraud without at least some slight injury is not ground for relief, this general rule is not an obstacle to recovery in cases of the kind here under consideration, even though there be a total absence of injury to the complaining party. That is, where one occupies a fiduciary relation to the plaintiff, and, acting in co-operation with the defendant, he abuses the confidence of the plaintiff, his associate in a common enterprise, by entering into a secret agreement with the defendant, the general rule that fraud without injury is not ground for relief is not applicable, and the plaintiff will be entitled to relief whether he has been injured or not. Both law and equity have a most tender regard for the rights of a complaining party growing out of a fiduciary relationship. So that, where any abuse of that relation is discovered, the complaining party is entitled to relief, whether any actual damage be established or not. In this class of cases the question is not whether the breach of confidence has resulted in profit to the unfaithful coadventurer, or whether it has resulted in injury to his joint adventurers, but whether there has been a breach of confidence on the part of the fiduciary. The great solicitude of the courts has been rather wholly to avoid any recognition of a principle that, in the hands of avaricious and cunning men, might be turned to their own account, than to inquire whether the complaining party has suffered any actual disadvantage. The rule that a coadventurer must act with utmost good faith, and in all things be faithful and loyal to his associates and to the purpose of the enterprise, is not intended to be remedial of actual wrong, but preventive of the possibility of it, and it matters not that there is no fraud meditated and no injury done. Henninger v. Heald, 52 N. J. Eq. 431, 29 Atl. 190, affirmed 53 N. J. Eq. 694, 35 Atl. 1130.

[4, 5] But even if, in cases of this character, it were necessary to show injury in order to entitle the complaining party to relief, we think the complaint, if "liberally construed, with a view to substantial justice between the parties" (section 452, Code Civ. Proc.), does show injury to plaintiffs. Under the terms of the contract of purchase made by MacDonald and plaintiffs with Oxnam, the four purchasers were to receive an undivided four-fifths of the mine. The complaint alleges that it was agreed between MacDonald and appellants, before making their contract of purchase with Oxnam, that if they entered into the contract with Oxnam the four would own and operate the property "as equal joint owners and equal active partners," and that appellants relied upon MacDonald "becoming equally interested financially" with them "in the purchase of the said mining property." Under the terms of the contract of purchase each of the four associates was to be liable for the payment of some money, whether the venture proved to be profitable or otherwise. MacDonald was to pay $7,500 upon the maturity of his note to Oxnam, and each of the three appellants was to be liable for his share of the $22,500 that was to be advanced for the installation of the new cyanide plant, the purchase of the other and additional equipment, and the working capital. The complaint does not allege whether, according to the agreement between the four purchasers, MacDonald was to furnish any part of this $22,500. But whether he was or not, it certainly was understood that, on or before the maturity of his note to Oxnam, he was to pay at least the face of that note, $7,500. In other words, though the complete understanding between MacDonald and appellants is not disclosed by the complaint, nevertheless, whatever it may

have been, MacDonald, whether the enterprise proved a losing or a profitable venture, whether the mining property proved valuable or valueless, was to pay $7,500 at least, and, possibly, a part of the $22,500; and each of appellants was to pay his share of the $22,500—regardless of how the venture terminated. In short, the agreement between the four joint adventures, whatever it may have been in its entirety, required of each the payment of a sum of money, win or lose. But, by reason of the secret side agreement between Oxnam and MacDonald, the latter, if the venture proved unprofitable, was to be relieved of the payment of his agreed share of the purchase price, to the extent, at least, of the sum evidenced by his note—$7,500—upon his reconveying to Oxnam his share of the purchased property—an undivided one-fifth of the mine. This secret side agreement was therefore unquestionably one of considerable advantage to MacDonald, and, of course, a corresponding disadvantage to the vendor, Oxnam, who, in the event that his mine proved worthless after the efforts of the four joint purchasers to work it profitably, was not to receive the $7,500 which the contract between him and his four vendees contemplated that he should receive in any event, upon the maturity of the note executed to him by MacDonald. It is a reasonable inference, therefore, that if Oxnam had not made this prior, secret side agreement with MacDonald, he could have afforded to make, and, possibly, might have made, with the four coadventurers and purchasers, an agreement more advantageous to appellants. It is alleged in the complaint that Oxnam gave MacDonald the secret side agreement "in consideration of plaintiffs signing the said contract," i. e., the contract of purchase that appellants and MacDonald made with Oxnam. The only reasonable inference from this allegation is that Oxnam, deeming his secret side agreement with MacDonald of advantage to the latter, concluded he could make it a means whereby to secure the execution by appellants of the contract of purchase that finally was made, by using MacDonald as a decoy to get his coadventurers into the deal upon terms satisfactory to Oxnam, that is, upon the terms set forth in the contract of purchase as finally made. Any such trick as that is a fraud; and if it resulted in a contract of purchase less advantageous to appellants than they otherwise would have secured, it worked an injury to them.

By entering into the written contract of purchase, along with his coadventurers, MacDonald, in effect, represented to them that he was purchasing an undivided interest upon the terms in that contract set forth. This representation, inferable from the fact that he agreed to become one of the joint purchasers upon the terms and conditions set forth in the written contract of purchase, may well have been a substantial inducement to his coadventurers to join with him in their contract with Oxnam. Appellants left it to MacDonald to carry on the negotiations for the purchase of the property. We cannot read the complaint without being impressed with the idea that MacDonald was the leader in the joint enterprise, and that appellants, his coadventurers, placed great reliance upon his judgment and faith in their proposed venture. For this reason MacDonald, by joining with appellants in the purchase of the property, thereby may have, and possibly did, lead his associates to believe that his confidence in the outcome of their enterprise was such that he was willing to obligate himself to the extent of $7,500 at least, whether the venture proved profitable or otherwise. For this reason the mere fact that MacDonald executed the contract of purchase as a joint purchaser with appellants afforded ample basis for the allegation that, had appellants known of the secret side agreement, they would not have entered into the contract with Oxnam to purchase the property.

In view of the failure of the complaint fully and completely to set forth the understanding between appellants and MacDonald, we have assumed that MacDonald was to put up some part of the $22,500 that was to be advanced to purchase the new cyanide plant, etc., thus assuming the situation to be that which is the most favorable to respondent. However, from certain facts appearing upon the face of the contract of purchase itself, as well as from facts alleged in the complaint, we are disposed to surmise that the understanding between the four joint adventurers was that MacDonald was to give his note for $7,500, but was not to be obligated to pay any further sum, and that each of his three associates was to put up, in cash, a similar amount; thus making the total amount of cash to be advanced by the three appellants equal the sum of $22,500—the amount that the purchasers agreed was to be advanced to purchase the new cyanide plant, etc. If this assumption be correct, then, if MacDonald continued unconditionally obligated to pay his note for $7,500, as contemplated by the contract of purchase made by himself and coadventurers with Oxnam, each of the four would be obligated for $7,500, or one-fourth of $30,000. This surmise comports with that provision of the contract whereby it is provided that Oxnam was not to receive any of the profits from the mine until the four purchasers had taken out of the profits, if any there might be, not only the balance of what was denominated the purchase price ($12,500), but the further sum of $30,000. In other words, we are inclined to the supposition that, according to the agreement between the four coadventurers, whatever that agreement in its entirety may have been, each of them was to obligate himself to Oxnam in an equal amount, and each was to pay his share whether any profits were received from the mine or not, except that MacDonald, instead of being required to make an immediate payment of his share, $7,500, was not to pay his pro rata until the maturity of his note. This assumption accords with the allegation of the complaint that appellants relied upon MacDonald becoming "equally interested financially with the plaintiffs in the purchase of the said mining property." If this be so, then the effect of the secret side agreement between Oxnam and MacDonald would be this: MacDonald, as well as Oxnam, without paying or becoming obligated for any sum whatever, but at appellants' risk and expense and on the strength of the $22,500 to be advanced by appellants, would receive the benefit of all development work to be done on the mine; so that, if the mine proved to be valuable, MacDonald, as well as Oxnam, without incurring any risk, but at appellants' expense, would have his undivided one-fifth demonstrated to be a valuable interest, and, if the mine turned out to be valueless, he and Oxnam would lose nothing beyond their fleeting expectations of valuable mining interests, while appellants would be out $22,500. However, irrespective of whether or not we have conjectured correctly the nature of the agreement between MacDonald and his three associates, the result of this appeal must be the same. For this much is certain: MacDonald, according to the contract of purchase, was to be obligated for at least $7,500, and this sum, according to the understanding evidenced by the contract of purchase, he was to pay in any event, whether the venture proved to be a winning or a losing proposition; but, according to his secret side agreement with Oxnam, unknown to his associates—a secret agreement entered into "in anticipation of the execution of the contract of purchase" and "in consideration of plaintiffs signing the said contract" of purchase—MacDonald was not to pay even that $7,500, in the event that it should turn out that the mining operations did not return a profit sufficient to enable him to pay his note out of his share of the profits. This for reasons already stated, was a fraud upon his joint adventurers—a fraud that entitled them to rescind their contract with Oxnam as an aider and abettor in the consummation of that fraud.

Respondent suggests that Oxnam never became a partner of appellants; that, therefore, there was no fiduciary relation between him and them; and that, consequently, he is not liable, his secret side agreement with MacDonald notwithstanding. This, clearly, is non sequitur. MacDonald, as a coadventurer of appellants, occupied towards them a confidential relation that demanded of him the utmost good faith in all his dealings with, or on behalf of, his associates in the common enterprise, and precluded him from making, for the advantage of himself or Oxnam, the secret side agreement, the making of which was a breach of his duty to appellants and a fraud upon them. Oxnam, knowing all the facts, aided and abetted him in the consummation of this fraud. Oxnam, therefore, was as much guilty of this constructive fraud as was MacDonald. Lomita L. & W. Co. v. Robinson, supra; King v. White, supra. "Persons united for a common purpose must be loyal to that purpose and to each other. None may * * * secure an unfair advantage over those interested with him. * * * Those aiding him in procuring an advantage may, in equity, be held liable with him for the fraud." 23 Cyc. 455. For this reason Oxnam's contract with appellants was tainted with fraud, upon the discovery of which appellants were entitled to rescind the vitiated contract. Noble v. Fox, supra.

Though notice of appellants' election to terminate their contract with Oxnam was given to respondent as executrix, and this action to obtain a judicial decree of rescission and be restored to the status quo is an appropriate remedy, it is claimed by respondent that appellants lost their right of rescission by failure to assert it promptly. There seems to be some confusion in the minds of respondent's counsel in regard to the precise nature of the fraud of which appellants complain. Respondent's counsel say that, if the secret side agreement between MacDonald and Oxnam affected the operation of the mine to any appreciable extent, appellants could not have gone on with their operations for a year and nine months without having their suspicions aroused. But clearly this is not an action where appellants are complaining of any fraudulent misrepresentations as to the character or value of the mining property. What they complain of is the disloyalty of their coadventurer, MacDonald, in concealing from them the fact that their common vendor, Oxnam, was willing, if the mining operations did not prove profitable, to take back MacDonald's share of the undivided four-fifths agreed to be conveyed to the four associates, and relieve him from all obligation to pay the $7,500 which, by the contract of purchase and his promissory note, he had obligated himself to pay as his share, or at least as a part of his share, of the entire purchase price, regardless of how the joint enterprise eventuated.

[6] It no doubt is the general rule that one seeking to rescind a contract must exercise the right promptly upon discovering the facts which entitle him to rescind. Here the fact relied upon as giving the right to rescission is the existence of a secret contract between respondent's testator and appellants' coadventurer, MacDonald. In the nature of things, that fact, hidden in the secret recesses of the hearts of MacDonald and Oxnam,

could not be discovered until one or the other in some manner communicated it to the outside world. Appellants are not chargeable with remissness because they did not discover the fact until it was communicated to them by MacDonald on or about August 11, 1915.

[7] While it is true that appellants did not give notice of rescission until about seven weeks after the discovery of the secret agreement, the delay was the result of indulgences extended to them by respondent, who, by countenancing negotiations with appellants in their endeavor to effect a compromise and settlement of their claim, necessarily led appellants to refrain from giving that notice of rescission which is a necessary prelude to a contest in court for a judicial decree of rescission. Notice of rescission has been held to be within reasonable time if given within two months after the discovery of the fraud. Hill v. Wilson, 88 Cal. 92, 97, 25 Pac. 1105.

[8] It is claimed that sufficient diligence was not shown in bringing the suit after the notice of rescission. It does not appear when the original complaint was filed. On the other hand, it does appear that any delay which there may have been in bringing the suit after the discovery of the secret agreement and the notice of rescission was, or could have been, at all injurious to respondent or the estate which she represents.

[9, 10] Respondent's contention that the complaint fails to show that appellants offered to restore to Oxnam, or to his estate, everything of value received by them under the contract, is not tenable. The complaint specifically alleges not only that appellants and MacDonald have executed and delivered to the heirs of Oxnam a quitclaim deed to the mining property, as requested by the representatives of the estate, and have turned over to the representatives of the estate the possession of the mine, personal property, supplies, and equipment, but that appellants have actually restored and returned "everything received under or by virtue of said contract of purchase or mining operations." It is true that it appears, inferentially, that appellants disposed of bullion from the mine. They allege that they spent $5,908.18 for repairs, supplies and operating expenses, "over and above all moneys received by them, * * * for the bullion receipts or other proceeds of said mining business." Respondent contends that the receipts for the bullion may have been less than its reasonable market value, and cites Bailey v. Fox, 78 Cal. 389, 20 Pac. 868, to support her claim that a sufficient offer to restore the status quo has not been shown. In view of the express allegation that appellants actually have restored to the estate of T. H. Oxnam, deceased, everything of value received, we must conclude that they either repurchased the bullion and returned it to Oxnam's estate, or else that its value is less than any balance that appellants may be entitled to recover. Where, in an action of this character, a return in specie of all the property received by the plaintiff is rendered impossible by reason of his having parted with a portion of it before discovery of the fraud, the requirements of justice are satisfied by a return of the property on hand with compensation in money for the remainder. Basye v. Paola Min. Co., 79 Kan. 755, 101 Pac. 658, 25 L. R. A. (N. S.) 1302, 131 Am. St. Rep. 346; Wright v. Dickinson, 67 Mich. 580, 35 N. W. 164, 11 Am. St. Rep. 602; Henninger v. Heald, supra; Spreckels v. Gorrill, supra, 152 Cal. 392, 394, 92 Pac. 1011; Civ. Code, § 3408. If, after allowing respondent's claim for the reasonable market value of all ore and bullion that appellants may have sold, if any, there is still a balance due appellants, no express offer to return, in money, the actual value of such ore or bullion is necessary. The equities of the parties may be fully adjudged without such unnecessary circumlocution. "One who attempts to rescind a transaction on the ground of fraud is not required to restore that which in any event he would be entitled to retain." Richards v. Fraser, supra; Matteson v. Wagoner, 147 Cal. 739, 744, 82 Pac. 436.

[11] For the foregoing reasons we think the complaint, considered as a whole—that is, read as though the matters erroneously stricken therefrom had remained in—states a cause of action, and that it is good as against respondent's general demurrer.

[12] Nor do we think the complaint vulnerable under the attack by the special demurrer. It is true it is not a model pleading, stating in ordinary and concise language the facts constituting the cause of action. Still it is not fatally uncertain in any of the particulars pointed to by the special demurrer. We readily can see from the facts pleaded that, by more direct allegations of certain facts that seem clearly inferable from the facts alleged, as well as from the facts disclosed by the terms of the contract of purchase, appellants easily might have avoided any attack on the ground of uncertainty. However, we think the complaint sufficient if its allegations be liberally construed, with a view to substantial justice, as is required by section 452 of the Code of Civil Procedure, whereby the old common-law rule that a pleading must be construed most strongly against the pleader has been abrogated and superseded by the more liberal rule of the statute. Estate of Wickersham, 153 Cal. 603, 96 Pac. 311. In recent years great changes have been wrought by the Code in the rules for the construction of pleadings. For sufficiency of the facts pleaded, courts look to substance, not to form. The basic principle of the Code Procedure is that the administration of justice should not be embarrassed by technicalities, strict rules of construction, or useless forms. This liberal spirit has even been carried into the Constitution. Section 4½,

art. 6. The Code requires not only a liberal construction, with a view to substantial justice between the parties, but also that the court shall disregard any defect in the pleadings which does not affect the substantial rights of the parties. Code Civ. Proc. § 475. Construing the complaint in the light of these liberal provisions, we think it impregnable to the attack made upon it by this demurrer.

Many of the particulars as to which the demurrer charges uncertainty are matters that lie peculiarly within respondent's or her testator's knowledge, as, for instance, the facts immediately connected with the secret side agreement between MacDonald and Oxnam, also the facts connected with the time within which appellants' verified claim should have been presented. As to such facts respondent cannot be heard to complain that appellants have not alleged them with sufficient certainty.

Nor do we think the court was justified in granting respondent's motion to strike out certain parts of the complaint. Many of the allegations stricken out were relevant and material. For example, the allegations that the secret side agreement was entered into "in anticipation of" the execution of the contract of purchase, and that it was entered into "in consideration of plaintiffs signing the contract of purchase," were certainly material. The allegation that the secret side agreement was entered into "in anticipation of" the execution of the contract of purchase tends to show the connection between the two agreements, and that Oxnam and MacDonald were conspiring to bring about the execution of the contract of purchase by using MacDonald as a decoy. So, also, the allegation that the execution of the contract of purchase was the "consideration" for the secret side agreement tends to show the use of MacDonald as a decoy to induce appellants to enter into a contract that otherwise they possibly would not have made.

The judgment is reversed, and the court below directed to overrule the demurrer to the complaint, with leave to defendant to answer.

We concur: SLOANE, J.; THOMAS, J.

180 Cal. 783

Ex parte McDERMOTT. (Cr. 2264.)

(Supreme Court of California. July 31, 1919.)

1. INSURRECTION ⚷2—PUBLICATION OF ANARCHISTIC DOCTRINE—STATUTE—VALIDITY.

Act April 30, 1919 (St. 1919, p. 281), defining criminal syndicalism and sabotage, and prescribing penalties, is not beyond the legislative powers, at least in so far as its provisions are material in case in which the prisoner is charged with the offense defined by section 2, subd. 3.

2. STATUTES ⚷251 — EMERGENCY CLAUSE — SUFFICIENCY.

Section 4 of Act April 30, 1919 (St. 1919, p. 282), as to criminal syndicalism and sabotage, *held* to be a sufficient compliance with Const. art. 4, § 1, requiring a statement in one section of the act of the facts making it necessary in the judgment of the Legislature that a law shall go into immediate effect.

In Bank.

In the matter of the application for a writ of habeas corpus in behalf of Thomas McDermott. Application denied.

J. G. Lawlor, of San Francisco, for petitioner.

PER CURIAM. The prisoner has been held to answer a charge of willfully, unlawfully, and feloniously circulating and publicly displaying certain books, papers, pamphlets, documents, and other printed and written matter, containing and carrying written and printed advocacy, teaching and advising criminal syndicalism, to wit, advocating, teaching and advising commission of crime, sabotage, and other willful and malicious damage and injury to property, and unlawful acts of force and violence and unlawful methods of terrorism as a means of accomplishing a change in industrial ownership and control and effecting political changes.

The complaint or deposition on which he was held to answer stated an offense under the language of an act of the Legislature entitled "An act defining criminal syndicalism and sabotage, prescribing certain acts and methods in connection therewith and in pursuance thereof and providing penalties and punishments therefor," approved April 30, 1919 (St. 1919, p. 281). The term "criminal syndicalism" is defined in section 1 of the act as "any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change." Subdivision 3 of section 2 defines the particular offense with which the prisoner was charged in substantially the language used in the complaint or deposition.

[1, 2] No reason for holding this act to be beyond legislative power appears to us, certainly in so far as its provisions are material in this case. Section 4 of the act is as follows:

> "Inasmuch as this act concerns and is necessary to the immediate preservation of the public peace and safety, for the reason that at the present time large numbers of persons are going from place to place in this state advocating, teaching and practicing criminal syndicalism, this act shall take effect upon approval by the governor."

We think this to be a sufficient compliance with the provisions of section 1 of article 4 of the Constitution requiring a statement "in one section of the act" of the facts making it necessary in the judgment of the Legislature that a law shall go into immediate effect, where the Legislature considers that this is necessary "for the immediate preservation of the public peace, health or safety." The courts may not say that this conclusion of the Legislature was not justified.

We have read the evidence adduced on the preliminary examination, and cannot hold that the prisoner has been committed for trial without reasonable or probable cause.

The application for a writ of habeas corpus is denied.

ANGELLOTTI, C. J., and SHAW, MELVIN, LAWLOR, WILBUR, LENNON, and OLNEY, JJ., concur.

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181 Cal. 58

EARL v. DUTOUR et al. (L. A. 5224.)

(Supreme Court of California. Aug. 20, 1919. Rehearing Denied Sept. 18, 1919.)

1. BOUNDARIES ⚷33—PROPERTY CONVEYED—HALF OF "LOT"—PRESUMPTION.

Relative to eastern boundary of property conveyed by deed of the westerly half of a city lot, according to recorded map, the word "lot" will be presumed, in the absence of circumstances indicating a contrary intention, to be used in its general and customary sense, of not including the half of the street to which the owner of the lot held title, subject to the public easement.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Lot.]

2. BOUNDARIES ⚷33—PROPERTY CONVEYED—EVIDENCE TO REBUT PRESUMPTION.

Presumption of the word "lot" in deed of westerly half of city lot, according to recorded map, being used in its general and customary sense of not including part of street, *held* not rebutted by the map, nor by the fact that the deed conveyed half of the water right appurtenant to the lot, which had originally been allotted on the basis of acreage, including the portion of the lot lying in the street.

Department 2.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Edwin T. Earl against L. A. Dutour and another. Judgment for defendants, and plaintiff appeals. Reversed.

W. J. Ford, of Los Angeles, W. Leroy Thomas, for appellants.

Anderson & Anderson, of Los Angeles, for respondent.

LENNON, J. This appeal is from a decree quieting plaintiff's title to a strip of land fifteen feet wide adjacent to the center line of lot 17 of the Hillard tract in the county of Los Angeles.

[1] Plaintiff and defendant own, respectively, the easterly and westerly halves of lot 17, and the sole question in dispute is whether the center line of the lot forms the eastern or western boundary of the strip of land in suit. The answer to this question depends upon the construction to be placed upon the word "lot" in the deed by which was conveyed to defendants the "westerly one-half of lot 17 of the Hillard tract, as per amended map recorded in book 43, page 64, miscellaneous records of said county."

Inasmuch as the map referred to clearly indicates that the western boundary of lot 17 is the center line of an avenue 60 feet in width, it was contended on behalf of plaintiff and held by the trial court that the 30-foot strip covered by the street was part of the "lot" within the meaning of the deed, and that therefore the eastern boundary of defendants' land was a line halfway between the center line of the avenue and the eastern boundary of lot 17.

With this conclusion we are unable to agree. However clearly it may appear that the owner of a lot holds title to the center of an adjoining street, subject to the public easement, and that the boundary of the lot is technically, therefore, the center of the street, in view of the fact that the owner of such lot or land has no right to the possession or occupancy of any portion of such public street, we are of the opinion that the word "lot," as generally and customarily used, does not include such portion of the street. Wegge v. Madler, 129 Wis. 412, 109 N. W. 223, 116 Am. St. Rep. 953. As stated by the Supreme Court of Indiana:

> "Lot and street are two separate and distinct terms, and have separate and distinct meanings. The term 'lots,' in its common and ordinary meaning, includes that portion of the platted territory measured and set apart for individual and private use and occupancy. While the term 'streets' means that portion set apart and designated for the use of the public, and such is the sense in which such terms will be presumed to have been used, unless it be made to appear that a contrary meaning was intended." Montgomery v. Hines, 134 Ind. 221, 225, 33 N. E. 1100, 1101.

In the absence, therefore, of any circumstance indicating that a more unusual and technical meaning of the word "lot" was contemplated and intended by the grantor, it will be presumed that the grant of a fractional part or of a given number of feet of a certain lot or parcel of land conveys the given fractional part or number of feet of that portion of the lot or parcel of land which is set apart for private use and occupancy.

[2] Plaintiff contends that the circumstances revealed by an analysis of the map referred to in the deed indicates that the defendants' grantor used the word "lot" as including the portion lying in the street as well as the portion set apart for private use. These circumstances are stated as follows:

> "First. The length of all lot lines is given in chains on the face of the map, and extend to the center of the avenues in front. The widths of the streets are not given on the map itself, but are stated in the legend on the map, such width being given in feet. Second. The side lot lines themselves are extended by dashed lines to the centers of the avenues in front. Third. The

gross area is given in acreage marked on each lot. Fourth. The center line of each avenue is marked on the map by a dashed line which is intersected in nearly all instances by dashed lines extending the heavy lines of the lots to the center of the avenues."

Giving to these items all the force which may reasonably be claimed for them, they tend to show no more than that it was intended that lot owners in the Hillard tract should take title to the center of the streets or avenues. They do not, we think, tend in any way to rebut the presumption that defendants' grantor used the word "lot" in its ordinary and commonly accepted meaning. Of no greater force, in our opinion, is the fact that the deed in question conveyed one-half of the water right appurtenant to lot 17, the same having originally been allotted on the basis of acreage including the portion of the lot lying in the street. It follows that the presumption stands unrebutted.

The judgment appealed from is reversed.

We concur: WILBUR, J.; MELVIN, J.

181 Cal. 48

PATTEN & DAVIES LUMBER CO. v. AMIGO CO. (L. A. 5210.)

(Supreme Court of California. Aug. 18, 1919.)

1. CONTRACTS 🔑302 — STATEMENT OF DEFECTS.

An owner of property being improved, who was to furnish a statement of defects, was not required, by implication, to add to a statement of defects directions as to the steps which the contractor should take in order to remedy the defect.

2. CONTRACTS 🔑305(1) — DEPARTURES FROM CONTRACT.

Where defects in work constituted material departures from the contract, and were made by the contractor with intent to cheat and defraud, and the owner was thereby cheated and defrauded, the contractor is in no position to assert that the owner waived his right to object to the defects in the work by failing to serve a statement of defects as required by the contract.

Department 2.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by the Patten & Davies Lumber Company, a corporation, against the Amigo Company. Judgment for defendant, and plaintiff appeals. Affirmed.

G. C. De Garmo, of Los Angeles, for appellant.

Emmet H. Wilson, of Los Angeles, for respondent.

LENNON, J. In this action the plaintiff, as assignee of one F. J. Castellaw, sued to recover a balance alleged to be due for labor and materials furnished in improving streets on defendant's land. The defendant had judgment, from which the plaintiff appeals upon a bill of exceptions.

The trial court found that the work done was defective in numerous particulars and that the defendant had paid all that the work was reasonably worth. The principal and practically the only point made in support of the appeal is that the trial court should have found—

> "that the defendant, by reason of its failure to serve upon the contractor a written statement of the defects to be remedied by the contractor to entitle him to a certificate of completion, is estopped to deny the proper performance of the contract by the contractor and from claiming defective workmanship or materials performed and furnished by the contractor."

It might be supposed from this statement of appellant's contention that it would be claimed that no written statement of defects had been delivered by the defendant to the contractor, and that, therefore, the defects having been inadvertently made and never brought to the attention of the contractor, the latter was relieved of the responsibility of remedying them. It appears from its brief, however, that appellant admits that a general statement of defects in grading and oiling had been delivered, and admits that the contractor had knowledge of the defects in the work, but insists that the statement was not sufficiently specific to inform the contractor what steps defendant required to be taken to remedy these defects.

[1] This contention of the appellant is wholly and obviously without merit. In the first place, as found by the trial court, a written statements of defects, stating the true and just reasons for refusing to accept the work, was delivered. Defendant was, indeed, required by the contract to furnish a statement of defects; but it was not required, either expressly or by implication, to add to this statement directions as to the steps which the contractor should take in order to remedy the defects. Its duty was fulfilled when it stated the defects, indicated that they were departures from the contract, and demanded that the contract be carried out.

[2] Moreover, it appears from the unquestioned finding of the trial court that the defects in the work constituted material departures from the contract, which were made by the contractor willfully and with intent to cheat and defraud defendant, and that defendant was thereby cheated and defrauded. This being so, neither the contractor nor his assignee is in any posi-

tion to assert that defendant has waived its right to object to the defects in the work by failing to serve a proper statement of defects.

Finally, it appears from the unquestioned findings of the trial court that, several months prior to the alleged completion of the work, defendant had made a partial payment to cover certain concrete work already completed; that, by reason of defects in said work which were fraudulently concealed from defendant, this payment greatly exceeded the value of the work done; and that, by reason of willful departures from the contract, the value of the work done subsequent to the said payment and prior to the alleged completion of the work did not exceed the amount of the excess in the prior payment; wherefore no sum whatever was due or owing from the defendant to the contractor or to his assignee at the time the suit was filed. We are at a loss to understand how, without undertaking to question these findings, appellant can seriously argue that it should be allowed to recover the full contract price for the work by reason of any insufficiency in the statement of defects delivered by the defendant.

Judgment affirmed, with damages in the sum of $50 for prosecuting a frivolous appeal.

We concur: WILBUR, J.; MELVIN, J.

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181 Cal. 61

In re BALLOU'S ESTATE. (Sac. 2939.)

(Supreme Court of California. Aug. 23, 1919.)

1. WILLS ⚷734(1)—LEGACIES—INTEREST.

The matter of interest on legacies is controlled by statute, in absence of provisions in will.

2. ADOPTION ⚷20—EFFECT.

Adoption establishes legal relation of parent and child, including obligation of parent to support child.

3. WILLS ⚷734(6) — LEGACIES — INTEREST — LEGACY FOR "MAINTENANCE."

A legacy to testator's adopted daughter, who had received substantial support from him for nearly 10 years preceding the making of the will and was in receipt of such support at the time of his death, *held* to be a "legacy for maintenance," within Civ. Code, § 1369, providing that such legacies bear interest from testator's death.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Maintenance.]

4. WILLS ⚷734(11)—INTEREST ON LEGACY—STATUTORY BENEFITS.

An adopted child's right to interest on a maintenance legacy, under Civ. Code, § 1369, is not destroyed because child demanded and received statutory family allowance pending administration, etc., where there was nothing in will which required child to elect between rights under will and statute.

In Bank.

Appeal from Superior Court, Tulare County; Stanley A. Smith, Judge.

In the matter of the estate of George Adams Ballou, deceased. Application by Alice May Ballou, for distribution of a legacy. From part of a decree refusing certain interest on the legacy, the applicant appeals. Reversed.

Middlecoff, Scott & Ham, of Visalia, for appellant.

E. C. Farnsworth and Power & McFadzean, all of Visalia, for respondent.

ANGELLOTTI, C. J. Deceased died testate, May 31, 1917, leaving an estate aggregating in value nearly $84,000. On July 6, 1914, when 81 years of age, he had legally adopted as his child one Alice May Riley, thereafter known as Alice May Ballou. In his will, executed May 16, 1916, he made provision for her as follows:

> "Secondly, I give, devise and bequeath to my adopted daughter, Alice May Ballou, the sum of ten thousand dollars in cash."

This was the only provision which in any way referred to her. The residue of his property was left to his lawful nephews and nieces. Upon application by her for distribution of this legacy, the court below decreed payment to her, in full satisfaction of the legacy, the sum of $10,000, together with interest from May 31, 1918, which was one year after the death of deceased. We have here an appeal by such child from the decree, in so far as it refused interest for the year immediately following the testator's death. The sole question on the appeal is as to the date from which interest should be paid on the legacy.

The child was within a few days of 11 years of age at the date of the making of the will, and she was, in substantial part, at least, supported by deceased from the time of her adoption to the date of his death. The court substantially found that at the time of the death of deceased she possessed no other property or source of maintenance. The evidence showed that she and her mother had been abandoned by the father in the year 1910, and that the father thenceforth had contributed nothing to the support of the child. At the time of the adoption, deceased deposited $400 in a bank for the support of the child and its mother, and continuously thenceforth she lived either in an apartment provided for her and her mother by deceased, or at a convent school, where the cost of her maintenance was paid by deceased. He also paid bills incurred to provide her with food. Some question appears to have arisen between the mother and deceased as to whether he was furnishing sufficient support; the mother commencing a suit against deceased in March, 1916, to compel him to furnish the same. This action was pending at the time of his death.

[1-3] In the absence of provision in the will, the matter of interest on legacies is controlled by our statutory regulations in that behalf. By section 1368, Civil Code, it is provided that legacies are due and deliverable at the expiration of one year after the testator's decease. Section 1369, Civil Code, is as follows:

> "Legacies bear interest from the time when they are due and payable, except that legacies for maintenance, or to the testator's widow, bear interest from the testator's decease."

The will here containing no provision on the subject, the question is whether or no the legacy to Alice May Ballou is one for maintenance. If it is a legacy for maintenance, it must be held under the clear and explicit terms of the statute that it bears interest from the testator's decease. The trial court found that the legacy "was not given or intended to be given to said minor as a legacy for maintenance." We are constrained to hold that this finding is without legal support in the evidence. Whether or not it was intended as a legacy for maintenance must, of course, be determined from the words of the will, taking into view the circumstances under which it was made, exclusive of the oral declarations of the testator. Civ. Code, § 1318. Except for its description of the legatee as "my adopted daughter," the will is entirely silent in this regard. That the legatee was the adopted daughter of deceased is a conceded fact that must be taken into view in determining the intent and purpose of this legacy. The effect of the adoption was to establish between deceased and Alice May Ballou the legal relation of parent and child, with all the incidents and consequences of that relation (see Estate of Jobson, 164 Cal. 312, 128 Pac. 938, 43 L. R. A. [N. S.] 1062; Estate of Darling, 173 Cal. 221, 159 Pac. 606), including of course, the obligation of support of the child by the parent.

In all jurisdictions in which the question has arisen it appears to be held with practical unanimity that a legacy to a minor child by a parent, or one standing in loco parentis, is, in the absence of other substantial provision in the will for maintenance, and, of course, in the absence of language indicating a contrary intent, presumed to be a legacy for maintenance. As said in 40 Cyc. 2095:

> "The reason for this exception is founded in the moral and legal obligation of parents to provide for the necessities of their offspring, and from the presumption that they do not generally intend to leave their children in destitution and want during the most helpless periods of their infancy."

See 2 Woerner, Am. Law of Adm'n star p. 1005; Brown v. Knapp, 70 N. Y. 136, 142; Neder v. Zimmer, 3 N. Y. Supp. 133; In re Keech's Estate, 240 Pa. 491, 87 Atl. 623. In so far as the evidence of circumstances proper to be taken into consideration is concerned, there is nothing to rebut this presumption. In fact, such evidence affirmatively shows appreciation by the testator of his obligation to support his child, and substantial support by him from the time of adoption to the time of his death. Construing the words of the will in the light of the relationship between the parties, and in connection with the circumstance that the child had received substantial support from the testator for nearly ten years next preceding the making of the will, and was in receipt of such support at the time, "we are of the opinion," as said in Estate of Mackay, 107 Cal. 303, 308, 40 Pac. 558, 560, "that the provision in question created a 'legacy for maintenance.'"

[4] That under the law regulating the administration of estates of deceased persons the legatee was entitled, as the child of deceased, to receive a family allowance for her support pending the settlement of the estate we regard as entirely immaterial in this connection. Such a situation in no way affects the question of the character of the legacy as being one for maintenance or otherwise. Notwithstanding the right to family allowance for the few months of pendency of administration, the legacy is still a "legacy for maintenance," and, in so far as the matter we are discussing is concerned, section 1369, Civil Code, puts all legacies for maintenance on the same footing as legacies to the testator's widow, and expressly provides that both of these classes of legacies shall bear interest from the date of the testator's death, in the absence, of course, of provision to the contrary in the will. In this regard we are bound by the plain, unambiguous terms of the statute. The character of the legacy as a legacy for maintenance being established, the result prescribed by the statute necessarily follows.

That the legatee, as a minor child of deceased, was in fact allowed, and did in fact receive, a family allowance pending administration, as well as a homestead, we must likewise regard as immaterial on this appeal. Obviously such matters can have no bearing on the question of the character of the legacy, and are material, if at all, only upon some such theory as that by accepting certain benefits given her as the child of the deceased by statute, she has elected to take those benefits in place of certain benefits given her by the will. There is, however, nothing in the will upon which it may be claimed that the child was put to an election in this matter, and, this being so, her receipt of the benefits accorded her by the law as a child of deceased from the funds of the estate in no way affects her rights as a legatee. See Estate of Cowell, 164 Cal. 636, 130 Pac. 209.

In so far as the decree disallows interest on appellant's legacy for the year commencing May 31, 1917, it is reversed.

We concur: SHAW, J.; WILBUR, J.; OLNEY, J.; LENNON, J.; LAWLOR, J,; MELVIN, J.

(181 Cal. 55)

NAHHAS et al. v. BROWNING et al.

(Sac. 2632.)

(Supreme Court of California. Aug. 19, 1919.)

1. Replevin ⟹124(3)—Dismissal—Effect.

Plaintiff in replevin cannot, by dismissing his action after destruction of the property by fire, deprive defendants of the right given them by Code Civ. Proc. § 667, to recover damages on the replevin bond for the taking and withholding of the property.

2. Replevin ⟹124(3)—Bond—Damages.

Where, after plaintiff in replevin obtained property by replevin process, it was destroyed by fire, the owners may recover, in suit on replevin bond, not only the value of the property, but damages for withholding, and they are not restricted to interest on the value of the property, upon the theory that taking was a conversion.

3. Replevin ⟹83—Damages to Defendant.

One whose property is taken in replevin suit is not confined to interest as on the value of the property as damages, if he can establish the fact that the value of the use of the property exceeds the interest.

4. Appeal and Error ⟹694(1)—Review—Findings.

In the absence of a record showing the evidence, special findings of the jury are conclusive on appeal.

5. Replevin ⟹79—Interest.

Parties whose property was taken under replevin process are not entitled to recover interest on the value of the property which was destroyed while in possession of the plaintiff in replevin, together with damages for the withholding of the property.

In Bank.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by J. N. Nahhas and another against J. W. Browning and others. From an order, made on motion of defendants, vacating the judgment rendered on the verdict of the jury, plaintiffs appeal. Order reversed, with directions.

George R. Freeman, of Willows, for appellants.

Thomas Rutledge, of Colusa, for respondents.

LENNON, J. The plaintiffs herein sue on a replevin bond; Browning, the plaintiff in the replevin action, and Balsdon and Morris, his sureties, being joined as defendants. The property replevied consisted of a harvesting outfit. It was destroyed by fire while in the possession of Browning, who thereafter dismissed the replevin suit. The plaintiffs thereupon instituted this action and recovered judgment on a verdict awarding damages in the sum of $3,695. The verdict of the jury was accompanied by answers to certain questions submitted by the court, which indicated that the sum of $3,695 had been arrived at by adding the item of $920, representing the plaintiffs' damage for the loss of the use of the property, to the item of $2,775, representing the value of the property at the time it was replevied.

On the defendants' motion, the court, by an order purporting to be made pursuant to the provisions of section 663 of the Code of Civil Procedure, vacated the judgment on the ground that it was inconsistent with and not supported by the so-called special verdict, and entered judgment for the plaintiffs in the sum of $2,775, with interest from the date of the replevin at 7 per cent. yearly. The plaintiffs thereupon prosecuted this appeal upon a bill of exceptions containing the pleadings, the verdict, the original judgment, and the order appealed from, but which does not set forth or purport to set forth any of the evidence received in the case.

[1, 2] In making the order complained of, the lower court apparently proceeded upon the theory that the plaintiffs' cause of action was to be viewed solely as one for wrongful conversion, and, pursuant to this theory, it applied the rule of damages prescribed by section 3336 of the Civil Code, and therefore eliminated the item of $920, representing the plaintiffs' damage for the loss of the use of the property. In this the court was in error. By dismissing his action in replevin, Browning could not, and did not, deprive the plaintiffs of their right to recover such damages as they could have recovered in that action had it been prosecuted to judgment. Mills v. Gleason, 21 Cal. 274, quoted with approval in Clary v. Rolland, 24 Cal. 147, 152. It is expressly provided in section 667 of the Code of Civil Procedure that—

"If the property [involved in a replevin action] has been delivered to the plaintiff, and the

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

defendant claim a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same."

A return of the property could not have been had in the replevin suit here in question. Had that action been carried to judgment, defendants, plaintiffs herein, would therefore have been entitled to a judgment for the value of the property, not as damages for its conversion, but as a substitute for and in lieu of the property, and would, in addition, have been entitled to a judgment for damages for the taking and withholding the property. Such, then, would have been the measure of the damages of the plaintiffs herein, had the replevin action proceeded to judgment, and such, therefore, should be the measure of their recovery on the bond. 34 Cyc. 1582–1585; 2 Sedgwick on Damages (9th Ed.) pp. 1433. 1434; Talcott v. Rose (Tex. Civ. App.) 64 S. W. 1009; Sopris v. Lilly, 1 Colo. 266.

[3-5] Ordinarily, loss of use and other injuries resulting from the taking and withholding of personal property may be compensated by allowing the successful party in a replevin suit to recover interest on the value of the property from the time of the taking. There is no good reason, however, for holding that he is confined to interest as damages, if he can establish the fact that the value of the use of the property of which he was deprived exceeds the interest. Hunt v. Thompson, 19 Wyo. 523, 120 Pac. 181, 122 Pac. 624; 2 Sedgwick on Damages (9th Ed.) p. 1046. In the absence of a record showing the evidence received in the case, the so-called special finding of the jury is conclusive upon this appeal that the damage for taking and withholding the property was shown to be $920, an amount in excess of the interest. Special injury resulting from the taking and withholding of the property having been duly alleged in the complaint, plaintiffs are entitled to recover the sum of $920 assessed as damages for such injury, together with the value of the property, with interest on the total sum from the date of the entry of the original judgment. They are not, however, entitled to interest on the value of the property from the date of the taking to the date of the judgment. 2 Sedgwick on Damages (9th Ed.) p. 1048; Freeborn v. Norcross, 49 Cal. 313; Garcia v. Gunn, 119 Cal. 315, 51 Pac. 684.

The judgment is reversed, with directions to the lower court to enter judgment in accord with the views herein expressed.

We concur: ANGELLOTI, C. J.; WILBUR, J.; LAWLOR, J.; SHAW, J; OLNEY, J.; MELVIN, J.

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181 Cal. 44

MATTSON v. MATTSON. (L. A. 4910.)

(Supreme Court of California. Aug. 16, 1919.)

1. Husband and Wife 🔑296—Separate Maintenance—Complaint.

A wife's separate maintenance complaint need not allege her residence.

2. Pleading 🔑192(2), 354(1)—Complaint—Motion to Strike—Demurrer.

A wife's complaint for separate maintenance is not subject to be stricken because uncertain in its allegations of cruelty, but the proper remedy is a demurrer, under Code Civ. Proc. § 430, upon ground that complaint is uncertain, etc.

3. Trial 🔑163—Motion for Nonsuit—Requisites.

A motion for nonsuit at close of plaintiff's case will not be granted unless specific grounds on which motion is made are stated.

4. Husband and Wife 🔑297—Separate Maintenance—Corroboration.

Corroboration is unnecessary in a wife's action for maintenance without divorce, since Civ. Code, § 130, requires corroboration only in actions where a divorce is granted.

5. Husband and Wife 🔑298½—Separate Maintenance—Findings.

In a separate maintenance action, findings that plaintiff wife did not accuse defendant of improper relations with his daughter-in-law and that none of plaintiff's statements had brought defendant into contempt, etc., *held* a sufficient finding upon the issue whether plaintiff circulated false reports regarding defendant and his daughter-in-law.

6. Husband and Wife 🔑297—Separate Maintenance—Sufficiency of Evidence.

In a wife's action for separate maintenance, conflicting evidence *held* to sustain trial court's finding that plaintiff wife did not circulate false reports regarding defendant and his daughter-in-law.

7. Divorce 🔑54—Recrimination—Cruelty.

In a wife's separate maintenance action a finding that plaintiff was entitled to divorce on grounds of extreme cruelty precludes defendant husband from securing a divorce on his cross-complaint, even if he could have established plaintiff's cruelty.

8. Husband and Wife 🔑288—Maintenance—Mutual Fault.

Alimony may be awarded a wife in a separate maintenance action, although both she and defendant husband were at fault.

Department 1.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by Alice Mattson against Olaf O. Mattson. Judgment for plaintiff, and defendant appeals. Affirmed.

E. J. Emmons, H. E. Johnstone, and Thomas Scott, all of Bakersfield, for appellant.

Walter Osborn, of Bakersfield, for respondent.

LAWLOR, J. This action was brought in the superior court of Kern county by the plaintiff against the defendant, her husband, for maintenance and support, both pendente lite and permanent, counsel fees, and costs. After the defendant had interposed a demurrer and a motion to strike out, which were allowed by the court, the plaintiff filed an amended complaint, to which defendant demurred and moved to strike out certain portions thereof. The demurrer to the amended complaint and motion to strike out were denied, whereupon the defendant filed an answer and a cross-complaint in which he asked for a divorce upon the ground of extreme cruelty. The court found in favor of the plaintiff; that she and the defendant intermarried on June 8, 1910, and ever since have been, and now are, husband and wife; that she had a cause of action for divorce on the ground of extreme cruelty, and that she was entitled to the sum of $150 a month for permanent support and maintenance, as well as to counsel fees and costs of suit, it having been found "that this defendant is the owner and is in possession" of property of the total value of about $200,000, and "that his gross monthly income is of the sum of about $500." The defendant was denied a divorce upon the ground of extreme cruelty as alleged in his cross-complaint. Judgment was entered accordingly. Defendant moved for a new trial upon statutory grounds, which motion the court denied. The defendant thereupon appealed from the judgment entered in favor of the plaintiff and against the defendant and from the judgment denying the defendant a divorce in said action.

It appears that both the plaintiff and the defendant were more than 60 years of age at the time they intermarried. The evidence as to the controverted issues is in sharp conflict. In support of the allegations of the complaint the plaintiff introduced evidence tending to show that the defendant had on numerous occasions struck and beat her and otherwise subjected her to cruel and inhuman treatment, which had caused her both physical and mental suffering. All this was vigorously denied by the defendant, who supported his cross-complaint with evidence that the plaintiff was of a nagging and quarrelsome disposition, and that she had circulated certain false and malicious reports concerning his alleged adulterous relations with his daughter-in-law. Plaintiff in her answer to to the cross-complaint and in her testimony, denied the allegations of extreme cruelty. The specific facts, in so far as they are pertinent, will be developed in our discussion of the various points presented for review on this appeal.

[1] 1. It is urged by defendant that his demurrer to the amendment complaint should have been granted. The demurrer was made on the ground that the complaint failed to allege the residence of the plaintiff. This contention is without merit. In an action for separate maintenance residence need not be alleged or proved. Hiner v. Hiner, 153 Cal. 254, 94 Pac. 1044.

[2] It is also urged that it was error to deny defendant's motion to strike out certain portions of the amended complaint. While the defendant, relying on the allegations of the pleading, has advanced no argument in his brief why the motion should not have been denied, an examination of the pleading itself, which is set out in the transcript, shows that it was made on the ground of uncertainty as to time and place of certain alleged acts of extreme cruelty. A motion to strike out on the indicated grounds is not proper practice in this state. The only proper remedy is by demurrer on the ground that the complaint is ambiguous, unintelligible, or uncertain under section 430 of the Code of Civil Procedure. McFarland v. Holcomb, 123 Cal. 84, 55 Pac. 761.

[3] 2. At the close of the plaintiff's case the defendant moved for a nonsuit as follows: "If your honor please, in this case, we now move for a nonsuit as to the cause of action set out in the plaintiff's complaint." The motion was denied by the court and defendant assigns this as error. It is well established in this state that a motion for nonsuit will not be granted unless the specific grounds on which such motion is made are stated. Coffey v. Greenfield, 62 Cal. 602; Miller v. Luco, 80 Cal. 257, 22 Pac. 195; Durfee v. Seale, 139 Cal. 604, 73 Pac. 435.

[4] Defendant urges that the motion should have been granted on the ground that the evidence in support of the allegations of extreme cruelty was not sufficiently corroborated. The only statutory provision requiring corroboration in a civil case is section 130 of the Civil Code. That section applies only to actions for divorce, and even in such actions only to the *granting* of the divorce. Hence there is no foundation whatever for the claim that corroboration is necessary in an action for maintenance without divorce.

[5] 3. As a further assignment of error it is urged by defendant that the court did not make a specific finding on a material issue in the case—on the question as to whether or not the plaintiff circulated false reports about the defendant and his daughter-in-law. However, the following appears in the findings of the court:

> "That on said date and at said time or at any other time this plaintiff did not accuse the defendant of improper relations with his daughter-in-law; * * * that no acts or statements made by this plaintiff have brought this defendant into contempt with all of his friends or with any of his friends; and that no act or state-

ment of this plaintiff has brought the previous good reputation of this defendant into dispute."

In our view, the finding we have just quoted is a sufficient answer to this objection.

[6, 7] It is further urged that the court erred in not finding in favor of the defendant on this issue, for the reason that the preponderance of the evidence tended to establish the fact that the plaintiff did circulate reports to the effect that the defendant had been on "intimate" terms with his daughter-in-law. It is true that there was evidence to that effect. It is also true that the plaintiff denied making any such statements, thus producing a conflict which the court resolved in favor of the plaintiff. Upon the record before us we cannot disturb the finding. Moreover, if the court had found in favor of defendant on this issue, the error would in no way be prejudicial to him, because, in view of the finding "that the plaintiff has a cause of action for divorce on the grounds of extreme cruelty," the defendant would not have been entitled to a divorce even if the court had found in his favor on this issue. In Sweasey v. Sweasey, 126 Cal. 123, 58 Pac. 456, it was said:

> "Appellant complains of some findings against him in his cross-action for divorce. If these are well founded, appellant is still not injured; for it was found that he was guilty of desertion, and no complaint is made that this finding is not sustained by the evidence. He could not, therefore, have obtained a divorce, even though the court had found in his favor upon those issues."

[8] 4. It is contended by defendant that, in order for the plaintiff to recover in this action, she must be without fault, and that the evidence as to her conduct toward defendant, if not sufficient to warrant the granting of a divorce in his favor, was sufficient to bar her recovery. This is not the law. It is a well-established principle that, even "if the parties are both at fault and cannot live together, alimony may, however, be decreed." 21 Cyc. 1602.

The judgment is affirmed.

We concur: SHAW, J.; OLNEY, J.

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179 Cal. 284

HENSLEY v. HENSLEY. (L. A. 4474.)

(Supreme Court of California. Nov. 19, 1918. Remittitur Issued Dec. 20, 1918.)

1. TRIAL ⚷384—NONSUIT—WHEN PROPER—CASE TRIED BY COURT.

In a case tried without a jury, if the evidence is insufficient to support a judgment for complainant, nonsuit is properly granted.

2. HUSBAND AND WIFE ⚷278(1)—SEPARATION—PROPERTY SETTLEMENTS.

Property settlements between husband and wife when there is no fraud are highly favored in the law.

3. HUSBAND AND WIFE ⚷281—PROPERTY SETTLEMENTS—PRESUMPTION OF FRAUD.

Where the husband and wife had been living apart for years, and the wife acted upon the advice of her attorneys in making a property settlement, there was no presumption of confidential relation, and the wife had the burden of proving fraud, if any, in the agreement.

4. HUSBAND AND WIFE ⚷281—PROPERTY SETTLEMENTS—FRAUD—EVIDENCE.

Evidence *held* insufficient to show fraud of the husband in securing property settlement with his wife.

Department 2.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Suit by Robert C. Hensley against Annie E. Hensley, wherein defendant filed a cross-complaint. There was a nonsuit as to one branch of the cross-complaint. Decree for defendant for a divorce and for monthly allowance. From the judgment of nonsuit and an order denying motion for new trial, defendant appeals. Affirmed.

H. H. Chase, of San Bernardino, and A. H. Davis, of San Francisco, for appellant.

Byron Waters and Holcomb & Coy, all of San Bernardino, for respondent.

MELVIN, J. Robert C. Hensley brought an action for divorce against Annie E. Hensley. She answered, denying the allegations of the complaint, and by cross-complaint she asked for a divorce from her husband on the grounds of desertion, cruelty, and nonsupport, and prayed for the rescission of a certain agreement by which the property matters had been settled out of court about a year before the complaint was filed. By stipulation the allegations of the cross-complaint were deemed denied.

At the close of defendant's evidence on her cross-complaint, plaintiff moved for a nonsuit as to cross-complainant's cause of action for cancellation of the agreement between the parties. This motion was granted. Upon the merits of the divorce case the defendant and cross-complainant prevailed. There was also an order requiring plaintiff to pay a certain sum monthly for the support of the minor child of the parties to the action. Defendant and cross-complainant appeals, however, from the judgment of nonsuit and from an order denying her motion for a new trial.

The plaintiff and defendant were married in 1907. In September, 1910, Hensley left his wife and went to Canada. He had sold some property in Oregon for about $30,000. Mrs. Hensley had employed counsel to represent her, and there had been some investigation on the part of these gentlemen relative to Mr. Hensley's financial affairs. In August, 1912, Mr. Davis, one of Mrs. Hensley's counsel, wrote to his associate in the matter, Mr. H. H. Chase, of San Bernardino, advising him that Hensley had sold the ranch at Ashland, Or., for $30,000, together with all the furniture and household effects. In a later letter written during the same month to the same correspondent there was information to the effect that Hensley had bought property, placing it in the names of his children. Mr. Davis also wrote that he was quite certain that Hensley had money invested in business with a son in Calgary, Alberta, Canada. Later Mr. Davis wrote again, stating that Hensley was worth $32,000 when he left Oregon.

On October 10, 1912, Mrs. Hensley filed a suit for separate maintenance. In her verified complaint it was alleged that Hensley had $31,000 in his pocket when he left Oregon and went to Canada. She also averred in that pleading that her husband owned an equity of $10,500 in real estate near Colton, Cal., standing in the name of his son, and that he had "more than $20,000 in other property" the location and manner of investment being unknown to her. Before the filing of Hensley's answer in the suit for maintenance there was further correspondence between Mrs. Hensley's attorneys regarding the amount of money Hensley was known to have possessed and the terms upon which Mrs. Hensley would settle.

On January 4, 1913, Hensley filed his answer, denying the ownership of any equity in the property standing in his son's name in California, admitting that he took $28,000 to Canada, and averring that he had divided this sum with his children, retaining one-quarter for himself. Regarding his financial ability he alleged that "the only property owned by the defendant, Robert C. Hensley, consists of the claims for money loaned by him to his said son and daughter, amounting to about $4,500 on open account, the exact amount of which is unknown to this defendant."

Following the filing of the answer in the suit for maintenance, negotiations for a settlement were prosecuted, and in April, 1913, the contract which Mrs. Hensley sought to have set aside in the case at bar was executed. It recited the pending litigation, and Mrs. Hensley agreed to take $5,000 in settlement of all claims. The sum of $2,000 was paid at the time, and three promissory notes were executed by Mr. Hensley payable to his wife. It was agreed that, except for the payment of these notes, neither party should ever have any claim against the other for support, alimony, maintenance, or for any other purpose whatever. It was further covenanted that upon payment of the notes Mrs. Hensley would dismiss the suit for maintenance pending in the superior court of San Bernardino county. The contract was subsequently fully executed, and in her bill praying for rescission Mrs. Hensley offered to restore land of the value of $3,000, which she declared was all the property remaining of the $5,000 received from her husband.

[1] Appellant's first contention is that she established a prima facie case of fraud in the procurement of the contract of settlement, and that therefore the court was bound to put the cross-defendant upon proof of his good faith in that transaction. It is to be remembered, however, that this case was tried without a jury. If the evidence was insufficient to support a judgment for cross-complainant, the court properly granted the motion. Downing v. Murray, 113 Cal. 455, 463, 45 Pac. 869; Estate of Dole, 147 Cal. 188, 81 Pac. 534. We must, then, examine the testimony with a view to determining whether or not the court's order amounted to an abuse of discretion. We have made such examination, and are convinced that there was no such abuse.

[2] Property settlements between husband and wife, when there is no fraud, are highly favored in the law. In McClure v. McClure, 100 Cal. 339, 343, 34 Pac. 822, 824, the court quoted with approval a paragraph from Dr. Wharton's work on Contracts, a part of which is as follows:

> "The rule is peculiarly applicable in family settlements, where right and wrong on both sides are so often dependent on feeling; in which cases the courts, unless there be an imposition, will not undertake to weigh actual gain or loss."

See, also, Snowball v. Snowball, 164 Cal. 476, 129 Pac. 784.

[3, 4] It is true that appellant testified to a belief in and reliance upon the allegations in the verified pleading and an affidavit used in the suit for maintenance that Mr. Hensley was worth less than $5,000. But she testified upon cross-examination that she had been advised by her counsel that the transfers of property to Hensley's children could be set aside. She said, among other things:

> "When the matter of settlement came up and during the negotiations I knew of the actual situation, and that the money had been invested in the name of the children."

She also stated that, when she learned in the fall or winter of 1913 that the property had been reconveyed to her husband, she again employed Mr. Davis. Yet she took no steps to set aside the contract until after the filing of his complaint in the action for divorce in the following year. We cannot say, therefore, that the court was not justified in believing that Mrs. Hensley did not rely upon the representations of her husband at the time of the settlement of the suit for maintenance. The husband and wife had been living apart for years. That they were in hostility the suit for maintenance sufficiently proves. The transactions for settlement of her claim were conducted through her agents and his; so there was no chance for personal influence to be exercised by him upon her. There was no presumption of confidential relation such as was found to exist in cases like Brison v. Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189, and Brison v. Brison, 90 Cal. 323, 27 Pac. 186, 191. The parties to the contract were dealing "at arms' length." Snowball v. Snowball, supra. The language used in the decision in Dimond v. Sanderson, 103 Cal. 97, 102, 37 Pac. 189, in which it was contended that a wife declaring on a note given by her husband must overcome a presumption of fraud seems applicable to the facts in this case:

> "It must appear upon the face of the transaction, or by proof, that there was no consideration, or that the marital confidence was used to take an unfair advantage, or that this confidence was subsequently violated, before the burden is cast upon the plaintiff of sustaining the fairness and the consideration of the transaction against the presumption invoked by appellant."

That case emphasizes the fact that the burden of proving fraud was upon the cross-complainant. That the court, in holding that she failed to prove such fraud by clear and convincing testimony, did not abuse judicial discretion, we are persuaded.

This disposes, we believe, of all the material contentions made by appellant.

The judgment and order are affirmed.

We concur: WILBUR, J.; LORIGAN, J.

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181 Cal. 35

CALIFORNIA PORTLAND CEMENT CO. v. BOONE et al. (L. A. 4950.)

(Supreme Court of California. Aug. 16, 1919.)

1. Municipal Corporations 🔑358(1) — Street Improvement — Acceptance of Work.

Under Improvement Act 1911, § 21, power to accept the work on a street and to make the assessment to cover the cost is vested directly in the street superintendent; the act not providing the assessment shall be ordered or approved by the board of trustees or the city council, except as specified in section 30.

2. Municipal Corporations 🔑358(1) — Street Improvement—Certificate of Acceptance—Statute.

Improvement Act 1911 does not require a certificate of final acceptance of a street improvement from the street superintendent.

3. Municipal Corporations 🔑358(1) — Street Improvement—Acceptance by Superintendent of Streets—Statute.

The fact that the contractor for a street improvement requested that the work be accepted piecemeal, as provided in Improvement Act 1911, § 30, and that the board of trustees of the city granted the request, did not change plain provisions of the statute that the work must in all cases be done under the direction and to the satisfaction of the superintendent of streets (section 18) and that he alone has power to accept the work as completed, though if he refuses the contractor may appeal to the council under section 21.

4. Municipal Corporations 🔑365—Street Improvement — Acceptance by Board of Trustees—Binding Force.

Resolution of board of trustees of a city ordering an assessment to cover the cost of a street improvement in compliance with the contractor's petition, supported by the certificate of acceptance of the street superintendent, amounted to a legal acceptance of the improvement under the contract as completed, binding as between the city and the contractor, and also binding on a materialman seeking to recover on the contractor's bond.

5. Municipal Corporations 🔑373(3) — Street Improvement—Date of Completion —Certificate of Acceptance.

Street improvement under Improvement Act 1911 *held* completed on November 11th, as certain witnesses testified, and not on the date of the street superintendent's certificate of final acceptance of the work, made November 30th; the 30-day period within which materialmen and laborers might file claims as provided in section 19 of the act beginning to run from the 11th.

6. Municipal Corporations 🔑373(3) — Street Improvement—Claim of Materialman—Time for Filing.

A materialman on a street improvement is not required to wait for the completion or the acceptance of the work, but can file his claim with the superintendent of streets without waiting for final completion of the entire work.

7. Appeal and Error 🔑103—Order Denying Motion—Statute.

An order denying a motion to strike out parts of the complaint is not appealable under Code Civ. Proc. § 963.

8. Appeal and Error 🔑1078(3) — Appeal from Order—Failure to Mention Point.

Where the point is not mentioned in the briefs, the appellate court will ignore an appeal from order denying motion to strike out certain parts of the complaint.

Department 1.

Appeal from Superior Court, Los Angeles County; H. T. Dewhirst, Judge.

Action by the California Portland Cement Company against J. L. Boone, receiver of the Commonwealth Bonding & Casualty Insurance Company, and the Easley Construction Company. From judgment against the receiver, and from an order denying his motion to strike out parts of the amended complaint, he appeals. Reversed.

A. J. Sherer, Robert Young, and Haas & Dunnigan, all of Los Angeles, for appellant.

G. C. De Garmo and Alexander MacDonald, both of Los Angeles, for respondent.

LAWLOR, J. This is an appeal by defendant J. L. Boone, receiver of the Commonwealth Bonding & Casualty Insurance Company, from a judgment of the superior court of Riverside county entered in favor of the plaintiff and against this defendant in the sum of $4,922, with interest thereon, and with costs amounting to $45.60, and from an order denying his motion to strike out certain parts of the amended complaint.

It appears that on May 21, 1914, a contract was entered into between O. F. Easley, who later assigned the contract to the Easley Construction Company, a corporation, defendant herein, and A. B. Tuthill, as superintendent of streets of the city of Corona, Riverside county, under the provisions of the Improvement Act of 1911(Stats. 1911, p. 730) for the improvement of a portion of Main street, in that city, by paving, laying sidewalks, gutters, and curbs beginning 22 feet south of the center line of the main track of the Southern California Railway Company and extending to the north line of Lemon street. In compliance with section 19 of the Improvement Act of 1911, O. F. Easley furnished a bond for the benefit of materialmen and laborers, upon which bond the Commonwealth Bonding & Casualty Insurance Company, original defendant in this action, and for which defendant J. L. Boone, receiver, was substituted at the time of the trial, became his surety.

Action was brought on this bond by the plaintiff to recover the sum of $9,146.21, the balance due on the purchase price of materials used in the work of improvement under the contract, consisting of cement and crushed rock furnished by the plaintiff to the Easley Construction Company, between June 24, 1914, and August 5, 1914. The Easley Construction Company defaulted in the action and judgment was entered against it for the full amount, from which judgment no appeal was taken. The judgment of $4,922 entered against defendant J. L. Boone, receiver, was solely for the cement; nothing being allowed for the crushed rock alleged to have been furnished, for the reason that the plaintiff in its verified claim did not specify any material except cement.

The principal questions involved in this appeal relate to the form of verified statement required by section 19 of the Improvement Act of 1911, and to the question of whether the verified statement was filed with the superintendent of streets within 30 days from the time the improvement under the contract was completed, involving as preliminary to the last question the one as to the time of completion of the work of improvement. Section 19 contains the following provision:

> "Any materialman, * * * whose claim has not been paid by the said contractor, company or corporation, to whom the contract was awarded, may, within thirty days from the time said improvement is completed, file with the superintendent of streets a verified statement of his or its claim, together with the statement that the same, or some part thereof, has not been paid."

Concerning the question as to when the work of improvement was completed, the following facts appear: On September 24, 1914, the board of trustees of the city of Corona, acting under the authority conferred upon it by section 30 of the Improvement Act of 1911, and upon the presentation of certificates by the superintendent of streets and the city engineer, in support of the petition of the contractor, stating that the work had been completed according to the terms of the contract from 22 feet south of the center line of the main track of the Southern California Railway to the center line of Olive street, passed a resolution ordering the street superintendent to make the assessment for that part of the work. Section 30 reads as follows:

> "The council, instead of waiting until the completion of the entire improvement, may, in its discretion, and not otherwise, upon the completion of two blocks or more of any improvement, order the street superintendent to make an assessment for the proportionate amount of the contract completed, and thereupon proceedings and rights of collection of such proportionate amount shall be had as provided in the preceding sections."

On November 11, 1914, the city engineer and the street superintendent certified to the board of trustees that the remainder of the work of improvement had been completed according to the terms of the contract. The certificate of the street superintendent, after describing the newly finished portion as that part of Main street lying between the center line of Olive street and the north line of Lemon street, concluded:

> "That prior hereto the said Easley Construction Company, to my entire satisfaction and approval and in accordance with said street contract No. 28, has completed the improvement, and all of it, on Main street from a point 22 feet south of the center line of the main track of the Southern California Railway Company to the center line of Olive street. *That all of said improvement* under said contract No. 28, per the terms of the contract, *have prior hereto been completed* and to my entire satisfaction and approval.
>
> "Dated Corona, California, Nov. 11, 1914."

(Italics ours.)

Acting upon this certificate, the board of trustees, on November 17, 1914, passed the following resolution:

> "A resolution ordering the street superintendent of the city of Corona to make an assessment for the proportionate amount of the contract for the improvement of Main street from the center line of Olive street to the north line of Lemon street, completed.
>
> "Whereas, as will appear from the records and proceedings of the street superintendent of the city of Corona, O. F. Easley, the original contractor for the improvement of Main street, * * * has improved said Main street from the center line of Olive street to the north line of Lemon street, the amount of the completed portion of said improvement being more than two blocks; and
>
> "Whereas, the work of said improvement has been performed satisfactorily to said street superintendent *and has been accepted by said street superintendent*, as in compliance with the plans, specifications and contract for said improvement; and
>
> "Whereas, said contractor together with the Easley Construction Company, has and have filed with this board of trustees a petition praying that an order issue therefrom to the said street superintendent directing him to make an assessment for the proportionate amount of the contract completed; and
>
> "Whereas, it appears, upon consideration of said petition and the facts in the premises, that it is one that may properly be granted under the provisions of section 30 of an act of the Legislature of the state of California, commonly known as the Improvement Act of 1911, and that such order should issue:
>
> "Now, therefore, be it resolved by the board of trustees of the city of Corona that the street superintendent of said city be and he hereby is ordered and directed to make an assessment for the proportionate amount of the contract completed on said Main street from a point 22 feet south of the center line of the main track of the Southern California Railway to the north line of Lemon street, under said street contract No. 28; and it is further resolved that the amount of work for which an assessment is hereby ordered to be made is as follows, to wit:
>
> "All of the work and improvement as contemplated and as required under said street contract No. 28, together with the plans, profiles and specifications forming a part of said street contract No. 28 on said Main street from the center line of Olive street to the north line of Lemon street.
>
> "Be it further resolved, that the city clerk be and he is hereby directed to transmit a copy of this resolution to the said street superintendent forthwith.
>
> "Introduced, adopted and approved this 17th day of November, 1914." (Italics ours.)

On November 10, 1914, T. J. Fleming, the secretary and general manager of the plaintiff company, wrote to the superintendent of streets as follows:

> "Please advise in the inclosed stamped return envelope the exact date of completion of contract of the Easley Construction Co., on Main street, Corona, also date of acceptance and date of issuance of the warrant, when the same has been issued, and greatly oblige. Very truly yours, T. J. Fleming, Sec'y & Gen. Mgr."

To which inquiry the street superintendent replied as follows:

> "Yours received. Should have answered before but have been very busy on account of the races. The street is about completed and warrant will be issued early next week. Will let you know when same is turned over if you wish. Very truly, A. B. Tuthill."

The plaintiff made further inquiry of the street superintendent on November 19, 1914, as follows:

> "Yours of the 16th received, relating to Easley contract on Main street, and we will be under many obligations to you if you will kindly advise us when the street is completed and the warrant turned over. Addressed stamped envelope is inclosed for your reply, and with kindest regards, we are very truly yours, T. J. Fleming, Sec'y & Gen. Mgr."

To this letter the street superintendent made the following reply:

> "Your favor of the 19th instant received. In reply will say that work is completed on Main street and I have this day issued warrant, diagram and assessment dated November 30th, 1 o'clock p. m. Trusting the above information is complete, I remain, very truly, A. B. Tuthill, Supt. of Streets."

The above correspondence was admitted in evidence over the defendant's objection that it was irrelevant, incompetent, and immaterial. The following certificate was also admitted over a like objection by defendant:

> "28. Improvement of Main street from So. Cal. R. R. track to Lemon street. O. F. Easley, Contractor. Date of contract, May 21st, 1914. September 25th, 1915: I hereby accept the above street from So. Cal. Ry. track to center line of Olive street. November 30 from center line of Olive street to Lemon street.
>
> "A. B. Tuthill, Street Supt.
>
> "——— 190—. Certificate of acceptance issued.
>
> "———, Street Superintendent."

Witnesses, Frank L. Woodling, M. Terpening, city clerk of Corona, O. F. Easley, the original contractor, and A. B. Tuthill, street superintendent, all called on behalf of the defendant, testified that the work was completed on or before November 11, 1914. With this evidence before it the court found that—

> "Said company proceeded with the completion of said contract and of said street work and completed the same on the 30th day of November, 1914."

[1] It is urged by appellant that this finding is against the evidence; that all of the oral testimony and the certificates of the street superintendent and the city engineer, dated November 11, 1914, show conclusively that the work of improvement was com-

pleted on that date; and that the resolution passed by the board of trustees of the city of Corona on November 17, 1914, amounted to a formal acceptance of the work. In our opinion this contention must be sustained. Section 18 of the Improvement Act of 1911 provides that—

> "The work must, in all cases, be done under the direction and to the satisfaction of the superintendent of streets. * * * The assessment and apportionment of the expenses of all such work, or improvement shall be made by the superintendent of streets in the mode provided by this act." Stats. 1911, p. 738.

Nowhere does the act provide that the assessment shall be ordered or approved by the board of trustees or city council except as provided for in section 30. The power to accept the work and make the assessment to cover the cost thereof is vested in the street superintendent direct, under the provisions of section 21, which reads as follows:

> "Section 21. After the contractor of any street work has fulfilled his contract to the satisfaction of the street superintendent of said city, or city council on appeal, the street superintendent shall make an assessment to cover the sum due for the work performed and specified in said contract. * * * "

[2, 3] There is no provision in the act that there shall be a certificate of final acceptance such as that made by the street superintendent on November 30th; though it is provided by section 36 that the city council shall by ordinance adopt such streets or parts thereof as may have been completed to the satisfaction of the street superintendent. This might imply that the council or board of trustees may require such a certificate before adopting a street. But no such question is presented here. The question to be decided is: When was the work completed? The fact that the contractor requested that the work be accepted piecemeal as provided in section 30, and that the board of trustees granted the request, cannot change the plain provisions of the act that "the work must in all cases, be done under the direction and to the satisfaction of the superintendent of streets" (section 18), and that he alone, therefore, has power to accept the work as completed. If he refuse to accept, however, the contractor may appeal to the council. Section 21.

[4-6] The board of trustees, in passing the resolution of November 17, 1914, ordering the assessment to cover the cost of improving that portion of Main street lying between the center line of Olive street and the north line of Lemon street, in compliance with the contractor's petition, supported by the certificate of the street superintendent, authorized the payment for all of the work of improvement under the contract. No part remained unfinished. To quote again from the certificate of the street superintendent:

> "All of said improvement under said contract No. 28, per the terms of the contract, have prior hereto been completed and to my entire satisfaction and approval."

This resolution amounted to a legal acceptance of the street improvement under the contract as completed, binding as between the city and the contractor. Such an acceptance of the work as completed must also be considered binding upon the plaintiff, a materialman, seeking recovery on its bond. Denny-Renton Clay & Coal Co. v. National Surety Co., 93 Wash. 103, 160 Pac. 1. We think therefore that the court erred in finding that the work of improvement was completed on November 30th; that the finding should have been that the work was completed on November 11, 1914; and that the 30-day period, within which materialmen and laborers may file their claims as provided in section 19, began to run from that date. Such a construction would work no hardship on a reasonably diligent claimant. He is not required to wait for the completion or the acceptance of the work, but can file his claim without waiting for the final completion of the entire work. French v. Powell, 135 Cal. 636, 68 Pac. 92; Hub Hdw. Co. v. Ætna Accident, etc., Co., 173 Pac. 81.

It is further urged by appellant that, even though it should be conceded that the work was completed on November 30th, the plaintiff did not file its verified claim within 30 days, as prescribed by the act. It appears that a representative of the plaintiff left Los Angeles at about 1 p. m. on December 30th and arrived in the city of Corona at 4:30 on the same afternoon, for the purpose of filing the plaintiff's claim with the superintendent of streets. This messenger found the office of the street superintendent closed and was told that the street superintendent had gone into Los Angeles at 11 o'clock that morning. After waiting until 8 o'clock that night for him to return, the messenger left the verified claim with the city clerk of the city of Corona, who has an office in the same building as the superintendent of streets, with instructions that the claim should be filed with the superintendent of streets at the earliest possible moment. At 9 o'clock the next morning, December 31, 1914, the city clerk filed the claim with the superintendent of streets. This, appellant contends, did not comply with the statutory requirement that a materialman may "within thirty days from the time said improvement is completed, file with the superintendent of streets a verified statement of his or its claim." In view of the fact that we are of the opinion that the court erred in finding that the work was completed on November 30, 1914, it is not necessary to discuss this point.

[7, 8] We have ignored the appeal from the order denying the motion to strike out, for two reasons: First, because such an order is not appealable (section 963, Code Civ. Proc.); and, second, the point is not mentioned in the briefs.

Judgment reversed.

We concur: SHAW, J.; OLNEY, J.

181 Cal. 51

SILVERSTIN et al. v. KOHLER & CHASE et al. (L. A. 5245.)

(Supreme Court of California. Aug. 18, 1919.)

1. SALES 🔑456—CONDITIONAL SALE—LEASE FORM.

An agreement as to a piano, though in form a lease, providing for bill of sale on payment of certain sum, *held* a conditional sale.

2. SALES 🔑477(4)—CONDITIONAL SALE—ACTION FOR INSTALLMENT OF PRICE—EFFECT ON TITLE.

Seller in conditional sale by bringing action merely for the installments due, only part being due, does not confirm title in buyer; this not being inconsistent with continuance of the contract.

3. SALES 🔑479(2) — RETAKING BY CONDITIONAL SELLER.

Seller in conditional sale not having confirmed title in buyer by suing for installments, his retaking possession, as authorized by contract, on further default, even though forcible, does not amount to conversion.

4. ASSAULT AND BATTERY 🔑15—CONDITIONAL SALE—FORCIBLE RETAKING.

Seller in conditional sale, being justified in retaking possession without process of law only where possession can be secured peaceably, is liable for assault in forcible retaking.

5. APPEAL AND ERROR 🔑757(3)—RECORD—REVIEW.

The point of insufficiency of evidence to support finding cannot be considered; the appeal being based on a typewritten transcript, and the evidence not being printed in the brief, as required by Code Civ. Proc. § 953c.

Department 2.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by I. Silverstin and another against Kohler & Chase and others. Judgment for plaintiffs, and defendants appeal. Modified and affirmed.

Lewis Sherman Jones and Henry Wetherhorn, both of Los Angeles (G. C. Ringolsky and H. A. I. Wolch, both of San Francisco, of counsel), for appellants.

Drew Pruitt and John Dennison, both of Los Angeles, for respondents.

WILBUR, J. Plaintiffs, husband and wife, brought this action to recover from defendants the value of a certain piano belonging to the plaintiffs, alleged to have been converted by the defendant, and for damages for personal injuries suffered by the plaintiff Ida Silverstin at the time of the forcible taking of such piano, and for punitive damages. The court rendered judgment for $350, the value of the piano, and for $150 actual damages for personal injuries suffered by the plaintiff Ida Silverstin. The controversy between the parties grows out of an agreement entered into between defendants' assignor, S. Borax & Co. and I. Silverstin, relating to said piano, dated October 10, 1913. This contract purports to lease the piano in question for $500, $110 of which is acknowledged to have been received, and the balance of $390 agreed to be paid in monthly installments of $10, commencing on the 1st day of November, 1913. The contract also provides:

> "Third. When all of said rental with interest thereon as aforesaid is paid, then upon the payment by me of one dollar, as consideration therefor, the title of said instrument is to be vested in me, and S. Borax & Co. is to give me a bill of sale of the same.
>
> "Fourth. It is also agreed that in the event that I shall refuse to accept delivery of said instrument, or fail to pay either of said monthly installments, or interest thereon at maturity, or violate any provision of this lease, then at the option of S. Borax & Co. all of said rental, together with interest thereon as aforesaid, shall in either of said cases immediately become due and payable, and S. Borax & Co. may at its option upon such default enforce payment of the entire sum then unpaid and interest thereon, or S. Borax & Co. may, at its option, take possession of said instrument and cancel this lease, and in that event I hereby agree to surrender and return said instrument to it in as good condition as when received, customary wear by careful usage excepted."

S. Borax & Co. assigned their interest in the contract and in the piano to the defendants Kohler & Chase. The plaintiffs paid $20 and no more. In June, 1915, defendant sued I. Silverstin for the monthly payments then due, amounting to $140 principal and $27.30 interest, obtaining a judgment therefor, which judgment has never been paid. Plaintiffs failed to pay any subsequently accruing installments, and on July 19, 1916, defendants took possession of the piano.

[1-4] It is asserted that the trial court decided the case on the theory that the contract in question was a conditional sale; that the sellers by bringing suit for the installments of the purchase price elected to recover the purchase price, thereby confirming title in the plaintiffs, and thereafter had no right to recover possession of the property, and that their act in taking possession

thereof was a conversion of the property. This agreement is a conditional sale of the piano, although in form a lease. Van Allen v. Francis, 123 Cal. 474, 56 Pac. 339; Perkins v. Mettler, 126 Cal. 100, 58 Pac. 384; Lundy Furniture Co. v. White, 128 Cal. 170, 60 Pac. 759, 79 Am. St. Rep. 41; Muncey v. Brain, 158 Cal. 307, 110 Pac. 945; Wiley B. Allen Co. v. Wood, 32 Cal. App. 76, 162 Pac. 121; Adams v. Anthony, 172 Pac. 592; American Can Co. v. White, 130 Ark. 381, 197 S. W. 695; Young v. Phillips, 203 Mich. 566, 169 N. W. 822. The authorities throughout the United States are not uniform on the question as to when a vendor in a conditional sale must be held to have elected to pursue the remedy of collecting the purchase money rather than the recovery of the property itself. In many states it is held that where the full amount of the purchase price is due and the seller brings an action to recover the same he thereby confirms the title in the purchaser. This rule has been recognized in this state. Parke, etc., Co. v. White River Lumber Co., 101 Cal. 37, 35 Pac. 442; Holt, etc., Co. v. Ewing, 109 Cal. 357, 42 Pac. 435; Bailey v. Hervey, 135 Mass. 172; Frisch v. Wells, 200 Mass. 429, 86 N. E. 775, 23 L. R. A. (N. S.) 144; Galbreath v. Mayo (Okl.) 174 Pac. 517, and cases cited; Jordan v. Peek, 103 Wash. 94, 173 Pac. 726. In Parke, etc., Co. v. White River Lumber Co., supra, we followed the Massachusetts rule as announced in Bailey v. Hervey, supra. That court in a recent case has clearly indicated the difference between a suit for the whole purchase price under such a contract after the entire purchase price has become due and such an action for a part of the purchase price where some of the installments alone are due. Russell v. Martin, 232 Mass. 379, 122 N. E. 447. In that case it was said:

> "The plaintiff [vendor] undoubtedly could have sued on each note as it fell due, and still retained title."

It was expressly so held in Haynes v. Temple, 198 Mass. 372, 84 N. E. 467. The recovery of possession of the property and of the purchase price thereof are not always inconsistent remedies under such contracts. In recent decisions of this court we have pointed out that the retaking of possession by a seller under a conditional sale, for default of the purchaser is not always to be considered an election to waive pursuit of the purchase price, and may be entirely consistent with the rights of the purchaser to recover such price. Matteson v. Equitable M. & M. Co., 143 Cal. 436, 77 Pac. 144. See, also, Muncey v. Brain, supra; Adams v. Anthony, supra.

In the case at bar the seller sued for installments of the purchase price which were due under the terms of the contract, and allowed the purchaser to remain in possession according to the contract. There was nothing in this inconsistent with the terms of the contract. The money was due, by its terms, and the seller had a right to recover the same. Section 1047, Civ. Code. Such recovery was not inconsistent with a continuing contract between the parties. Peurrung v. Carter-Crume Co. (C. C. S. D. Ohio) 110 Fed. 107. There is no difference in principle, in favor of the purchaser, between such recovery of the installments due and the payment of those installments by the purchaser without suit. The seller was not therefore put to his election between two inconsistent remedies. If he had exercised the option given him under the contract to declare the whole of the purchase price due, and sued for the amount, the situation would have been entirely different, under the authorities cited. Here he acted in accordance with the contract. When, therefore, the purchaser subsequently defaulted in the payment of other installments, defendants had a right, under the terms of the contract, to retake possession, and such taking, even though forcible, did not amount to a conversion of the property. 38 Cyc. 2021, note 10. Plaintiff's judgment, therefore, for the value of the piano, upon the theory that the title thereto had passed to the purchaser by reason of the seller's suit to recover installments of the purchase price, is erroneous. Defendants are only liable for the assault upon the person of the plaintiff Ida Silverstin, as they were only justified in taking possession of the property without process of law, where such possession could be secured peaceably. Rosenthal v. McMann, 93 Cal. 505, 29 Pac. 121.

[5] The judgment for the personal injuries suffered by the plaintiff Ida Silverstin is attacked because of an alleged failure of the evidence to support the finding. This point cannot be considered for the reason that the appeal is based on a typewritten transcript, and the evidence on that subject is not printed in the brief, as required by law. Code Civ. Proc. § 953c.

The judgment is modified by reducing the amount thereof to $150, with interest from the date of the judgment, and is affirmed as modified, appellant to recover costs of appeal.

We concur: LENNON, J.; MELVIN, J.

(181 Cal. 33)

YOLO WATER & POWER CO. v. SUPERIOR COURT et al. (S. F. 9182.)

(Supreme Court of California. Aug. 14, 1919.)

1. COURTS 🔑212—TRANSFER OF CAUSE—SUPREME COURT—PROHIBITION.

If the Supreme Court has power to order transfer of a prohibition proceeding to it from the District Court of Appeal prior to final judgment by the latter court, it is not warranted in exercising such power after respondent's demurrer to the petition has been overruled, and an alternative writ directed to issue, but no final judgment has been given; peculiar facts of the case not constituting such an emergency as requires an immediate decision by the highest court.

2. COURTS 🔑99(2)—ORDER ON DEMURRER—LAW OF CASE.

Order of the District Court of Appeal overruling demurrer to a petition for prohibition, and the views stated by the court as its reasons for making the order, do not constitute the law of the case so far as further proceedings in such court are concerned, or on any petition for hearing in the Supreme Court that may be filed after the proceeding is finally determined by the District Court of Appeal.

In Bank.

Petition for prohibition by the Yolo Water & Power Company against the Superior Court of the state of California and others, resulting in order overruling demurrer and directing an alternative writ to issue. On application for immediate transfer to and hearing in the Supreme Court. Application denied.

See, also, 185 Pac. 195.

H. B. Churchill, of Lakeport, and Robert Duncan, of Ukiah, for petitioner.

PER CURIAM. This is an application for the transfer of a proceeding in prohibition, now pending in the District Court of Appeal of the Third appellate district, to this court for hearing and determination. The District Court of Appeal made an order to show cause why such a writ should not be issued, in response to which the respondents interposed a demurrer. After argument on this demurrer the District Court of Appeal, on August 8, 1919, made an order overruling the demurrer and directing an alternative writ of prohibition to issue. This order was accompanied by an opinion. This being the situation with reference to the proceeding in the District Court of Appeal, and no final judgment having been given by that court, this application is made to this court for an immediate transfer and an immediate hearing herein, on the ground that there is such an emergency, due to the peculiar facts of the case, as requires an immediate decision by the highest court of the state.

[1, 2] Conceding the existence of the power of this court to order this transfer prior to final judgment by the District Court of Appeal, we do not feel that we are warranted in exercising that power in the present situation of the proceeding. In denying the application for transfer we deem it proper to say that in view of our decisions neither the order overruling the demurrer made by the District Court of Appeal nor the views stated by that court as its reasons for making such order constitute the law of the case in so far as further proceedings in said court are concerned, or upon any petition for a hearing in this court that may be filed after said proceeding is finally determined by such District Court of Appeal. Furthermore, denial of this application is not to be taken as indicating our assent to the conclusion reached by the District Court of Appeal on demurrer, or the views expressed in the opinion of said court filed with said order.

The application for transfer is denied.

All concur, except WILBUR, J., absent

(42 Cal. App. 100)

AVERY v. AVERY et al. (Civ. 2897.)

(District Court of Appeal, First District, Division 2, California. July 7, 1919.)

1. APPEAL AND ERROR 🔑1010(1)—REVIEW—FINDINGS.

Findings of fact in an action tried to the court are conclusive on appeal, where the evidence is such that different inferences might reasonably have been drawn therefrom.

2. DEEDS 🔑60—DELIVERY—REQUEST THAT DEED BE NOT RECORDED.

In view of Civ. Code, § 1056, where deeds were duly delivered, the fact that the grantor requested that they should not be recorded until the happening of some future event does not affect their validity, for they would pass title without recordation.

3. EVIDENCE 🔑67(3)—INSANE PERSONS 🔑26—COMMITMENT FOR INSANITY—EFFECT OF JUDGMENT.

A judgment declaring one judicially insane and committing him establishes insanity only as of the date of the judgment, for there is a legal presumption of sanity in regard to every man, and proof of insanity at one time carries no presumption of its past existence.

4. EVIDENCE 🔑63—PRESUMPTIONS—SANITY.

There is a legal presumption of sanity in regard to every man.

5. DEEDS 🔑68(1½)—VALIDITY—SANITY.

If one is able to understand the nature and situation of his property, his relations to those around him, and the effect of his acts, and is free from delusion, he is capable of disposing of his property, notwithstanding he is afflicted with symptoms of insanity which later necessitate his commitment to an insane asylum; hence, though certificates of medical examiners attached to a judgment committing one as an insane person stated the attack of insanity began 1½ months ago, deeds made by the one committed approximately 30 days earlier, are not voidable on that account, etc.

Appeal from Superior Court, Alameda County; William M. Conley, Judge.

Action by Manuel Avery against Franklin L. Avery and others. From a judgment for defendants, plaintiff appeals. Affirmed.

F. W. Sawyer, of San Francisco, for appellant.

A. J. Woolsey, of Oakland, for respondent Schmidt.

F. J. Castelhun, of San Francisco, for respondent Avery.

F. H. Bartlett, of Oakland, for respondent Esparza.

LANGDON, P. J. This is an action to quiet title to five lots described in the complaint and situated in Berkeley, Alameda county. From a judgment for the defendants, the plaintiff appeals.

The defendants answered separately, each claiming a different portion of the land described in the complaint as grantees of Fidelius Avery, deceased. It is conceded that on the 26th day of May, 1915, title to this land was in Fidelius Avery, the foster father of the plaintiff. Plaintiff claims title thereto as his heir at law, asserting, first, that the deeds under which the defendants claim as grantees were never delivered during the lifetime of the grantor; and, second, that, if such deeds were delivered, they were nevertheless executed and delivered at a time when the grantor was insane, and therefore incompetent to make any contract.

[1, 2] The first contention may be very briefly disposed of. The evidence upon the question of delivery was such that different inferences might reasonably have been drawn therefrom, and under such circumstances the finding of the trial court is conclusive. The fact that the grantor requested that the deeds should not be recorded until the happening of some future event would have no effect upon their delivery. Lewis v. Brown, 22 Cal. App. 38, 133 Pac. 331. The deeds would pass title without recording. In so far as the deeds to Franklin Avery are concerned, there can be no doubt that there was an unconditional delivery to him which passed title. These deeds were delivered to him personally, and section 1056, Civil Code, provides that:

> "A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made."

See Mowry v. Heney, 86 Cal. 471, 25 Pac. 17; Lewis v. Brown, 22 Cal. App. 38, 133 Pac. 331.

As to the delivery to the other defendants, some question might arise from the evidence as to whether Franklin Avery, in receiving the deeds from the grantor, was acting as the agent of the grantor or as the agent of the grantees; but, as stated before, either inference would be warranted from the evidence, and the trial court has resolved the doubt in favor of the defendants by its finding.

[3-5] This leaves for our consideration only the contention of appellant that the evidence does not warrant the finding that, at the time the said deeds were executed and delivered by the grantor, the said grantor was of sound and disposing mind. The evidence shows that the deeds were all executed on May 26, 1915, and that the grantor was judicially declared insane and ordered confined in the Agnews State Hospital for the insane on June 23, 1915. The testimony of Franklin Avery and the testimony of the notary public who made out the deeds at the request of the grantor, and before whom said deeds were executed, was to the effect that at the time the deeds were executed and delivered the grantor was of sound mind. It is true the record discloses contradictory testimony upon this question, and the appellant relies especially upon the record in the insanity hearing, which was introduced in evidence in this case. The judgment therein established the insanity of the grantor only as of the date of the judgment. It has been held that it is not conclusive as to even that fact against those who were not parties. Den v. Clark, 10 N. J. Law, 217, 18 Am. Dec. 417. But, be that as it may, it is clear that such judgment is not proof of insanity at a time prior to the date stated therein, for there is a legal presumption of sanity in regard to every man, and therefore proof of insanity at one time carries no presumption of its past existence. Estate of Dolbeer, 3 Cof. Prob. Dec. 249.

Appellants argue that, as the certificates of the medical examiners attached to the judgment of the court stated, among other things, that the "present attack began 1½ months ago," the plaintiff may not introduce evidence contrary to this recital. The answer to this objection is that the statement of the medical examiners has not even the force of a judgment, and it is clearly not conclusive of the fact recited against persons not parties to the proceeding. Furthermore, it appears from the same certificate that the following question appearing thereon was left unanswered by the examiners: "Was the present attack gradual or rapid in its onset?" We therefore have in the record no statement by the examiners as to whether the insanity stated by them to have begun 1½ months previously came on suddenly, rendering the subject incompetent from that time, or whether its effects were gradual and slow or intermittent, which latter conditions might be consistent with capacity to make the deeds at the time they were made; for it is not every symptom or indication of insanity which will render one incompetent to dispose of his property. It has been said that if one is able to understand and carry in mind the nature and situation of his property, and his relations to his relatives and those around him, with clear remembrance as to those in whom and those things in which he has been mostly interested, capable of understanding the act he is doing and the relation in which he stands to the objects of his bounty, free from any delusion, the effect of disease, which might lead him to dispose of his property otherwise than he would, if he knew and understood what he was doing, he has the capacity to dispose of his property. Whitney v. Twombly, 136 Mass. 145; Estate of Motz, 136 Cal. 558, 69 Pac. 294; Estate of Houston, 163 Cal. 169, 124 Pac. 852.

We cannot, therefore, disturb the finding of the trial court in regard to the competency of the grantor, and the judgment is affirmed.

We concur: BRITTAIN, J.; HAVEN, J.

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42 Cal. App. 166

STATE BOARD OF HEALTH OF CALIFORNIA v. ALAMEDA COUNTY.

(Civ. 2796.)

(District Court of Appeal, First District, Division 2, California. July 10, 1919.)

COUNTIES 🔑216—CLAIM AGAINST COUNTY—"CLAIM"—"BILL"—"DEMAND."

Under Code Civ. Proc. § 342, outlawing claims against counties six months after rejection by the supervisors, which section is made applicable to actions by the state by section 345, *held*, that a demand or bill by state board of health against a county under St. 1913, p. 868, for cost of eradicating rodents and other vermin from county, is barred six months after rejection, since there is no difference between "bill" or "demand," and a "claim."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bill; Claim; Demand.]

Appeal from Superior Court of Alameda County; Wm. H. Waste, Judge.

Action by the State Board of Health of the State of California against the County of Alameda. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Kemper B. Campbell, of Los Angeles, for appellant.

Ezra W. Decoto and Theo P. Wittschen, both of Oakland, for respondent.

LANGDON, P. J. This is an appeal by the plaintiff, state board of health, from a judgment rendered against it in an action brought to recover from the county of Alameda the amount of three bills or demands presented by said board to the board of supervisors of Alameda county, which had been rejected by said board of supervisors. The demands were for the amount of money expended by plaintiff for the eradication of rodents on lands situated in the county of Alameda, and arose by reason of the provisions of a certain act entitled "An act to prevent the introduction, and provide for the investigation and suppression of contagious or infectious diseases, and appropriating money to be used for such purpose," which is found in the Statutes of 1913, at page 868. This statute, as it read at the time of the expenditures represented by the demands, provided an appropriation of $100,000, which was to be used by the state board of health in such way as it saw fit for the eradication of rodents and other vermin liable to spread infectious or contagious diseases. For the amount spent on a given piece of property the state board of health was authorized to file a bill with the board of supervisors of the county within which the property was situated, which body is directed by the act to allow the bill as filed at its next regular meeting. After payment by the county, it is given a lien for the amount of the demands so paid against the property mentioned therein, and upon which the money was spent for the purpose specified in the act. The defendants demurred to the complaint upon three grounds, and judgment was entered upon the demurrer, the plaintiff having refused to amend its complaint.

It is only necessary under the conclusion we have reached to consider one ground of objection stated in the demurrer, as that objection is decisive of the present action. It is that the alleged cause of action is barred by the provisions of section 342, Code of Civil Procedure, which section reads as follows:

> "Actions on claims against a county which have been rejected by the board of supervisors, must be commenced within six months after the first rejection thereof by such board."

We fail to see the force of the distinction sought to be made by the appellant between a bill or demand presented to the board of supervisors and a claim presented to that body. The complaint stated that certain of the demands upon which the action is founded were rejected by the board of supervisors of Alameda county on December 27, 1915, and that others were rejected on March 6, 1916. The present action was not commenced until June 1, 1917, almost 15 months after the last claim had been rejected.

Appellant argues that the statutes of limitation are not applicable to the state in any case where the cause of action arose in the exercise of its governmental functions, and cites numerous authorities in which this common-law rule is announced. The answer to this objection is that the rule has been changed in this state by express code provision. Section 345, Code of Civil Procedure, which is found in the same chapter as section 342, Code of Civil Procedure, above quoted, reads:

> "The limitations prescribed in this chapter apply to actions brought in the name of the state, or for the benefit of the state in the same manner as to actions by private parties. * * *"

Clearly the state board of health is but an arm of the state, and comes within the provisions of the last quoted section.

The demurrer was properly sustained, and the judgment is affirmed.

We concur: HAVEN, J.; BRITTAIN, J.

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42 Cal. App. 168

HAND v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (Civ. 2976.)

(District Court of Appeal, Second District, Division 1, California. July 10, 1919.)

PROCESS ⚷119—SERVICE—IMMUNITY.

Where plaintiff in action pending in another state comes into this state to attend the taking of a deposition by his adversary he is subject to service of a summons.

Petition for writ of prohibition by James D. Hand against the Superior Court of Los Angeles County and Grant Jackson, Judge of said court. Proceeding dismissed.

Edmon G. Bennett and Lewis D. Collings, both of Los Angeles, for petitioner.

Reginald W. Clapp, of Los Angeles, for respondents.

SHAW, J. This is an application for a writ of prohibition. Petitioner, who is a resident of Illinois, was plaintiff in an action wherein Edwin M. Allen et al. were defendants, then pending in one of the courts of that state. He came here to attend the taking of depositions to be used in the trial of the case, and while present in the office of the commissioner before whom the depositions were made he was served with a summons in an action brought against him in the superior court of Los Angeles county. Claiming that by reason of the facts he was privileged from service of such process, he appeared specially and moved the court to quash and vacate service of the summons. This motion was denied, whereupon he filed this petition to restrain the court from further proceedings in the action.

The authorities of other jurisdictions involving the question as to what extent a nonresident party to an action attending the trial of the case is exempt from service of process issued in another action therein brought, are by no means uniform. Many of them relate to the question of immunity granted witnesses from arrest while attending as such upon the trial of cases, the rights of whom, however, in this state are fixed by section 2067, Code of Civil Procedure. As to the rights of parties to actions, where they are nonresidents of the state wherein the trial is had, one line of argument is illustrated by Burroughs v. Cocke & Willis, 56 Okl. 627, 156 Pac. 196, L. R. A. 1916E, 1170, and Cooper v. Wyman, 122 N. C. 784, 29 S. E. 947, 65 Am. St. Rep. 731, upholding the privilege of immunity to parties, while other cases, such as Guynn v. McDaneld, 4 Idaho, 610, 43 Pac. 74, 95 Am. St. Rep. 158, Baldwin v. Emerson, 16 R. I. 305, 15 Atl. 83, 27 Am. St. Rep. 741, Baisley v. Baisley, 113 Mo. 544, 21 S. W. 29, 35 Am. St. Rep. 726, and Bishop v. Vose, 27 Conn. 1, may be cited in support of a contrary view. The reason for granting immunity to suitors is varied. By some of the authorities it is based upon a personal privilege of the suitor, and by others upon the fact that public policy demands that the courts should not be hampered by having those in attendance upon trials interfered with by other litigants.

These reasons, however, have no application to the instant case, for the reason that petitioner was not a party to the trial of any action in this state; he was not a witness, nor was he in attendance upon any court whose proceedings could be hampered by the service of process upon him. He was merely, of his own volition and for his own interest, an attendant at the taking of a deposition on behalf of his adversary, and the notary public acting as commissioner before whom the depositions were taken was not answerable to the court before which the action was pending for anything said or done; the entire proceeding being outside of its jurisdiction. Greer v. Young, 120 Ill. 184, 11 N. E. 167. Hence, while it may be, for the purposes of this case, conceded that in furtherance of justice parties to actions and their witnesses should be privileged, not only from arrest, but from service of summons, while in attendance upon the trial of a cause, such rule has no application to the case of a party living in a foreign state, where he is a party to litigation there pending, and attends in this state for the purpose of taking testimony out of court. In order to come within the rule, the proceeding must in any event be one in court or a similar tribunal. Quoting from Parker v. Manco, 61 Hun, 519, 16 N. Y. Supp. 325, the courts of which state fully recognize the rule invoked by petitioner:

"We think, therefore, that the coming into this state, for the purpose of being present upon the taking of testimony to be used in an action in another state, neither comes within the spirit nor the letter of the rule to which attention has been called, and that the defendant [petitioner here] was liable to service of process, and the service of summons herein."

The proceeding is dismissed.

We concur: CONREY, P. J.; JAMES, J.

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42 Cal. App. 148

MELICHAREK v. COLKINS et al.

(Civ. 2291.)

(District Court of Appeal, Second District, Division 1, California. July 10, 1919.)

1. VENDOR AND PURCHASER ⚷116—RESCISSION OF CONTRACT—COMPLAINT.

Where purchaser failed to tender a reconveyance of lots or of money received by purchaser for them, he had no cause of action for rescission of the purchase contract.

2. VENDOR AND PURCHASER ⚷35—RESCISSION OF CONTRACT—MISREPRESENTATION.

A vendor's representations that tax deed affidavits upon which the validity of his title depended were correct according to advice he had received, etc., *held* not a misrepresentation of fact authorizing rescission of the sales contract.

3. VENDOR AND PURCHASER ⚷334(5)—FAILURE OF CONSIDERATION — WHAT CONSTITUTES.

Where lots bought by plaintiff from a tax sale purchaser were redeemed by the owner upon payment of accrued taxes, interest, etc., there was not a total failure of consideration, authorizing the plaintiff to recover from his vendor in an action for money had and received.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Frank Melicharek against Anna M. Colkins and A. J. Daniels, as administrator of the estate of A. Colkins, deceased. Judgment for plaintiff, and defendants appeal. Reversed.

James Brunken, of Los Angeles, for appellants.
Charles H. Mattingly, of Los Angeles, for respondent.

CONREY, P. J. Prior to the year 1913, at a sale for delinquent assessments for the widening of Figueroa street, in the city of Los Angeles, under the Street Opening and Widening Act of 1903, four lots of land in said city were sold to the defendant Anna M. Colkins, and certificates of sale thereon were issued to her. Thereafter she made assignments of said certificates of sale to A. Colkins. In the month of October, 1913, the street superintendent of the city of Los Angeles conveyed to A. Colkins, as assignee of defendant Anna M. Colkins, the four lots above mentioned. On or about the 3d day of November, 1913, A. Colkins sold and by grant deeds (one for each lot), conveyed to the plaintiff said four lots; plaintiff paying for each of said lots the agreed price of $275. Anna M. Colkins, who was the wife of A. Colkins, joined with him in the execution of the deeds to plaintiff. Without describing the several tracts in which the lots were located, we will designate them by their lot numbers only. While the plaintiff and A. Colkins were negotiating for the sale, they took the tax deeds to the office of Mr. Mattingly, an attorney at law, and asked him if they were valid. He told them that it depended upon whether or not the affidavits of Mr. Colkins were sufficient, and that if those affidavits were not sufficient the deeds were not good. The affidavits referred to were those required by section 28 of the Street Opening and Widening Act of 1903, which affidavits must be made and filed with the street superintendent. The affidavits were not present at that time and were not examined, but Colkins said that "everything is correct."

Testifying in this action for the plaintiff, Mr. Mattingly states that "then Mr. Colkins stated that he knew that the affidavits were correct—all correct, because he said that he had obtained advice on the subject." This and similar testimony of the plaintiff constituted all of the evidence of representations made by the defendant concerning those affidavits. Mr. Mattingly informed them that, even though the tax deeds were absolutely correct in every particular, in order to obtain a marketable title it would be necessary to have an action to quiet title. With this information Melicharek paid the consideration and accepted the deeds from the defendants, and employed Mr. Mattingly to go ahead and quiet title. Before commencing such action, however, Melicharek, for a consideration of $150 paid by him, obtained a quitclaim deed from the owner of lot 330, and afterwards sold that lot. He also commenced actions to quiet title upon two of the lots and was made defendant in an action to quiet title to the remaining lot. In those cases it was determined that such affidavits were insufficient and that solely by reason thereof the tax deeds were void. As a condition of the quieting of the title of the owner in each of said cases, the owner was required to and did pay to Melicharek the amount of taxes and penalties constituting the purchase price, which Mrs. Colkins had paid at the tax sale. These sums so received by Melicharek amounted in all to the sum of $40.76.

In the present action the plaintiff seeks to recover judgment against the defendants

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

for the sum of $825, with interest from November 3, 1913, on account of the consideration paid by him for lots 267, 266, and 51. The complaint alleged that for the purpose of deceiving and defrauding the plaintiff, and inducing plaintiff to purchase said lots from said defendant for the sum of $825, defendant A. Colkins represented to plaintiff that said affidavits were sufficient, and that grant deeds from himself and wife to the plaintiff would convey a good and sufficient title, and would enable the plaintiff to quiet his title against the record owners of the property; that said representations were not true, and were known to the defendant to be not true, and were not warranted by the information of said defendant A. Colkins; that plaintiff believed and relied upon said representations, and except for those representations would not have paid to the said A. Colkins the said sum of $825; that plaintiff received no consideration for said sum of $825; that said deeds were void and of no effect by reason of the insufficiency of said affidavits and each of them; and that said grant deeds from defendants to plaintiff conveyed to plaintiff no title, all of which defendants at all times knew.

[1] The complaint did not refer to the fact that a fourth lot was included in the transaction, or that said sum of $40.76, or any portion thereof, had been received by plaintiff from the owners of the lots. No tender of said money, or of a reconveyance to the defendants of said lots, or any of them, was made by the plaintiff to the defendants, or either of them. Although the plaintiff had perfected his title to lot 330, and had exchanged that lot for other property of a value not appearing herein, he excluded from his complaint in this action that part of his transaction with the defendants, and did not offer to reconvey lot 330 to defendants, or to account in any way for the proceeds thereof. On these facts it is clear that the complaint has not stated a cause of action for rescission.

[2] And even if the plaintiff had herein offered to do all that must be done by a party seeking to rescind a sale, the facts of the case do not show that plaintiff has any right of rescission. The only misrepresentation claimed by him was that to which we have referred. This on its face was not a representation of fact, but merely an expression of opinion, which at the time was stated to be made upon advice theretofore received. There is no evidence that the defendant A. Colkins had not received such advice, or that he did not believe the same, or that he was not warranted in believing the same.

[3] But respondent claims that he is entitled to recover as upon an action for money had and received by the defendant for the use of the plaintiff; this claim being based upon the allegation that the plaintiff received no consideration whatever for the money paid by him and which he seeks to recover. But there was not a total failure of consideration. Even if the tax deeds were void, it is conceded that the vendor was the owner of a valid interest in the property conveyed, and had acquired that interest by virtue of a valid tax sale of the property to his assignor. At the time of the conveyance to plaintiff there existed no facts constituting a breach of any covenant, stated or implied, in the deeds made by defendants to the plaintiff. The utmost that can be said in favor of plaintiff's case is that the consideration which he received for the money paid by him was less valuable than it would have been if the tax deeds had been sufficient to carry the title. Having taken the property with this contingency before his eyes, and there being no equitable ground for rescission of the transaction, he is not entitled to recover. Neither the complaint nor the facts proved are sufficient to support the judgment. It should be noted that in computing the amount of its judgment the court gave credit to defendants for said sum of $40.76; but that does not affect our conclusions, herein stated.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

42 Cal. App. 170

STUBBS v. ABERCROMBIE et al.
(Civ. 2128.)

(District Court of Appeal, Second District, Division 2, California. July 10, 1919.)

False Imprisonment ⚿7(1)—Legality of Arrest—Complaint for Larceny of Deed.

Complaint, under Pen. Code, § 492, for larceny of deed, on which was issued warrant under which arrest was made, *held* to state an offense, so that there was no false imprisonment; it alleging stealing of deed executed by A. to J., conveying a certain lot, of a certain value, and the personal property of A.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Ira H. Stubbs against Mary E. Abercrombie and others. Judgment for plaintiff, and defendants Abercrombie and Palmer appeal. Reversed.

A. J. Hill, David R. Faries, and Dian R. Gardner, all of Los Angeles, for appellants.

Frank A. McDonald, of Los Angeles, for respondent.

THOMAS, J. This is an action whereby the plaintiff seeks to recover from the defendants the sum of $50,000 for damages al-

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

leged to have been sustained by him by reason of false imprisonment.

The material allegations of the amended complaint, so far as the gist of the present action is concerned, were denied. Demurrers interposed by defendants were overruled by the court. When the case came on for trial, the defendant Lyons, the constable, and Palmer, the justice of the peace, moved to strike the amended complaint from the files, so far as they were concerned. This motion was denied. The court granted a motion on the pleadings to dismiss as to the defendant Lyons, and the action thereupon proceeded against the defendants Mrs. Mary E. Abercrombie, who swore to the criminal complaint, which was the basis of the issuance of the warrant of arrest, and Harlan G. Palmer, the justice of the peace, who issued the said warrant. Judgment was given to plaintiff against the defendants in the sum of $50.

Each of these two defendants has appealed separately. By proper order of the court, made on stipulation of all parties concerned herein, both appeals were consolidated, and it was further stipulated that the transcript and briefs on appeal filed herein for the defendant and appellant Palmer might be used by all the parties hereto as the transcript and briefs in such consolidated appeals. The appeals are taken by the alternative method.

The facts, so far as material here, are as follows: Plaintiff, at the time of the transaction out of which this case arose, was a real estate dealer. He offered to defendant Mrs. Abercrombie an equity in a bungalow in the city of Hollywood and $800 in cash in exchange for a lot owned by her in Culver City, which she accepted, and thereupon she executed and conveyed her property to one Margaret Turner, who, as plaintiff informed her, was the owner of the Hollywood property. This deed and certain escrow instructions were placed in escrow. Shortly thereafter plaintiff told Mrs. Abercrombie that the lot she was transferring to Margaret Turner, and the building thereon, had been resold to Mr. Amenzo W. Brown, that this new deed should be substituted in escrow for the former deed, and that in this way the expenses of recordation and escrow fees could be saved. Mrs. Abercrombie, being apparently of an obliging disposition, consented to this arrangement, which was by her carried out. Plaintiff thereafter procured the first deed referred to above, and pretended to, and apparently did, destroy and throw it into a waste basket. In fact, however, he did not do so, but put the same into his pocket, and later placed it in escrow with another title company, with instructions to have the same recorded. At the same time and place plaintiff also placed in escrow a deed from Margaret Turner to Amenzo W. Brown, executed by himself as attorney in fact for said Margaret Turner. Shortly thereafter plaintiff called and obtained from the escrow company the deed from Mrs. Abercrombie to Margaret Turner, and himself had it recorded, thereby causing the records in the county recorder's office to show a transfer of the property from Mrs. Abercrombie to Margaret Turner. After being recorded, this deed was returned to the escrow company, and its escrow completed, Mrs. Abercrombie's lot being sold to Amenzo W. Brown, and the plaintiff received a check for $1,615, that being the amount paid by Brown, less escrow and recordation fees. Meanwhile the first escrow failed because of Mrs. Abercrombie's loss of record title. From what has been said it would appear that the result of this legerdemain in reality is that Mrs. Abercrombie conveyed her lot in compliance, as she supposed, with her understanding with the plaintiff, but received nothing in exchange therefor, while Mr. Brown got the lot and the plaintiff the money. The record nowhere discloses that Margaret Turner has ever transferred the Hollywood property or paid any money to Mrs. Abercrombie.

It is not necessary for this court to brand the foregoing transaction by any designation. The brand is obvious. Upon discovering the foregoing facts, Mrs. Abercrombie went to the office of the district attorney and stated the facts, after which she was advised that a public offense had been committed by plaintiff, and by one of the deputies in that office a criminal complaint was prepared, charging plaintiff with the crime of grand larceny. Before affixing her signature thereto, Mrs. Abercrombie took the complaint to the defendant Harlan G. Palmer, the justice of the peace aforesaid, and signed and swore to it before said Palmer as justice of the peace. A warrant of arrest was issued thereon, and the plaintiff arrested, arraigned, and, in default of bail, committed to the county jail. Three days later, before another justice, plaintiff was given a preliminary hearing, and the said charge dismissed, on the ground that the criminal complaint did not state facts sufficient to constitute a public offense. Shortly thereafter he brought this action.

From the record before us it appears that plaintiff brought this action originally against Mrs. Abercrombie alone for alleged malicious prosecution. A demurrer was interposed to the complaint and sustained by the court. The plaintiff then, by way of alleged amendment, filed an amended complaint against Mrs. Abercrombie, and included with her as defendants George W. Lyons. the constable who arrested him, and Harlan G. Palmer, the justice of the peace aforesaid, and changed his cause of action from one for malicious prosecution to one for false imprisonment.

On the trial it appears that the court refused to permit the defendants Abercrombie and Palmer to show that they, or either of them, were not actuated by malice, or that they acted in good faith, or under advice of counsel, or that there was probable cause for the arrest. The court held that the defendants were liable to the plaintiff, and that the liability could not be measured in merely nominal damages, but must be for a reasonable attorney's fee and actual compensatory damages. Three "fundamental questions," as appellants designate them, are presented to us, viz.:

(1) "Should the plaintiff's change of cause of action have been authorized?"

(2) "Did the criminal complaint [referred to in this action] state a public offense?"

(3) "When is a justice of the peace liable for false imprisonment, and to what extent?"

The first question presented is a close one. Under the common law the courts had no power to allow an amendment which introduced a new and distinct cause of action to an existing pleading.

"In a majority of the states the courts have established the doctrine that the powers conferred upon them, under the Codes and practice acts, in respect to amendments which set up a new and distinct cause of action, are no greater than that existing at common law, and that they are not authorized to grant such amendments at any stage of the proceedings." 31 Cyc. 409 et seq.

Our Supreme Court has held, in the case of Frost v. Witter, 132 Cal. 421, 64 Pac. 705, 84 Am. St. Rep. 53, that—

"all that can be required * * * is that 'a wholly different cause of action' shall not be introduced; * * * that 'a complainant is not at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment,'" and that "the matter of the amendment must not be 'entirely foreign to the original complaint.'"

"In false imprisonment the essence of the tort consists in depriving the plaintiff of his liberty without lawful justification, and the good or evil intention of the defendant does not excuse or create the tort. The plaintiff's grievance is the use against him of force, actual or threatened. Consequently, in the common-law procedure, the action must be brought in trespass. But in the case of malicious prosecution, or abuse of process, the process is valid, and in itself justifies the restraint or imprisonment. To deprive the defendant of its protection, it is necessary to show malice, want of probable cause to institute the proceeding, or some oppressive or fraudulent use of the machinery of the law. Consequently the malice or evil intent is the gist of the tort, the injury suffered by plaintiff resulting only indirectly from the wrongful act—that is, the evil intent—of the defendant, and the common-law action to be used is trespass on the case. Of course, the common-law classification of the different causes of action has ceased to be important in itself, but it illustrates the entirely different legal nature of the two classes of torts." 11 R. C. L. 792.

To the same effect, but in different language, our own Supreme Court has held, in the case of Davis v. Pacific Telephone & Telegraph Co., 127 Cal. 312, 57 Pac. 764, 59 Pac. 698, which was an action for malicious prosecution, wherein the court cites with approval the case of Nebenzahl v. Townsend, 10 Daly (N. Y.) 235, and quoting from that decision says:

"The complaint was for false imprisonment and malicious prosecution, which was uniting two causes of action that were inconsistent with each other, for, if the arrest was without legal authority, it was not a case of malicious prosecution, * * * and if under lawful process there was no false imprisonment, the imprisonment being by lawful authority. Each cause of action is distinct from the other. Thus, formerly for false imprisonment the remedy was trespass, and for malicious prosecution it was case. * * * Both cannot exist upon the same state of facts, or, to put it more clearly, if the one lies upon the facts, the other does not."

The following cases, we think, support this conclusion: Davis v. Pacific Telephone & Telegraph Co., supra; Sterrett v. Barker, 119 Cal. 492, 51 Pac. 695; Krause v. Spiegel, 94 Cal. 374, 29 Pac. 707, 15 L. R. A. 707, 28 Am. St. Rep. 137; Wheeler v. West, 78 Cal. 95, 20 Pac. 45; Hackett v. Bank of California, 57 Cal. 335; Ramirez v. Murray, 5 Cal. 222; Wilson v. Lassen, 5 Cal. 114.

On the other hand, under section 427, Code of Civil Procedure, it appears that such causes of action as those under discussion may be joined in the same pleading, and in 11 R. C. L. 791, it is expressly stated that—

"Very often a single transaction may constitute both a false imprisonment and a malicious prosecution, and the plaintiff at common law might have his election to sue in trespass for false imprisonment or in case for malicious prosecution; and in jurisdictions where the strict separation of the forms of action has been abolished, two or more of the above causes of action may be joined in the same suit."

There is, we think, no doubt but that in either case—malicious prosecution or false imprisonment—so far as the case at bar is concerned, the alleged injuries to plaintiff "arose out of the same transaction." From what appears to us as the weight of authority, it would seem, although we do not so hold, that the trial court erred in granting leave to amend the complaint.

As to the second question, the answer must be in the affirmative. In passing upon this phase of the case courts are limited, we think, to the contents of the original complaint. It is not a question as to what the evidence on the trial may disclose. So considered, the complaint here measures up to every statutory requirement. It follows that the justice of the peace erred in dismissing the case aforesaid. The justice issuing the warrant, therefore, acted legally in issuing the warrant, and the arrest of plaintiff under and by virtue thereof was legal. This being true, the present action must fail.

This case is distinguishable from that of People v. Dadmun, 23 Cal. App. 290, 137 Pac. 1071, relied upon by respondent, in this: In the Dadmun indictment, though the defendant Dadmun was named as the grantee in the deed, it did not appear that the deed had been delivered. If it had been delivered, it became the defendant's property, and the taking of it was not larceny. If it had not been delivered, it was not an executed instrument, and had no intrinsic value, particularly in the absence of an allegation to that effect. In the present case the criminal complaint, which gives rise to the action for false imprisonment, alleges that the defendant "did steal, take, and carry away a certain bargain and sale deed executed by Mary E. Abercrombie to Margaret Turner, conveying lot 10, in block 19, Tract 2444 of Culver City, of the value of $1,000, * * * and the personal property of Mary E. Abercrombie." Here was an executed deed. The value is alleged. The fact that the deed was averred to be the property of the grantor does not change the nature of the transaction. The real property may have been retransferred to her by Margaret Turner, and the deed from herself may thus have become an important link in her chain of title. At any rate, the facts alleged bring the instrument in question within the provisions of section 492 of the Penal Code.

It is unnecessary to discuss the third question.

In view of the audacious and reprehensible conduct of plaintiff, as disclosed by the record here—he having caused Mrs. Abercrombie to lose her property, and then bringing this action against her because, after discovering his duplicity and the fraud he had perpetrated upon her, she had gone to the office of the district attorney of Los Angeles county, and, so far as the record here discloses, had in good faith, and without malice, placed before that officer her complaint, although that point is not raised in the briefs here—we think we ought to say a word. Even if the criminal complaint had lacked the proper allegations to set forth facts sufficient to constitute a public offense, still, under the facts disclosed by the record here, the defendant, Mary E. Abercrombie, would not be liable. Rush v. Buckley, 100 Me. 322, 61 Atl. 774, 70 L. R. A. 464, 4 Ann. Cas. 318; Tillman v. Beard, 121 Mich. 475, 80 N. W. 248, 46 L. R. A. 215; Gifford v. Wiggins, 50 Minn. 401, 52 N. W. 904, and an exhaustive note in reference to the same case in 18 L. R. A. 356. For these reasons, and many others which appeal to us, but which we do not discuss, we are unable to agree with the learned trial court in its conclusions.

The judgment is reversed.

We concur: FINLAYSON, P. J.; SLOANE, J.

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42 Cal. App. 209

MARTINELLI v. BOND et al. (Civ. 2799.)

(District Court of Appeal, First District, Division 2, California. July 14, 1919. Rehearing Denied by Supreme Court Sept. 11, 1919.)

1. Master and Servant ⚷302(1)—Auto Accident—Owner's Liability.

Neither ownership of an auto, nor the fact that the use and care of it was intrusted by the owner to an employé, renders the owner liable for injuries inflicted by it while in use by the employé for a purpose entirely unconnected with the owner's business.

2. Master and Servant ⚷330(3)—Auto Accident—Owner's Liability—Overcoming Prima Facie Case.

The presumption arising from the prima facie case against the owner of an auto, by proof of his ownership and that the driver, at the time of its collision, was his employé, is overcome, without leaving any conflict of evidence, by uncontradicted proof that the auto was in use by the employé for his personal pleasure.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Laureno Martinelli, a minor, by Lorenzo Martinelli, his guardian ad litem, against Vincent Bond, transacting business under the fictitious name of Bond Bros. & Co., and another. Judgment for plaintiff, and the named defendant appeals. Reversed as to named defendant.

Watt, Miller, Thornton & Watt, of San Francisco, for appellant.

Hoefler, Cook & Snyder, of San Francisco, for respondent.

HAVEN, J. Plaintiff suffered personal injuries caused by a collision between a motorcycle which he was riding and an automobile driven by the defendant Noonan and owned by his employer, the defendant Bond. In this action, brought to recover damages for such injuries, a verdict was rendered in favor of plaintiff against both defendants. From the judgment following such verdict, the defendants prosecute separate appeals. This appeal is by the defendant Bond.

The appellant contends, first, that any judgment against him was erroneous, for the reason that the automobile was being used at the time of the accident by the defendant Noonan for a pleasure trip, and was not then

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

engaged in the transaction of his employer's business; and, secondly, that the evidence shows that the injuries complained of were caused solely by the negligence of plaintiff, and not by or through any carelessness or negligence on the part of either defendant. Under the conclusions that have been reached, it will be necessary on this appeal to consider the first contention only.

The automobile which collided with plaintiff's motorcycle was purchased by the defendant Bond for use in the business transacted by him under the name of Bond Bros. & Co. The defendant Noonan was in the employ of the defendant Bond as manager of such business. The automobile, when purchased, was turned over by Bond to Noonan for the latter's exclusive use, and was kept by him at a garage at or near his home, at the expense of the appellant Bond. Noonan never informed appellant where the automobile was kept, nor did the latter make any inquiry with regard thereto. The defendant Noonan had entire charge of the automobile, using it as he desired without restriction. Appellant testified that he had instructed Noonan that said automobile should not be used by him for pleasure purposes. Noonan stated that he did not remember such instructions. The collision which caused the injuries to plaintiff occurred on Sunday, December 23, 1917, between 6 and 7 o'clock in the evening, at or near the junction of San Jose avenue and Mission street, in San Francisco. Upon that day the defendant Noonan had taken two friends for a pleasure outing to Camp Fremont. He testified:

> That the trip was made "for the purpose of taking an outing," and that "when I was using it [the automobile] on this Sunday, when I was out for a ride, it was not being used for any purpose connected with the business of Mr. Bond."

The appellant had no knowledge of the use of the automobile for the purpose stated upon the day of the accident, nor for several days thereafter.

[1] The test of an owner's liability for the tortious act of his employé, while driving the former's automobile, is the nature of its use at the time of the accident, whether or not it is then being used in the transaction of the owner's business. The very basis of the rule of respondeat superior, as applied to automobile accidents, is that the driver of the machine is acting for the owner, and not for himself personally, at the time of the accident. As soon as the driver steps aside from the owner's business, and enters upon the performance of some independent purpose of his own, he ceases to act as the agent of the owner, and the latter's responsibility for his acts terminates. Appellant cites a large number of cases in which owners of automobiles have been relieved from liability for damages resulting from accidents, by reason of the fact that, at the time of such accident, the automobile was in use for a pleasure ride or other personal purpose of the driver. This rule is so well established that there can hardly be said to be conflict of authority thereon. The citation of the following authorities is sufficient to indicate the basis of the rule and its wide application: Thompson on Negligence, § 526; Berry on Automobiles (2d Ed.) §§ 601 and 618; Babbitt on the Law Applied to Motor Vehicles (2d Ed.) §§ 872 and 891; Davids on the Law of Motor Vehicles, § 216; Mullia v. Ye Planry Bldg. Co., 32 Cal. App. 6, 161 Pac. 1008; Mauchle v. Panama-Pacific, etc., Co., 174 Pac. 400; Brown v. Chevrolet Motor Co. of Cal., 179 Pac. 697; Maupin v. Solomon, 183 Pac. 198; Power v. Arnold Engineering Co., 142 App. Div. 401, 126 N. Y. Supp. 839; Cunningham v. Castle, 127 App. Div. 580, 111 N. Y. Supp. 1057; Morier v. St. Paul, etc., Ry. Co., 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793; Gousse v. Lowe, 183 Pac. 295.

Upon principle and authority, neither the ownership of the automobile by appellant, nor the fact that the use and care of the same were intrusted by appellant entirely to the defendant Noonan, renders the appellant liable for injuries inflicted by the automobile while in use for a purpose entirely unconnected with the appellant or his business.

Respondent relies upon cases which hold that, when an employé is intrusted with an automobile, with permission to use it at his discretion in the business of the employer, under what has been termed a "roving commission," it is not necessary, in order to establish the owner's liability, to prove that, at the time the injuries were received, the employé was engaged in performing any particular business of the principal. The authorities so relied upon recognize that, even under that rule, it is still necessary to show that, at the time of the commission of the tort, the employé was acting within the general scope of his employment. Jessen v. Peterson, Nelson & Co., 18 Cal. App. 349, 354, 123 Pac. 219; Berry on Automobiles (2d Ed.) § 626.

[2] It is further contended by respondent that he made a prima facie case against appellant by proof of the latter's ownership of the automobile, and the fact that the driver, Noonan, was his employé at the time of the accident. The presumption arising from such prima facie case remained only so long as there was no substantial evidence to the contrary. When the fact is proven to the contrary without contradiction, no conflict of evidence arises, but the presumption is simply overcome. Maupin v. Solomon, supra; Brown v. Chevrolet Motor Co. of Cal., supra. In this case there is no conflict in the evidence as to the fact that, at the time of the accident, the automobile was in use by the employé for his personal pleasure. Uncontradicted proof of that fact dispelled the pre-

sumption of liability on the part of the owner.

The judgment against the appellant Bond is reversed.

We concur: LANGDON, P. J.; BRITTAIN, J.

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42 Cal. App. 213

MARTINELLI v. BOND et al. (Civ. 2808.)

(District Court of Appeal, First District, Division 2, California. July 14, 1919.)

1. Municipal Corporations ⚷706(5)—Collision of Auto—Negligence—Sufficiency of Evidence.

Evidence in connection with requirement of Motor Vehicle Act, § 20g, that driver of motor vehicle, in turning to left at street intersection, shall go beyond the center thereof, passing to its right, before turning to the left, *held* sufficient to support jury's finding of negligence of driver of auto colliding with plaintiff's motorcycle.

2. Appeal and Error ⚷1002—Review—Findings on Conflicting Evidence.

Jury's finding cannot be disturbed on appeal, on a mere conflict in the evidence.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Laureno Martinelli, a minor, by Lorenzo Martinelli, his guardian ad litem, against Vincent Bond, transacting business under the fictitious name of Bond Bros. & Co., and P. C. Noonan. From an adverse judgment, the last-named defendant appeals. Affirmed as to last-named defendant.

Watt, Miller, Thornton & Watt and Edward J. Lynch, all of San Francisco, for appellant.

Hoefler, Cook & Snyder, of San Francisco, for respondent.

HAVEN, J. This is an appeal by the defendant Noonan from a judgment against him and his codefendant Bond, entered upon the verdict of the jury in an action for damages for personal injuries. The appeal of the defendant Bond is considered in action No. 2799, 183 Pac. 461, and the judgment as to that appellant is reversed in an opinion this day filed. This appeal is submitted upon the same record and briefs as the appeal of Bond.

The facts concerning the accident which caused the injuries to plaintiff are partially stated in the opinion on the other appeal. The appellant Noonan was the driver of the automobile at the time of the collision which caused the injuries. The question of his liability depends upon whether the accident was caused by his negligence or by the negligence of plaintiff. The testimony was conflicting as between plaintiff's and defendants' witnesses, which conflict the jury resolved in favor of the plaintiff. Its verdict cannot be disturbed, if it finds support in the evidence. The collision which caused the injuries occurred at or near the junction of San Jose avenue and Mission street, in the city of San Francisco. At the point where these two thoroughfares intersect at an acute angle is located a monument, known as the "Daly Monument." Shortly to the east of this monument, and near the small end of the triangle caused by the intersection of the two streets, stood a small building used as a real estate office. Between this building and the monument was a space of from 12 to 14 feet in width. Upon the evening of the accident appellant started easterly on San Jose avenue, but, finding the road rough, turned his machine and returned to the vicinity of the intersection of that street with Mission street, preparatory to turning down Mission street and proceeding easterly thereon. The plaintiff, his companion upon his motorcycle, and another witness to the accident, all testified that, instead of returning to the corner of the two streets and making the turn there, the appellant drove his machine across the passageway upon private property, between the monument and the real estate office, and came into Mission street from that unused and private shortcut, rather than from the intersection of the two streets. There is also testimony to the effect that the automobile "dashed out from this small street," and that no horn was blown when it did so.

[1, 2] This testimony, in connection with the provisions of the Motor Vehicle Act to the effect that the driver of a motor vehicle, in turning to the left at an intersection with another street, "shall run beyond the center of such intersection, passing to the right thereof, before turning such vehicle toward the left" (Stats. 1915, p. 407, § 20 [g]), is sufficient to support the finding of the jury of negligence on the part of the driver of the automobile. The witnesses for the defendants all contradicted the statements made on the part of the plaintiff above referred to, but the verdict and judgment cannot be disturbed upon a mere conflict in the evidence.

The judgment against the appellant Noonan is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

42 Cal. App. 202

SONOMA COUNTY NAT. BANK v. SKINNER. (Civ. 2567.)

(District Court of Appeal, First District, Division 1, California. July 12, 1919.)

1. APPEAL AND ERROR 🔑1056(1)—HARMLESS ERROR—RULING ON EVIDENCE.

Exclusion of evidence, in action on note transferred as collateral security for certain indebtedness, to show that certain of the indebtedness was not due, was harmless; the balance due exceeding the note.

2. APPEAL AND ERROR 🔑1058(2)—HARMLESS ERROR—RULING ON EVIDENCE.

Sustaining objection to question is harmless; the fact sought to be elicited thereby appearing by subsequent testimony of the witness.

3. BILLS AND NOTES 🔑430—PAYMENT—RENEWAL NOTES.

Debt remaining, after crediting on a note a payment of part of it, is not extinguished, in the absence of agreement to that effect, by marking the note "Paid," surrendering it, and taking a new note for the balance.

4. BILLS AND NOTES 🔑357—ASSIGNMENT AS COLLATERAL—BONA FIDE HOLDING.

The assignee of a note as collateral for present and subsequent debts is, as regards subsequent debts, a bona fide holder of the note only as to such of those debts as are incurred before maturity of the note.

5. BILLS AND NOTES 🔑525—ASSIGNMENT AS COLLATERAL—DEBTS SECURED—EVIDENCE.

Evidence that the maker of a note assigned as collateral for subsequent debts of the payee paid it to the payee after its maturity with no knowledge of the assignee's claim has no tendency to show that debts of the payee to the assignee, incurred after assignment, were incurred after maturity of the note, and so not secured by it, as against the maker.

Appeal from Superior Court, City any County of San Francisco; John H. Hunt, Judge.

Action by the Sonoma County National Bank against R. M. Skinner. Judgment for plaintiff, and defendant appeals. Affirmed.

W. H. Morrissey, of San Francisco, and Frederick H. Shepper, for appellant.

Reuben G. Hunt, of San Francisco, for respondent.

WASTE, P. J. Defendant appeals from a judgment in favor of plaintiff, upon a directed verdict, for money due on a promissory note.

On November 28, 1914, C. F. Fury, being at the time already indebted to plaintiff, borrowed from it the sum of $500. He executed and delivered to it his promissory note for that amount. As collateral security for the payment of this note, for what he already owed, and for future advances, he transferred to the bank a claim, for the sum of $400, held by himself against the Helling estate, and transferred to it by indorsement the note in suit, executed to Fury by defendant. This note was dated November 27, 1914, and was payable May 27, 1915.

Some time thereafter the Helling estate paid to the banker the sum of $400, the amount of Fury's claim against it. This money the bank applied on the Fury note for $500, leaving a balance of $100 due thereon, for which Fury, at the time, executed a new note. The bank then canceled the $500 note, and credited it on the books of the bank as paid. It marked as "Paid" and delivered the canceled $500 note to Fury.

Subsequent to the transfer of the Skinner note by Fury to the bank, a number of transactions were had between them, resulting in the giving by Fury of several promissory notes. According to the uncontradicted testimony of the plaintiff's cashier, it was the custom of the parties that these notes "would run for a period of time, and were then afterwards canceled and new notes taken." It appears from the record to be equally well established that these dealings amounted to one continuous transaction, and that the collateral, pledged at the time Fury obtained the advance of $500, was held by the bank as security for the repayment of the varying aggregate amounts of Fury's indebtedness.

The present action was commenced on February 23, 1917, by plaintiff, to collect the sum of $400, alleged to be due on the note; the purpose being to thus foreclose on the collateral to that extent, and apply the amount on the total sum claimed by the bank to be due from Fury, amounting at that time to approximately $1,200, including the $100 note given on the surrender of the $500 obligation, as before stated.

[1] After the suit was instituted, but before the trial, the bank took from Fury a new note, dated April 19, 1917, for $100, marked the old note for that amount "Paid," and returned it to Fury. It does not appear when the new obligation matured. On the trial the defendant sought to ascertain when this last note became due, but the court sustained a general objection to the testimony. In seeking to show the maturity and disposition of this note, defendant was attempting to support the allegation of his answer, and the contention made here, that plaintiff was only entitled to hold the note of defendant as collateral for the $100 remaining unpaid on the original $500 note, and that by the terms of the new note for $100, executed after suit brought, the time of payment had been extended, and the suit, therefore, prematurely brought.

This contention, sound, if resting on proper foundation, loses its force in the present case, in view of the established fact that the note sued upon was collateral, not only for the payment of the $500, obtained from the bank by Fury at the time it was pledged, but also for repayment of whatever prior amount Fury owed the bank and all subsequent advances. At the time of the trial his total indebtedness amounted to about $1,200. Defendant did not attempt to prove, and apparently does not contend, that the indebtedness of Fury to the bank was different, or any less, than as testified to by the bank's cashier. We are therefore unable to find any harm done to defendant by this particular ruling of the court. San Luis Obispo County Bank v. Greenberg, 116 Cal. 467, 470, 48 Pac. 386.

[2, 3] The defendant, on cross-examination of the bank cashier, asked if it were not a fact that at the time of the trial the plaintiff was holding the Skinner note as security for the payment of the note for $100 (the balance unpaid on the $500 note), dated April 19, 1914. An objection, made by plaintiff, which we do not approve as being sufficient, was sustained by the court, and appellant specifies the ruling as error. He has no ground for complaint, for subsequent to the objection and ruling it appeared from the witness' testimony that the said note for $100 was included in the indebtedness of Fury to the bank, and was regarded merely as an unpaid balance on the original obligation for which the note in suit was pledged as collateral. The bank does not appear to have received the $100 note with any intention or agreement that it should constitute payment of the old obligation. In the absence of such agreement, it did not extinguish the debt. Bridge v. Connecticut, etc., Co., 167 Cal. 774, 141 Pac. 375.

[4, 5] At the conclusion of plaintiff's case, defendant offered testimony to show that the plaintiff bank at no time notified or advised him that it held the note in suit, and that long after the same became due, and without knowledge of the bank's claim, defendant paid and discharged his note by payment to Fury, the payee thereof. Plaintiff objected to this testimony, and the objection was sustained by the court. Respondent's cashier had testified, as to the advances made to Fury after the note in suit was pledged as collateral:

> "I am not sure of the date of the other advances, but I think they have been subsequent to the maturity of that note."

Appellant contends that, to entitle respondent to the privilege of a holder in due course, the burden was on respondent to show that as to those "other advances" they were made prior to the maturity of the collateral note.

> "Where a note is taken as collateral security for future advances the holder can assume a bona fide character only as to advances made previously to the maturity of the instrument." 8 C. J. 477; Texas Banking, etc., Co. v. Turnley, 61 Tex. 365.

The Skinner note was available to the bank as security, therefore, for the indebtedness of Fury, which began before the collateral note was given, or was thereafter incurred before its maturity, and which indebtedness continued unpaid at the time suit was commenced.

As we understand the offer made by defendant as his defense in the court below, however, we fail to perceive how the fact that he had paid the note to Fury after maturity, without knowledge of the bank's claim, would establish when, or under what circumstances, any of the advances were made by plaintiff to Fury. If the record brought here does not properly convey the real offer, appellant is unfortunate in not having correctly enlightened this court. If the record is correct, appellant's offer was not sufficiently comprehensive to make the point on which he relies.

On the record, as we review it, the lower court was correct in directing the verdict as it did. There was nothing in the transactions between the bank and Fury indicating that the note of $100 was taken in payment of the indebtedness remaining on the $500 note after crediting thereon the Helling claim, other than the cancellation and surrender of the old note. This, in the light of the evidence as to the circumstances of the giving of the new note, was insufficient to require a conclusion that there was any agreement to the effect that the new note was received by way of payment. Bridge v. Connecticut, etc., Co., supra. There was, therefore, nothing to submit to the jury.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(42 Cal. App. 178)

JACOBSON-REIMERS CO. v. TOZAI CO. et al. (Civ. 1998.)

(District Court of Appeal, Third District, California. July 11, 1919.)

1. PLEADING 🔑36(5)—ANSWER—ADMISSION BY FAILURE TO DENY.

Failure of answer, in action for breach of contract of sale, to deny demand for delivery, alleged in complaint, not only excuses plaintiff from making the fact clear, but justifies the finding of such demand.

2. SALES 🔑71(5)—QUANTITY—ALTERNATIVE—RIGHT OF DETERMINATION.

Under Civ. Code, §§ 1448–1450, as to right of selection where an obligation requires performance of one of two acts in the alternative, defendant, who contracted to sell to plaintiffs turkeys "numbering from 200 head to 1,200," to be delivered "between now and Thanksgiving," having delivered none, and refused to deliver any, lost his right of determining the number, and was liable for damages on the basis of the maximum number.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by the Jacobson-Reimers Company against the Tozai Company, a partnership composed of K. Hayashi and another, and the partners individually. Judgment for plaintiff, and defendants appeal. Affirmed.

U. W. Brown, and Harmon M. Albery, both of Colusa, for appellants.

E. H. Wakeman, of San Francisco, for respondent.

CHIPMAN, P. J. The action is to recover judgment for damages alleged to have been the result of defendants' failure to perform their covenants under a contract for the sale of turkeys, reading as follows:

> "Colusa, Cal., Nov. 5, 1917.
>
> "We agree to sell Jacobson-Reimers Company, of S. F., at twenty-seven and half cents per pound for choice dressed turkeys f. o. b. station numbering from two hundred head up to twelve hundred between now and Thanksgiving. Hens to weigh seven pounds and over and gobblers twelve pounds and over per piece.
>
> "Tozai Co.
> "By K. Hayashi."

It is alleged in the complaint that demand was made by plaintiff of defendants, within the period mentioned in said contract, that defendants comply therewith by delivering 1,200 turkeys, but defendants refused to do so, or to deliver any turkeys whatsoever; that the market price of turkeys had advanced at that time to 42 cents per pound, and that by reason of defendants' failure to deliver said turkeys plaintiff was damaged in the sum of $1,653. The complaint is verified. Defendants filed a general and special demurrer, which being overruled, they answered. The answer is a specific denial of the averments of the complaint, except that they do not deny that demand was made upon defendants to comply with the terms of the said contract, and their refusal to do so, and alleged as further answer that defendants delivered to plaintiff "the written offer set forth in plaintiff's complaint," but alleged that plaintiff at no time "accepted said offer in accordance with the terms thereof." The cause was tried by the court without a jury.

The court found that defendants executed and delivered to plaintiff the written agreement set forth in the complaint, by virtue of which "the defendants agreed to sell and deliver to the plaintiff f. o. b., meaning free on board cars at Colusa station, California, 1,200 choice dressed turkeys of the kind and weight in said agreement specified, that is to say, not less than 600 choice dressed hen turkeys weighing not less than 7 pounds apiece and 600 choice dressed gobblers weighing not less than 10 pounds apiece, in all weighing 11,400 pounds at least, at the price of 27½ cents per pound, to be delivered as aforesaid between the said 5th day of November, 1917, and Thanksgiving Day, to wit, the 29th day of November, 1917, who executed and delivered to said defendants a written acceptance of said offer of sale and delivery"; that in accordance with said offer of sale and acceptance thereof "the plaintiff at the city of Colusa, California, demanded of the said defendants the delivery of said 1,200 turkeys of the kind and weight and at the price specified in said written offer of sale, and in accordance with the terms thereof and plaintiff's written acceptance thereof, but that the defendants then and there refused, and ever since have refused, to deliver the said 1,200 turkeys, or any number thereof, or any at all, as provided in said written agreement; that on the said 29th day of November, 1917, the value of the aforesaid 11,400 pounds of turkeys, of the kind and weight specified in said written agreement of sale, to the plaintiff herein, was the sum of 5.4 cents per pound on said 11,400 pounds of turkeys in excess of the price of 27½ cents per pound, the price at which said defendants so offered to sell and deliver the same to plaintiff as aforesaid"; that by reason of the foregoing facts plaintiff has suffered damages in the sum of $615.60. It was further found that plaintiff, on said 29th day of November, 1917, was ready, able, and willing to accept and receive and pay for said turkeys specified in the said agreement, and on that day demanded the delivery of said turkeys from defendants, and offered to comply with all the terms of said agreement and plaintiff's acceptance thereof. The conclusion of law as found was that plaintiff is entitled to recover from defendants the sum of $615.60, with costs of the action, and judgment was entered accordingly. Defendants appeal from this judgment.

[1] Some question is raised as to the sufficiency of the evidence to support the finding that plaintiff made demand for the delivery of the turkeys, and while the evidence is not very clear on that point, the answer failed to deny demand as alleged in the complaint, and thus not only excused plaintiff from making this fact clear, but it justified the court in making the finding; the fact being that what occurred took place on the 28th of November, instead of on Thanksgiving Day, which was the 29th. It sufficiently appeared that defendants did not offer to furnish 200, or any number of, turkeys, but, in effect, repudiated their contract entirely, thus excusing plaintiff from making further demand.

[2] We do not find it necessary to set forth the testimony given in support of the findings. Appellants state as follows in their opening brief:

> "There is virtually but one question in this case: That is, whether or not the findings and judgment of the trial court can be sustained in awarding damages based upon the maximum amount in said offer of sale and acceptance thereof. * * * Defendants did not deliver any turkeys to plaintiff, and the contention of respondent and the judgment of the trial court is that the damage suffered by plaintiff by reason of such failure thereof is to be based upon the maximum amount specified in said offer of sale. Our contention in this matter is that any damage that may have occurred can only be based upon the minimum amount as specified therein."

Resulting from appellants' view of the case their claim is:

> "That the judgment in this case should be modified and reduced from the sum of $615.60 to the sum of $77.60."

What, then, is the rule governing alternative obligations? Counsel seem to have explored the cases and the text-books with diligence for light, and the written opinion of the learned trial judge shows that he examined with much care the authorities upon the question. The provisions of our Civil Code seem to have been overlooked, although they apparently state the rule applicable to the present case:

> "If an obligation requires the performance of one of two acts, in the alternative, the party required to perform has the right of selection, unless it is otherwise provided by the terms of the obligation." Civ. Code, § 1448.
>
> "If the party having the right of selection between alternative acts does not give notice of his selection to the other party within the time, if any, fixed by the obligation for that purpose, or, if none is so fixed, before the time at which the obligation ought to be performed, the right of selection passes to the other party." Id. § 1449.
>
> "The party having the right of selection between alternative acts must select one of them in its entirety, and cannot select part of one and part of another without the consent of the other party." Id. § 1450.

Referring to the number of turkeys to be delivered, the language of the obligation is, "numbering from two hundred head up to twelve hundred"; and as to the time of delivery the obligation is, "between now [its date] and Thanksgiving" (November 29th). Plainly the statute gave defendants the right to deliver any number of turkeys from 200 to 1,200 "between" the date of the obligation and November 29th. Defendants, admittedly, neither offered to nor did deliver any number of turkeys "between now and Thanksgiving," or at all, but, as the court found, refused to deliver any. In such a case, by the terms of the statute, "the right of selection passes to the other party." It is not necessary to resort to text-books or to the decisions of the courts. Sufficient to say, however, that our Code states the rule accepted generally by writers upon the law of contracts and by the courts. We agree with the statement made by the learned trial court in the concluding paragraph of his written opinion:

> In this case, there being no pretention that performance was even as much as attempted, it seems that under well-recognized principles of equity the defendant should not be permitted to limit his liability to the minimum delivery required by this agreement. To do so would allow the most flagrant abuse of such an agreement."

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

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42 Cal. App. 192

LEMMERMANN v. POPE & TALBOT.
(Civ. 2883.)

(District Court of Appeal, First District, Division 2, California. July 11, 1919.)

1. TRIAL 🔑139(1)—NONSUIT—WHEN PROPER.

Nonsuit may be granted only when there is no evidence of sufficient substantiality to support a verdict for plaintiff, indulging in every legitimate inference from plaintiff's evidence, and disregarding conflicting evidence.

2. MASTER AND SERVANT 🔑245(5)—CONTRIBUTORY NEGLIGENCE—OBEYING ORDER.

Order of master to experienced employé to get down from lumber pile to wagon by means of a plank extending between the two, with one end held by the master, did not excuse employé from negligence in so doing, there being no evidence that it amounted to coercion or duress, the danger of the course being as apparent to the employé as to the master, and there being no question but that he could have adopted other and safer methods of going between the two objects.

3. MASTER AND SERVANT 🔑278(9) — INJURY TO SERVANT—NEGLIGENCE OF MASTER—SUFFICIENCY OF EVIDENCE.

Evidence in servant's action for injury *held* insufficient to warrant a finding of negligence of the master in losing hold of plank, while servant was descending on it from lumber pile to wagon.

4. MASTER AND SERVANT 🔑265(15) — SERVANT'S KNOWLEDGE OF DANGER—PRESUMPTION.

It must be presumed that an employé engaged in like occupations for four years had equal knowledge with the master's representative of the danger of going from a lumber pile to a wagon, as ordered by the representative, by a plank extending between the two, held by the representative merely by a lumber hook.

5. MASTER AND SERVANT 🔑204(1), 228(1)—INJURY—SOLE NEGLIGENCE OF SERVANT.

Relative to defense that injury to servant was caused solely by his negligence, the effect of Employers' Liability Act on the defenses of assumption of risk and contributory negligence is immaterial.

6. MASTER AND SERVANT 🔑286(17), 289(37) —SERVANT'S ACTION FOR INJURY—NONSUIT.

Evidence in servant's action for injury in descending, on order, from lumber pile to wagon by plank held by lumber hook *held* to warrant nonsuit, as showing no negligence of master, but sole negligence of servant in adopting an unsafe instead of a safer method.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by William H. Lemmermann against Pope & Talbot. Judgment for defendant, and plaintiff appeals. Affirmed.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for appellant.

Walter H. Linforth, of San Francisco, for respondent.

HAVEN, J. Plaintiff appeals from a judgment of nonsuit rendered upon motion of the defendant at the close of the trial.

[1] It is settled law in this state "that a court may grant a nonsuit only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given." Perera v. Panama-Pacific International Exposition Co. (Sup.) 175 Pac. 454; Estate of Caspar, 172 Cal. 147, 155 Pac. 631. The question presented by the appeal is whether or not the facts disclosed by the evidence brought this case within the rule above stated.

The suit was for the recovery of damages resulting from personal injuries received by plaintiff while employed as a clerk's helper in the lumber yard of defendant, in which business he had been engaged for about four years prior to the accident. In the course of his employment he was ordered by the foreman in the lumber yard to help a certain tally clerk, named Lynch, who is designated by plaintiff as his "colaborer," in moving lumber from a pile upon which Lynch was standing to an adjacent wagon. Plaintiff testified that this pile was about 9 feet high. The pieces of lumber forming the same were not of uniform length, and, when piled, left uneven projections at the rear of the pile. Upon receiving instructions to report to Mr. Lynch, plaintiff climbed up the rear end of the pile. He testified that he took that as "the best way to get up." The wagon, which was being loaded, was standing at a distance of 5 feet from the lumber pile upon which Lynch and the plaintiff stood. Between that pile and the wagon was a small pile of lumber about 3 feet in height and 4 feet in width. At the time of the accident the lumber on the wagon had been piled to a distance of 4 feet from the ground. The driver of the wagon desired assistance in placing the lumber on his wagon, and Lynch instructed plaintiff to go to the wagon for that purpose. A plank of lumber 3 inches thick, 12 inches wide, and 16 feet long had been placed across the top of the pile of lumber and the lumber upon the wagon, extending beyond both the pile and the wagon. Plaintiff testified that, when Lynch told him to go down and help the teamster, he walked to the rear of the pile with the intention of going down the same way that he had come up, but just then there was a crane coming over with a load of lumber, which temporarily interfered with his descent. On that account he walked back to Lynch and waited a few minutes, when the latter drove a lumber hook into the plank and grabbing hold of it said: "Go ahead down, and I will hold the plank." In response to that request, and while the plank at the upper end was so held by Lynch, and with no one holding the lower end thereof, plaintiff sat upon the plank and shoved himself down with his hands. When he was between the lumber pile and the wagon the plank slipped out of Lynch's grasp and fell, precipitating plaintiff to the ground and causing his injuries. Asked why he attempted to slide down the plank instead of returning to the ground in the same manner in which he had come up, or instead of jumping from the piled lumber upon which he was standing to the smaller pile nearer the wagon, plaintiff stated that he did so because he had orders to go down the plank, and that it looked safer to him "to slide down that plank than to drop down 4 or 5 or 6 feet in the way that you have indicated to the 4-foot pile below."

The charge of defendant's negligence in the complaint is: First, the order from defendant, through Lynch, to plaintiff to go from the lumber pile to the wagon by means of the plank; and, secondly, that—

> "Said Daniel Lynch negligently and carelessly failed and neglected to maintain a firm hold upon said plank by means of his said hand and said lumber hook which he then and there held in his other hand, and by reason thereof said plank upon which said plaintiff was located, as aforesaid, slipped and slid along the top of said pile of lumber on said wagon, then and there causing said plaintiff to fall off and from said plank, and with great force and violence upon the ground, inflicting upon him severe personal injuries."

The answer denied the essential allegations of the complaint, and pleaded the following affirmative defense:

> "That the accident to the plaintiff, referred to in said complaint, was caused and brought about solely by and through the negligence of the plaintiff in attempting to get down from the said pile of lumber, by means of the plank referred to in said complaint, instead of climbing down from said pile of lumber at either end thereof, or by jumping therefrom to the lumber pile on the wagon, referred to in said complaint. That plaintiff was not ordered or directed by defendant to get down from said pile of lumber by means of said plank, but voluntarily and of his own motion adopted said plank as the way and means of getting down from said pile of lumber, and his said carelessness and negligence in so doing was the sole and proximate cause of said accident, and any injuries which resulted to him therefrom."

[2] Assuming that Lynch represented the defendant in ordering plaintiff to slide down the plank, such order did not compel plaintiff to adopt that method of transportation to the wagon. The danger of the course adopted being equally apparent to the plaintiff and to Lynch, the latter's order did not excuse the plaintiff from negligence, unless it amounted to coercion or duress on the part of Lynch, of which there was no proof. In Hall v. Clark, 163 Cal. 392, 395, 125 Pac. 1047, 1049, it is said:

> "It is thoroughly settled that an employé is not warranted in following the direction of an employer, except where he acts under what under the law amounts to duress or coercion, where the danger to be encountered in doing so is at once so obvious and so serious that no ordinarily prudent person of similar age and experience, situated as was the employé, would have obeyed the order."

There can be no question but that plaintiff could have adopted other and safer methods than the plank of proceeding from the lumber pile to the wagon. Under those circumstances, the order of Lynch cannot be said to have been the cause of the accident.

[3] The failure of Lynch to maintain a firm hold upon the plank is the only remaining charge of negligence against the defendant. As to this issue there was no proof of negligence. Plaintiff testified:

> "As I was going down from the pile marked 'B' to the wagon all of a sudden I felt the plank going, and I landed in the gangway, and that is all I know."

Lynch stated:

> "The plank got away from me because my hook pulled out. * * * As a matter of fact I don't know very much about what caused this accident other than the fact that the hook came out of the plank, and the plank got away from me. * * * I had the best hooking that I could have on the plank at the time Mr. Lemmermann started down. I put the hook down as we put it in at all times, about the same way —a jab and the hook generally holds."

This being all the testimony as to the immediate cause of the accident, a finding of negligence on the part of Lynch in failing to maintain a firm hold upon the plank would not have been warranted. Without such finding a verdict in favor of plaintiff would not have been supported under the pleadings.

[4, 5] Furthermore, the facts disclosed by the evidence sustained the affirmative defense pleaded by defendant. It must be presumed that plaintiff, having been engaged in like occupations for four years, had equal knowledge with Lynch as to the danger of intrusting his safety to the precarious hold of one man with a single lumber hook upon a slanting 16-foot plank with plaintiff's weight added thereto. The facts bear close resemblance to those involved in Hall v. Clark, supra. In that case the employé was ordered to drive his team over an embankment. It was held that in obeying such order he was guilty of negligence, for the reason that the danger was as apparent to the injured employé as to the foreman who gave the order. It is true that, at the time that case was decided, the defense of assumption of risk had not been abolished by the Employers' Liability Act. The defense here pleaded is neither that plaintiff assumed the risk of his employment, which "is said to rest on contract" (Tubbs v. Stone & Webster C. Co., 30 Cal. App. 705, 709, 159 Pac. 242, 244), nor is it a pleading of contributory negligence on the part of plaintiff, which assumes negligence on the part of defendant, but is a charge that the accident was caused solely by the plaintiff's negligence. Crabbe v. Mammoth Channel G. Min. Co., 168 Cal. 500, 505, 143 Pac. 714. The effect of the Employers' Liability Act (Stats. 1911, p. 796) upon the two designated defenses is therefore not material.

[6] Appellant relies upon the case of Tubbs v. Stone & Webster C. Co., 30 Cal. App. 705,

159 Pac. 242, as authority for his position that the question of negligence in the instant case should have been submitted to the jury. The case referred to is distinguished by the learned writer of that opinion from the case of Hall v. Clark in the following language:

> "The conclusions we have reached on this branch of the case are not at all in conflict with the decision in Hall v. Clark, 163 Cal. 392, 125 Pac. 1047, but are in harmony with it. The two cases are readily differentiated. In that case the plaintiff could know and appreciate the dangers incident to obeying the order as soon as it was made. The situation was visible, apparent, and known. In this case the danger was not known or appreciated until the risk had been well entered upon. In that case the plaintiff, with full knowledge of all the facts, did a manifestly dangerous act."

The above comment on the case of Hall v. Clark is equally applicable to the case at bar. In this case the plaintiff could know and appreciate the dangers incident to obeying the order of Lynch as soon as it was given. As a man of experience in lumber yards, he must have known the risk assumed in the method of transportation which he adopted. According to his own testimony he chose that method because he deemed it safer. His judgment upon that matter was erroneous, and for that mistake on the employé's part the law does not hold the employer responsible. Under the facts as disclosed by the evidence and the rule of law stated at the commencement of this opinion, the granting of the motion for nonsuit was not erroneous.

The judgment appealed from is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

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42 Cal. App. 152

TITLE GUARANTEE & TRUST CO. v. GARROTT. (Civ. 2916.)

(District Court of Appeal, Second District, Division 2, California. July 10, 1919. Rehearing Denied by Supreme Court Sept. 8, 1919.)

1. CONSTITUTIONAL LAW 🔑206(1)—DISCRIMINATION—CONTRACTS.

Const. U. S. Amend. 14, so far as it prohibits any abridgment of the privileges and immunities of citizens, and guarantees the equal protection of the laws, addresses itself to the state government and its instrumentalities, and not to contracts between individuals.

2. DEEDS 🔑149—CONDITIONS—REPUGNANCY TO INTEREST CREATED—SALE TO NEGROES.

Condition in deed of fee-simple absolute against leasing or selling to negroes within a certain time is within the common-law rule, of which Civ. Code, § 711, is declaratory, that "conditions restraining alienation, when repugnant to the interest created, are void."

3. DEEDS 🔑149—CONDITIONS RESTRAINING ALIENATION.

Civ. Code, § 711, declaring that conditions restraining alienation, when repugnant to the interest created, are void, is applicable, whether the provision be a condition subsequent, a conditional limitation, or a covenant.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the Title Guarantee & Trust Company against H. L. Garrott. Judgment for defendant, and plaintiff appeals. Affirmed.

Wm. T. Blakely, of Los Angeles, for appellant.

Willis O. Tyler, of Los Angeles, for respondent.

FINLAYSON, P. J. This is an appeal from a judgment against plaintiff after a demurrer to its complaint had been sustained without leave to amend. The appeal involves the validity of a condition in a deed providing for a forfeiture of the title conveyed in the event that the grantee should lease or sell to persons of African descent prior to January 1, 1925.

Plaintiff, being the owner of 127 lots in the Angelus Park Tract, in the county of Los Angeles, conveyed one of the lots to Pauline Kasanofska, under whom defendant claims title, by a deed the provisions of which, after the granting clause, so far as material to the question presented, are as follows:

> "It is provided, however, and the said party of the second part [the grantee] by the acceptance hereof, for herself, her heirs and assigns, hereby covenants and agrees to and with the said party of the first part [the grantor], its successors and assigns, as follows: That neither the said party of the second part, nor her heirs or assigns, shall or will * * * lease or sell any portion of said premises to any person of African, Chinese, or Japanese descent, and that if at any time the said party of the second part, her heirs, assigns, or successors in interest, or those holding or claiming thereunder, shall violate any of the provisions herein named, whether directly or under some evasive guise, thereupon the title hereby granted shall revert to and be vested in the said party of the first part, its successors and assigns, and its successors and assigns shall be entitled to the immediate possession thereof, which covenants shall be construed to be covenants running with the land, but shall cease and terminate, at option of the owner for the time being, after January 1, 1925."

The deed, which bore date November 12, 1910, was duly recorded on November 26, 1910. Thereafter, by mesne conveyances, the lot was conveyed to defendant, a negro of African descent, subject to the covenants and conditions in the deed to Pauline Kasanofska. Prior to and since the grant of the lot to Pauline Kasanofska, plaintiff, by deeds containing similar covenants or conditions, has conveyed many of the other lots to various persons, who have erected homes on their respective lots and have complied with the conditions contained in their deeds. The whole tract is now thickly settled with persons of the Caucasian race. Claiming that the provision inhibiting a conveyance to persons of African descent created a condition subsequent, that by reason of its violation the fee conveyed to defendant's predecessor, Pauline Kasanofska, has been forfeited, and that, therefore, it is entitled to re-enter for condition broken and to a reconveyance under section 1109 of the Civil Code, plaintiff brought this action, praying the court to compel a reconveyance and that it be placed in possession.

We think the provision in the deed relied upon by plaintiff as the basis of its claim for relief created a condition subsequent, and not a covenant. Where, as here, it clearly appears by the deed that it was the intention of the parties that, upon a breach of the restriction, the estate conveyed to the grantee should be defeated and should return to the grantor, the restriction is a condition subsequent. Ball v. Miliken, 31 R. I. 36, 76 Atl. 789, 37 L. R. A. (N. S.) 623, Ann. Cas. 1912B, 30. But, whether the provision be construed as a condition or a covenant, we think it is a nullity, and that the demurrer to the complaint very properly was sustained.

[1] We do not base our conclusion upon any supposed constitutional right of respondent; we do not think that the condition in the deed violates any provision of the state or federal Constitution. Upon this aspect of the case we agree with what is said by the Louisiana Supreme Court in Queensborough Land Co. v. Cazeaux, 136 La. 724, 67 South. 641, L. R. A. 1916B, 1201, Ann. Cas. 1916D, 1248. The Fourteenth Amendment, in so far as it prohibits any abridgment of the privileges or immunities of citizens of the United States and guarantees the equal protection of the laws to all persons, addresses itself to the state government and its instrumentalities, to its legislative, executive, and judicial authorities, and not to contracts between individuals. It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. Civil Rights Cases, 109 U. S. 18, 3 Sup. Ct. 18, 27 L. Ed. 835. The Fourteenth Amendment, it is true, applies to the judicial as well as the legislative department of the state government. But the judiciary does not violate this provision of the federal Constitution merely because it sanctions discriminations that are the outgrowth of contracts made by individuals. A different question would be presented if the court, while sanctioning such a provision against persons of African descent as we find in the deed in question here, were subsequently to hold to be invalid a similar provision directed against Hindoos, Cingalese, and Maoris, or any other class of persons except negroes. The equal protection clause of the Fourteenth Amendment makes but one demand upon the state, and gives to the state but one right. It is that the state shall make, execute, and interpret its laws without discrimination. It must not grant rights to one which, under similar circumstances, it denies to another. Upon this phase of the question see the note to Queensborough Land Co. v. Cazeaux, supra, L. R. A. 1916B, p. 1208.

[2] We think, however, that the condition against leasing or selling to persons of African descent violates the common-law rule of which section 711 of the Civil Code is declaratory:

> "Conditions restraining alienation, when repugnant to the interest created, are void."

The deed is not set forth in full in the complaint. We shall assume, however, as counsel themselves have in their briefs, that the deed to Pauline Kasanofska, both in its granting clause and its habendum clause, conveyed to the grantee the full fee title, so that the interest created by the deed was title in fee simple absolute. This being so, the real question is whether the condition forbidding alienation to persons of African descent at any time before January 1, 1925, is such a restraint on alienation as to be repugnant to the interest created by the granting and habendum clauses, within the meaning of section 711, or of the common law of which that section is declaratory.

Two cases, and two cases only, have come under our notice wherein the courts have passed directly upon a condition in a deed imposing a restraint on alienation such as that now before us. Those two cases are Queensborough Land Co. v. Cazeaux, supra, and Koehler v. Rowland, 275 Mo. 573, 205 S. W. 217. In each of these cases it was held that a condition in a deed providing for forfeiture in case the premises should be sold or leased to a negro is not an unlawful restraint upon the power of alienation. As we are constrained to disagree with each of these cases, a somewhat more elaborate presentation of the reasons for our conclusion is demanded than ordinarily would suffice.

Ever since the statute quia emptores, the tying up of real property has been regarded as an evil. Prior to that statute, restraints upon alienation of lands held in fee simple were practically an inseparable part of the ancient feudal system. All land in the kingdom was holden mediately or immediately of the king, styled the lord paramount; and the great lords, holding immediately under the king, when they granted portions of their lands to others, were still tenants with respect to the king, and were called mesne, or middle, lords. The lord had an interest in having a brave and loyal tenant, capable of rendering military service; and, on the other hand, the tenant was interested in living under the military chief of his own choice and adoption. The result was that certain reciprocal rights and incidents sprung out of these feudal tenures, among which were fealty and escheat. The tenant owed fealty to his lord; escheat was the reversion of the estate on a grant in fee simple upon a failure of heirs of the owner. These grants by the mesne lords were called subinfeudations. The grantee, owing fealty to his lord and grantor, could not alienate his land without the license or consent of his lord, who was the owner of the reversionary interest contingent upon the death of the grantee without heirs. All this was changed in the reign of Edward I by the statute quia emptores, which provided:

> "That from henceforth it shall be lawful for any freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same lands and tenements of the chief lord of the same fee, by such service and customs as the feoffor held before."

By declaring that every freeman might sell his lands at his own pleasure, parliament, by one stroke of the pen, broke down the last remnant of the feudal restrictions upon alienation that formerly had prevented the tenant from selling his land without the license of his grantor and feudal lord. By changing the tenure from the immediate to the paramount lord, the king, the statute took away the reversion from the immediate lord, and thus deprived him of the power of imposing any restraint, by contract or condition, expressed in the deed of conveyance.

Whether the statute quia emptores ever became effectual in any of the United States by express or implied adoption, or as a part of the common law, we need not stop to inquire, since it is clear that with us no such statute is needed, as here all lands are held in allodium, and with us no such right of escheat or possibility of reverter ever existed in the party conveying the estate. Here all sovereignty is in the state, and escheat, can only accrue to the state as the sovereign. Therefore, the question of the right to impose conditions or restrictions upon alienation stands upon common-law reasons, as it has stood in England since the statute quia emptores. See the able and elaborate opinion of Mr. Chief Justice Ruggles in De Peyster v. Michael, 6 N. Y. 467, 57 Am. Dec. 470, for a complete commentary upon this topic.

Ever since the statute quia emptores, the tying up of real property has been regarded as an evil that is incompatible with the free and liberal circulation of property as one of the inherent rights of a free people. In order to prevent this evil, two doctrines were established: One, that all interests should be alienable; the other, that all interests must arise within certain limitations of time. The latter doctrine is known as the rule against perpetuities. It is the first doctrine with which we are concerned.

The rule that conditions restraining alienation, when repugnant to the estate conveyed, are void, is founded on the postulate that the conveyance of a fee is a conveyance of the whole estate, that the right of alienation is an inherent and inseparable quality of an estate in fee simple, and that, therefore, a condition against alienation is repugnant to, and inconsistent with the estate conveyed. To transfer a fee, and at the same time restrain the free alienation of it, is to say that a party can grant, and not grant, in the same breath. But the rule is not founded exclusively on this principle of natural law. It rests also on grounds of clear public policy and convenience in facilitating the exchange of property, in simplifying its ownership, and in freeing it from embarrassments which are injurious, not only to the possessor, but to the public at large.

In the deed in question here, the restraint upon alienation is not absolute, either as to persons or time. As to persons, it is partial; as to time, it is temporary. The restraint, as to persons, is limited to three classes, namely, persons of African, Chinese, and Japanese descent. As to time or duration, the restraint is limited to a little over 14 years, or until January 1, 1925.

The decisions respecting the validity of a restraint that is only partial as to persons or temporary as to time, are in a state of conflict and hopeless confusion. Some, particularly the Kentucky cases, which admittedly are against the weight of authority (Bonnell v. McLaughlin, 173 Cal. 216, 159 Pac. 590), hold that if the restraint be total as to persons, but only temporary as to the time of its duration, and the time is not unreasonable, the condition is valid (Lawson v. Lightfoot, 84 S. W. 739, 27 Ky. Law Rep. 217). Others hold that if the restraint be total as to persons, but temporary as to time, the condition is utterly void, no matter how short the time may be. Mandlebaum v. McDonnell, 29 Mich. 78, 18 Am. Rep. 61; Latimer v. Waddell, 119 N. C. 370, 26 S. E. 122, 3 L. R. A. (N. S.) 668, and note; O'Connor v. Thetford (Tex. Civ. App.) 174 S. W. 680. And there are other cases that hold that if the restraint be partial as to persons, and the restricted class is so large that the restraint is unreasonable, the condition is void. Manierre v. Welling, 32 R. I. 104, 78 Atl. 507, Ann. Cas. 1912C, 1311. Still others hold, or seem to hold, that any restraint whatever as to persons, however partial, is void. Barnard's Lessee v. Bailey, 2 Har. (Del.) 56; Williams v. Jones, 2 Swan (Tenn.)

620. See, also, Bradford v. Leake, 124 Tenn. 312, 137 S. W. 96, Ann. Cas. 1912D, 1140.

We think that, on principle, any restraint on alienation, either as to persons or time, is invalid; and while there is no case in this state directly in point—or at least none to which our attention has been called—there is one case in which the Supreme Court says though by way of dictum, that any restraint whatever is void. Murray v. Green, 64 Cal. 367, 368, 28 Pac. 118. In all, or almost all, of the cases in which it is held that a condition restraining alienation for any time, however short, is void, the restraint was total as to persons, though but partial or temporary as to time. We think, however, that the reasoning whereby those courts reach the conclusion that a condition is void that imposes a total restraint upon the power of alienation for any time, however short, applies with equal force to a condition that imposes a restraint that is but partial as to the persons or classes of persons to whom the title may not be conveyed, and that the reasoning in those cases leads logically and inevitably to the conclusion that any restraint whatever on alienation, either as to persons or time, is void. In O'Connor v. Thetford, supra, the Texas Court of Civil Appeals, speaking of the generally accepted doctrine that the suspension of the power of alienation for any time, however short, is void, says that it "is the more logical and presents no difficulties such as will be encountered in determining what is a reasonable time." In Mandlebaum v. McDonnell, supra, the court, speaking of the same rule, propounds these pertinent questions:

> "Who can say whether the time is reasonable, until the question has been settled in the court of last resort, and upon what standard of certainty can the court decide it? Or, depending, as it must, upon all the peculiar facts and circumstances of each particular case, is the question to be submitted to a jury?"

These questions are equally pertinent when propounded with respect to a restraint on alienation that is partial as to persons. There are two English cases—Doe v. Pearson, 6 East, 173, and In re Macleay, L. R. 20 Eq. 186—that lend some support to the doctrine that, if the restraint on alienation be not total as to persons, the condition is valid. The authoritative force of those cases, however, was considerably shaken by the decision in the later case of Atwater v. Atwater, 18 Beav. 330. For an elaborate and learned discussion of the question, see Manierre v. Welling, supra, where, however, the restraint was so general and so nearly absolute in character as to amount to practically a total inhibition on the power of alienation.

If, as is held by the majority of the cases supported by principle and reason, a condition is void that imposes a total restraint on the power of alienation for any time, however short, then why should not a condition be void that imposes any inhibition on alienation to persons, however few, or to classes of persons, however limited the classes may be? Upon what principle can a restraint partial as to persons and a restraint partial as to time be put upon different bases? In one case, as in the other, the rule that any limitation, however partial, voids the condition, is the more logical, and presents no difficulties such as necessarily must be encountered in determining whether the restriction be reasonable or otherwise. The right of alienation is an inherent and inseparable quality of an estate in fee simple. Potter v. Couch, 141 U. S. 315, 11 Sup. Ct. 1005, 35 L. Ed. 721. Therefore any and all restraints on alienation necessarily must tend to deprive the granted estate of an incident inseparably inherent in it, and necessarily must be repugnant to and inconsistent with the grant, and, as such, void.

> "The general rule is that where a devise is made in fee, either of a legal or an equitable interest, all limitations tending to deprive the estate of any of the incidents appertaining to the interest created are held to be repugnant to the devise, and void. To transfer a fee, and at the same time to restrict the free alienation of it, is to say that a party can give and not give, in the same breath." Johnson v. Preston, 226 Ill. 447, 80 N. E. 1001, 10 L. R. A. (N. S.) 564.

If the continuation of the estate in the grantee may be made to depend upon his not selling or leasing to persons of African, Chinese, or Japanese descent, it may be made to depend upon his not selling or leasing to persons of Caucasian descent, or to any but albinos from the heart of Africa, or blond Eskimos. It is impossible, on any known principle, to say that a condition not to sell to any of a very large class of persons, such as those embraced within the category of descendants from African, Chinese, or Japanese ancestors, shall not be deemed an unreasonable restraint upon alienation, but that the proscribed class may be so enlarged that finally the restriction becomes unreasonable and void. Where shall the dividing line be placed? What omniscience shall tell us when the restraint passes from reasonableness to unreasonableness? Who can know whether he has title to the land until the question of reasonableness has been passed upon by the court of last resort? No matter how large or how partial and infinitesimal the restraint may be, the principles of natural right, the reasons of public policy, and that principle of the common law which forbids restraints upon the disposition of one's own property, are as effectually overthrown by the one as by the other. The difference is of degree, not principle.

Though there is no case in this state, to which our attention has been called, that is directly in point, we think the reasoning of the California cases leads necessarily to the conclusion that a condition against alienation, such as we have presented to us in this case, is void. See Murray v. Green, supra, Maynard v. Polhemus, 74 Cal. 141, 15 Pac. 451, Prey v. Stanley, 110 Cal. 423, 42 Pac. 908, and Bonnell v. McLaughlin, supra. In Murray v. Green the court expressly declares against the doctrine that any partial restraint on alienation may be valid, saying:

> "But it is claimed that, while a general restraint upon alienation is bad, a partial restraint is valid. But is it not obvious that in case of a grant in fee simple, where there is no possibility of reverter, any restraint whatever on the power of alienation would be repugnant to the interest created by the grant? In commenting upon the clause in which Littleton says, 'But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issue of such a one, etc., or the like, which conditions do not take away all power of alienation from the feoffee, etc., there such condition is good,' Chancellor Kent says: 'But this falls within the general principle, and it may be very questionable whether such a condition would be good at this day.' 4 Kent's Com. 131."

The counsel who has appeared as amicus curiæ has filed a brief in support of the validity of the condition against selling to persons of African descent, and has cited, among other cases, Cowell v. Colorado Springs Co., 100 U. S. 55, 25 L. Ed. 547. In that case it was held that a condition in a deed that intoxicating liquors shall not be manufactured or sold on the granted premises, and that if the condition be broken the title shall revert to the grantor, is not repugnant to the estate granted, and the condition is not invalid. There the condition in the deed made no attempt directly to restrict the power of alienation, but only placed a restriction upon use of the premises, not upon alienation. There is a clear distinction between a restriction on use of the premises by the grantee in a deed conveying the fee, imposed by a condition or covenant whereby reasonable building restrictions are created, and a direct restraint on alienation. It is true a restriction upon use may narrow the circle of possible purchasers. Whether it does or not is, in most cases, largely a matter of speculation. Certain it is that a restriction upon use only is not within the letter or spirit of section 711 of the Civil Code, or of the common-law doctrine of which that section is a codification.

> "Restrictions against particular use of particular parcels of land do not restrict the alienation, for the owner of the fee can convey it at his pleasure; and they do not tend to perpetuity, for the person who is entitled to the rights or privileges created or secured by the restrictions can at any time release them." 8 R. C. L. p. 1116.

Counsel for appellant relies confidently upon the case of Firth v. Marovich, 160 Cal. 257, 116 Pac. 729, Ann. Cas. 1912D, 1190. That was a case involving the breach of a building restriction affecting the use of the land by the grantee and his assignees. Speaking of this restriction, the court said:

> "* * * It is not repugnant to the granting clause, nor does it come within the terms of the Code sections prohibiting or limiting restraints on alienation;" also: "The power of alienation is not restrained."

There can be no doubt that "the power of alienation is not restrained" by a restriction upon use. It doubtless is true that a restraint upon use is inconsistent with ownership in fee simple absolute. And it is probable that one of the reasons that gave rise to the rule now embodied in section 711 of the Civil Code, namely, that the grantor cannot both give and not give—cannot grant the fee and still retain an essential incident to title in fee—is as applicable to a restriction upon use as to a restraint on alienation. But, even so, there is another reason that lies back of the rule respecting restraint on alienation that is not applicable to reasonable restraints upon use, and that is that, ever since the statute quia emptores, courts and Legislatures, in the interest of the public, have sought to strike the old feudal fetters from the power of alienation. The rule of the common law against restraints on alienation is based on considerations of great public convenience and policy as much as upon the natural law that a man cannot both give and not give. The only safe rule is to hold that a condition that restrains the power of alienation to any extent whatever, either as to persons or time, is inconsistent with the estate granted, as, indeed, it necessarily must be if the estate granted be title in fee simple absolute, and if, as all must admit, the power of alienation is an inseparable incident to, and a necessary concommitant of, ownership. Chancellor Kent says:

> "It [a fee simple] is an estate of perpetuity, and confers an *unlimited* power of alienation, and no person is capable of having a greater estate or interest in land. *Every* restraint upon alienation is inconsistent with the nature of a fee simple; and if a partial restraint be annexed to a fee, as a condition not to alien for a limited time, *or not to a particular person*, it ceases to be a fee simple, and becomes a fee subject to a condition." Kent's Com. vol. 4, p. 5. (The italics are ours.)

We cannot resist the conclusion that, by the positive, unqualified, and uncompromising language of section 711 of our Code, the Legislature intended that the rule in this state should be the definite and unequivocal rule so emphatically stated by Chancellor Kent. It is the more logical rule, and presents no difficulties such as must be encountered in determining when a restraint on alienation, partial as to the persons, passes out of the wide, uncharted, crepuscular region that lies between unquestionable reasonableness and unreasonableness.

Notwithstanding the obvious distinction between a restriction upon use, as in the case of a building restriction, for example, and a direct restraint upon the power of alienation, as in the present case, we find Mr. Justice Field, in Cowell v. Colorado Springs Co., supra, after saying that "the owner of property has a right to dispose of it with a limited restriction on its use," giving expression to this dictum:

> "Repugnant conditions are those which tend to the utter subversion of the estate, such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons or for a limited period, or its subjection to particular uses, are not subversive of the estate; they do not destroy or limit its alienable or inheritable character."

What Mr. Justice Field said, to the effect that restraints upon use do not tend to the subversion of the estate granted, was pertinent to the facts of that case and a correct statement of the law. What that learned jurist said about restraint upon alienation was dictum, pure and simple, and not in accord with the weight of authority nor the better-reasoned cases. That that part of the excerpt from the opinion of Mr. Justice Field wherein he animadverts on restraints upon alienation is dictum the federal Supreme Court itself has declared in the subsequent case of Potter v. Couch, supra.

Turning, now, to the two cases that are the most nearly identical with the facts of this case—Queensborough Land Co. v. Cazeaux, supra, and Koehler v. Rowland, supra: Each of these cases supports appellant's position. With neither of them, however, do we agree. The Louisiana case was decided in accordance with the principles of the civil law, and can throw but little, if any, light upon the construction of our Code provision, based, as it is, on the common law of England—a body of law that, ever since the statute quia emptores, has more and more treated land as an article of sale and traffic, as much so as personal property. In the Missouri case, the court, in one brief paragraph, disposes of this difficult question out of hand, citing but one case, Cowell v. Colorado Springs Co., supra, to sustain its statement that—

> "It is entirely within the right and power of the grantor to impose a condition or restraint upon the power of alienation in certain cases to certain persons, or for a certain time, or for certain purposes."

In short, the Missouri court's decision is based upon a dictum of Mr. Justice Field—a dictum by one of the country's most learned jurists, it is true, but a dictum, nevertheless, which, in so far as it refers to a time limitation upon alienation, is contrary to all the best-reasoned cases, such as Mandlebaum v. McDonnell, supra, and, in so far as it refers to restraints that are partial as to persons or classes of persons, is, we believe, contrary to logic and contrary to the clear implication of the Supreme Court of this state in Murray v. Green, supra, that any restraint whatever upon the power of alienation, however partial or temporary, or of whatever character, is violative of section 711 of our Civil Code, and, furthermore, it is dictum that is pregnant with uncertainties that necessarily would produce the greatest inconvenience in the world of trade and commerce, for no one could say whether any particular restriction was reasonable until the question had been litigated to the court of last resort, and no judge could know what standard of certainty should be employed to determine the question.

For these reasons, we hold that the condition against alienation in the grant from appellant to respondent's predecessor, Pauline Kasanofska, is a condition repugnant to the fee-simple estate created by the granting clause of the deed, and is void.

[3] We have treated the clause against leasing or selling to persons of African descent as a condition subsequent. Whether it be regarded as a condition subsequent or as a limitation over—a limitation conditioned upon the lease or sale of the premises to persons of the proscribed class—or as a covenant running with the land, as the deed itself declares it to be, the result must be the same. If it is a condition, it is void for the reasons already given. If it is a conditional limitation, it is equally within the condemnation of the common law and Code, § 711. Potter v. Couch, supra; Diamond v. Rotan, 58 Tex. Civ. App. 263, 124 S. W. 196; O'Connor v. Thetford, supra. If the language of the deed be construed as creating a covenant, it is equally void, for the rule respecting restraints on alienation does not depend upon the mere form whereby the restraint is imposed.

> "It avoids, as well, covenants of the grantee against alienation as conditions of like nature imposed by the grantor." Prey v. Stanley, supra.

Judgment affirmed.

We concur: SLOANE, J.; THOMAS, J.

VALLEJO v. BURROWS et al. (S. F. No. 8860.)

(Supreme Court of California. June 26, 1919.)

In Bank.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by Hazel Vallejo against John W. Burrows, special administrator, etc., and others. Judgment for defendants, and plaintiff appeals. Reversed, and remittitur directed to issue.

Cullinan & Hickey, Theo. A. Bell, and Hugh K. McKevitt, all of San Francisco, for appellant.

A. G. Kazebeer and J. E. Pemberton, both of San Francisco, for respondents.

PER CURIAM. In the above-entitled cause, in view of the application and stipulation of the parties, and in view of the order of the judge of the superior court having jurisdiction of the matter of the estate of Paul Seiler, deceased, authorizing such action as one of the steps in a compromise of the litigation involving the estate, a certified copy of which order is annexed hereto, it is ordered that the judgment appealed from be and the same is hereby reversed, without costs to any party, and that remittitur issue forthwith.

ANGELLOTTI, C. J., and SHAW, WILBUR, and OLNEY, JJ., being all present, concur.

181 Cal. 157

BRAUTIGAM v. BRAUTIGAM.
(L. A. 5233.)

(Supreme Court of California. Aug. 27, 1919.)

Divorce 🔑127(4) — Cruelty — Corroboration.

Corroboration, in action for divorce for cruelty, may be sufficient, though weak; the nature of the cruelty being of a character making corroboration difficult.

Department 1.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Anna M. Brautigam against Sigel F. Brautigam. Judgment for defendant, and plaintiff appeals. Reversed, and judgment directed for plaintiff.

Preisker, Preisker & Goble, of Santa Maria, for appellant.

SHAW, J. The plaintiff appeals from a judgment against her in an action for divorce, in which the defendant had defaulted and the case was submitted to the court upon the evidence produced by the plaintiff. The complaint as causes of divorce, alleged cruelty and desertion. It is unnecessary to set forth particularly the allegations or the evidence produced. A reading of the evidence satisfies us that it was sufficient to establish the cruelty alleged in the complaint. It fails to establish the allegation of desertion solely because of the fact that, after the cruelty had continued until it became impossible for the wife to continue living with her husband, as such, without destroying her health, the parties for that reason agreed to a separation. The only doubt in the case arises from the weakness of the corroboration. The nature of the cruelty was of a character which made corroboration difficult, but we think it was sufficient to meet the requirements of the law in that particular.

The judgment is reversed, and the court below is directed to enter judgment in favor of the plaintiff in accordance with this opinion.

We concur: LAWLOR, J.; OLNEY, J.

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181 Cal. 115

BENJAMIN v. WALTON. (L. A. 5215.)

(Supreme Court of California. Aug. 25, 1919.)

1. Assault and Battery 🔑40—Damages —Excessiveness.

$1,000 *held* not excessive damages for injuries which evidence tended to show caused permanent impairment to one eye, internal adhesions in the abdomen, severe pains, loss of sleep, and impaired earning capacity, resulting from an assault.

2. Assault and Battery 🔑34—Civil Liability — Admissibility of Evidence — Mitigation.

Where question of punitive damages had been withdrawn from jury in an assault case, provoking circumstances cannot be considered in mitigation of the actual damages suffered by plaintiff.

3. Trial 🔑244(1) — Instructions — Undue Prominence.

Where defendant's counsel in an assault case improperly argued to the jury that plaintiff's provoking words mitigated the damages, after question of punitive damages had been withdrawn from jury, the court might properly emphasize that portion of his instruction which showed the fallacy and impropriety of counsel's argument.

Department 2.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by W. L. Benjamin against R. A. Walton. Judgment for plaintiff, and defendant appeals. Affirmed.

Jones & Evans and W. E. Evans, all of Los Angeles, for appellant.

Oliver O. Clark, George M. Pierson, Claud B. Andrews, and E. B. Drake, all of Los Angeles, for respondent.

WILBUR, J. Plaintiff sued to recover compensatory and punitive damages for an assault. Defendant answered, admitting the assault, and alleging circumstances of provocation in mitigation of punitive damages. Upon the trial plaintiff waived punitive damages.

[1] The only question remaining for consideration was the amount of compensatory damages to which the plaintiff was entitled. The jury returned a verdict for $1,000. As usual, the evidence concerning the nature and extent of the plaintiff's injuries is conflicting. According to the testimony offered on behalf of plaintiff the sight of one eye has been permanently impaired, internal adhesions were caused by a blow on the abdomen, plaintiff has suffered severe pain and loss of sleep and impaired earning capacity, so that for a period of 10 months after the assault he had only earned $176. Without further statement of the testimony, it is evident that the damages were not excessive.

[2, 3] Plaintiff objects to the substance and the manner in which the following instruction was given to the jury:

"And, gentlemen, it is for you to determine whether any words were spoken by the plaintiff after he was first accosted by the defendant; but, if you find there were, they are not the slightest excuse or justification for the defendant. The jury have no right to consider them as any justification whatever, or in any

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

way as affecting or reducing the damages. A man has no right to take the law in his own hands under any circumstances, and the jury should not consider that at all. They should find what the damages were, without reference to any words that they may find were spoken."

With reference to the substance of the instruction appellant admits that no form of words would have justified an assault, but maintains:

> "That there is a rule of law which permits the jury to consider any words immediately preceding an affront which would tend to provoke an assault, in mitigation of any damages resulting."

It is sufficient in this regard to say that, the question of punitive damages having been expressly withdrawn from the jury, no circumstances of provocation, whether occurring before or at the time of the assault, could in any way be considered in mitigation of the actual damages suffered by plaintiff by reason of the assault. Marriott v. Williams, 152 Cal. 705, 93 Pac. 875, 125 Am. St. Rep. 87.

With reference to the manner of the court in giving this part of the instruction, an affidavit was filed by the appellant's attorney, in which it is stated:

> "His honor turned in his seat toward and faced the jury, leaned forward and with his left hand raised, and left fist clenched, and with strong and repeated gestures, with his said left hand and arm raised and extended, he gave said quoted instructions in a voice so loud that it could have been easily heard outside of the large courtroom, and in the corridors of the building."

The judge, in a reply affidavit, stated that, in giving this portion of the instruction he did face the jury and lean forward, but that he did not clench his fist, although he may have used gestures, and did give the instruction with great emphasis; that all the instructions were given in a loud tone of voice, and that this instruction was not given in a louder tone of voice than the rest. It was, however, given with greater emphasis than the rest, for the reason that the attorney for the defendant had argued to the jury that they should take into consideration in mitigation of damages the words that were claimed to have been spoken by the plaintiff just before the assault was committed. The affidavit proceeds as follows:

> "Before the introduction of any evidence by the defendant the plaintiff waived all claim for punitive damages, and the court then stated that, the assault being admitted in the answer, the defendant could not introduce any testimony looking to mitigation of damages, and that the recovery could be only for compensatory damages. The testimony of what was claimed to have been said at the time of the assault was admitted in evidence, however, as part of the occurrence at that time; the testimony of the defendant being substantially as follows: That he got out of the machine and approached the plaintiff as he was on his way to his gate, and asked him why he had been talking about the company as he had, and that the plaintiff replied, 'To hell with you and your company,' and that then the defendant struck the plaintiff with his fist. Notwithstanding the prior instructions of the court, however, counsel for defendant in his argument to the jury stated that this was like a boy's quarrel, and that the defendant should be excused and the damages should be mitigated on account of what was said, and I deemed it proper under those circumstances to give the instruction which I did give, and I was especially anxious that the jury should understand that, if the words referred to were spoken, they were not the slightest excuse or justification for the defendant's assault, and that they should not be considered as affecting or reducing the damages; and I emphasized the statement that no man had a right to take the law into his own hands, and that whatever damages the jury should find without reference to any words that they might find were spoken. I felt no prejudice against the defendant, and did not intend to indicate that I was prejudiced against him; but I did intend that the jury should understand that a man had no right to take the law into his own hands, and that they should disregard the argument of the attorney for the defendant that what was said by the plaintiff, if it was said, should be taken into consideration by the jury in fixing the damages."

Under the circumstances stated in the affidavit of the judge, it was proper for the court to point out the impropriety of counsel's argument. Instead of doing this directly in an instruction, as might well have been done, the judge specially emphasized that portion of the instruction which showed the fallacy and impropriety of counsel's argument.

The judgment is affirmed.

We concur: LENNON, J.; MELVIN, J.

181 Cal. 131

NICHOLS v. MOORE et al. (L. A. 5235.)

(Supreme Court of California. Aug. 25, 1919.)

1. LIMITATION OF ACTIONS 🔑177(3) — FRAUD—PLEADING.

A complaint based upon a fraud, outlawed by statute of limitations, except for fact that plaintiff had only recently discovered it, must plead facts excusing failure to make an earlier discovery.

2. EVIDENCE 🔑10(1) — JUDICIAL NOTICE — TIMBER LAND.

Judicial notice will be taken that there are vast areas of timber lands in the state of Washington.

3. LIMITATION OF ACTIONS 🔑179(2) — FRAUD—COMPLAINT—SUFFICIENCY.

A complaint based upon defendant's misrepresentations that land conveyed to plaintiff 12 years previously was timbered, and showing that plaintiff knew there was timber in the vicinity, but had not learned that this particular tract was burned over land until recently, etc., *held* to state facts excusing failure to earlier discover fraud sufficiently to avoid statute of limitations.

Department 2.

Appeal from Superior Court, Riverside County; H. H. Craig, Judge.

Action by Emma L. Nichols against Thomas Moore and E. E. Moore, his wife, and R. S. Brinkerhoff. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Evans, Abbott & Pearce and Albert D. Pearce, all of Los Angeles, for appellant.

Sarau & Thompson, of Riverside, for respondents.

WILBUR, J. [1-3] This is an action to recover damages for fraud. Demurrer was sustained to the complaint on the ground that the claim was barred by the statute of limitations. The transaction complained of occurred in October, 1904. Plaintiff alleges that the fraud was first discovered by her in October, 1916, a few months before the bringing of the action. As stated in Bradbury v. Higginson, 167 Cal. 553, 558, 140 Pac. 254, and cases therein cited, it is necessary for the party seeking to avoid the bar to affirmatively plead facts excusing the failure to make an earlier discovery of the mistake or fraud relied upon—citing Dennis v. Bint, 122 Cal. 39, 54 Pac. 378, 68 Am. St. Rep. 17; Harrington v. Paterson, 124 Cal. 542, 57 Pac. 476; Lady Washington Co. v. Wood, 113 Cal. 482, 45 Pac. 809. As was there said:

> "But a mere averment of ignorance of a fact which a party might with reasonable diligence have discovered is not enough to postpone the running of the statute. Hecht v. Slaney, 72 Cal. 363, 14 Pac. 88; Burling v. Newlands, 112 Cal. 476, 44 Pac. 810; Lady Washington Co. v. Wood, 113 Cal. 482, 45 Pac. 809; Tracy v. Muir, 151 Cal. 363, 90 Pac. 832, 121 Am. St. Rep. 117."

In Phelps v. Grady, 168 Cal. 75, 77, 141 Pac. 926, 928, the rule stated in Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807, concerning pleadings in such cases, is cited and approved as the rule "consistently adopted and adhered to in this state"—citing Robertson v. Burrell, 110 Cal. 578, 42 Pac. 1086; Lady Washington Co. v. Wood, 113 Cal. 485, 45 Pac. 809; Simpson v. Dalziel, 135 Cal. 603, 67 Pac. 1080; People v. San Joaquin, etc., Association, 151 Cal. 797, 91 Pac. 740. In order to determine the question whether or not the plaintiff has shown reasonable diligence to acquaint herself with the facts constituting the fraud, and therefore whether her claim is barred by the statute of limitations, it will be necessary to state some of the facts and circumstances concerning the fraud alleged and the discovery thereof.

The complaint is based upon defendants' fraud in securing a contract by which plaintiff transferred an orange grove in Riverside, Cal., worth $10,000 and returning an income of $1,000 a year, for defendants' land in the state of Washington, which is absolutely valueless. At the time of the transaction plaintiff was living in Ohio and the defendants were living in Riverside. The negotiations were conducted by correspondence. The false representations which induced the plaintiff to transfer her land were numerous—among others that the land was worth $25,000, and that the land was covered with timber, having at least 5,200,000 feet of timber of first-class quality, and, in addition thereto, other growing timber, that it was accessible to water transportation, and that when cleared the land was valuable for agriculture. The lands were more or less inaccessible, and known as wild lands. At the time of the representations and transfer there was no timber on the land. Whatever timber there had been thereon had been burned off. The land was valueless for agriculture. The allegations by which plaintiff justifies her failure to discover the fraud from the date of the transaction to October, 1916, and the circumstances concerning the discovery, are to the effect that during the negotiations leading up to the transfer the defendants sent a letter to her from one J. A. Wittrow, who signed himself as a "cruiser," written upon the letter head of the Bank of Clallam County, Port Angeles, Wash., whose president subsequently acknowledged the signature to the deed which was delivered to plaintiff at the time of the transfer of the land to her; that by this representation so conveyed to her she was lulled into a false sense of security; that she was unacquainted with the basis upon which assessments were made for taxes in that neighborhood, and that therefore the tax bills did not advise her of the fraud; that she was acquainted with the lands in the vicinity of the lands in question and knew that they were timber lands containing valuable timber; that she had bought the property as an investment for herself and children, and that the defendants knew that it was her desire to purchase the property for such purpose; and that she held the same as investment until 1916, when she had her brother investigate the property. She alleges that from the time of the transaction till that date she was at all times in the state of Ohio, and never in the state of Washington, although she had been in the state of Washington before or at the time of the transaction in question.

Without considering other items of fraud alleged, regarding the vicinity of the land to navigable water and its availability for agricultural purposes after it had been cleared, the question resolves itself into this: Was there anything in the situation that put the plaintiff on inquiry or required her to investigate the question as to whether or not the land had been denuded of its timber by fire before she acquired it? If the plaintiff had no knowledge whatever regarding the property, it might be said that the failure to investigate for 12 years and her reliance during all that period upon the assertions of strangers was inexcusable, and at least came within the principles enunciated in Phelps v. Grady, 168 Cal. 75, 141 Pac. 926. But the very fact that the plaintiff did know something of the surrounding lands, and did know that there were valuable timber lands, and that the land in question was located in such a district, coupled with the fact that such land does not change its character, and that under ordinary conditions the only result of a failure to examine the property for 12 years would be that the timber would have had that much more additional growth and be that much more valuable, tended to prevent any inquiry even by a careful person, where it involved a long and expensive trip to a more or less inaccessible land. It is a matter of common knowledge, of which the court will take judicial notice, that there are vast areas of timber land in the state of Washington. It is also claimed that the plaintiff did not sufficiently allege the facts concerning the discovery.

The real question, however, is whether or not plaintiff was justified in refraining from making any investigation until she sent her brother in 1916 to examine the property with a view to a sale of the timber thereon. If she was in fact ignorant of the fraud at that time, as she alleges, and as the demurrer admits, the allegation that she discovered the fraud through the investigation made by her brother at that time is a sufficient statement concerning the discovery. As was said in Phelps v. Grady, 168 Cal. 75, 141 Pac. 926, every case of this sort must turn upon its particular facts, and where the alleged fraud of the defendants consisted, among other things, of concealing from the plaintiff the fact that the timber had been entirely burned off the land in question, the plaintiff has sufficiently disclosed by the facts alleged in her complaint that she was not in any way put upon inquiry, and that there was nothing to cause her in the exercise of ordinary diligence to examine the land in question, for the mere purpose of determining whether or not the timber that the defendant had represented was on the ground, and which she believed to be there, was in fact there.

The judgment is reversed.

We concur: LENNON, J.; MELVIN, J.

181 Cal. 125

GARBARINO v. NOCE et al. (No. 2767.)

(Supreme Court of California. Aug. 25, 1919.)

1. Waters and Water Courses 🔑152(5)—Water Rights—Pleading—Sufficiency.

Allegations that defendant owned a third interest in a ditch and water right may be supported by proof of ownership acquired by deed, prescription, or other lawful manner.

2. Evidence 🔑353(3) — Admissibility — Recitals in Ancient Deeds.

Recitals in a 50 year old deed relating to the property conveyed are competent evidence of the facts recited, even as against strangers to the title.

3. Evidence 🔑353(3) — Admissibility — Recitals in Deeds.

A 50 year old deed *held* admissible to show a declaration by the grantor while in possession that he then claimed full ownership of a ditch and water right.

4. Waters and Water Courses 🔑152(8)—Ownership of Ditch — Sufficiency of Evidence.

Plaintiff's testimony that defendants used water from a ditch by his permission and deeds indicating that ditch had been considered appurtenant to plaintiff's and not defendant's property, etc., *held* to sustain a finding that ditch and water right belonged solely to plaintiff, although the parties had alternated in using the water for many years.

5. Waters and Water Courses 🔑151 — Prescriptive Rights — Extinguishment —Disuse.

Under Civ. Code, § 811, subd. 4, relating to extinguishment of servitudes, a prescriptive right to the use of a ditch and water right is lost by failure to exercise the right for five years.

In Bank.

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by Angelo Garbarino against Philip Noce and Mrs. G. Cammissiona. Judgment for plaintiff, and defendants appeal. Affirmed.

J. B. Curtin, of Sonora, for appellants.

John A. Wall and R. B. Stolder, both of Mariposa, for respondent.

SHAW, J. The defendants appeal from a judgment in favor of the plaintiff. The case involves the respective rights of the three parties in the waters of a stream known as Maxwell creek and in a certain ditch by which water is diverted therefrom. Each party owns a small parcel of land abutting upon the creek in the outlying limits of Coulterville. Noce's land is the upper parcel, Cammissiona's is the next, and that of Garbarino is the lowest upon the stream. The part of Noce's land for which the water is claimed lies on the northerly side of the creek. The lands of Cammissiona and Garbarino are on the southerly side. The ditch in question is a foot wide at the bottom, 18 inches wide at the top, and a foot deep. It diverts water from the stream at a dam situated about three-fourths of a mile above the land of Garbarino and about a quarter of a mile above the parcel of Noce. It is wholly on the southerly side of the stream and passes through the parcel of Cammissiona to that of Garbarino. In order to take water therefrom to the Noce land, a cut is made in the ditch, so as to let the water run into the bed of the creek, from whence it is taken into another ditch, on the northerly side of the creek, to the Noce land. Concerning these facts there is no dispute.

The plaintiff alleged that he is the owner of the entire interest in the ditch and in all the water it carries, that in July, 1916, defendant Noce wrongfully diverted water from the ditch and appropriated the same to his own use, and that he threatens to continue to do so. He prays that he be declared to be the owner of the entire interest in the water right and in the ditch, and that Noce be restrained from interfering therewith. Mrs. Cammissiona was brought in as a party defendant after the action was begun. The complaint contains no allegation as to her. The question as to her rights is raised by her answer. The claim of Noce and Mrs. Cammissiona is that the three parties to the suit are equal owners of the ditch and of the right to the water carried therein, as tenants in common, for a certain period of each year. More particularly, their claim is that the right to the common use of the ditch and to the water carried therein begins as soon each year as the water naturally running in the creek ceases to flow down its bed as far as their lands. In explanation it should be said that, as the land of each party is riparian to the stream, each has the right to use thereon a reasonable proportion of its water, and that in the early part of the season of each year there is enough water in the creek to enable Noce and Cammissiona to divert it directly from the stream to their respective tracts without making use of Garbarino's ditch, and that they have been accustomed to do so. This usually continues until June or the early part of July. It is only thereafter, when the water gets too low to allow this, that they resort to the ditch or claim the right to use it. After this occurs, so they each claim and allege, each party, including Garbarino, has the right to use the ditch and all the water it carries, exclusive of the others, one day in three in successive turns, for the remainder of the season, to carry water to their respective parcels of land. At that time the ditch takes all the water of the creek flowing at its head. The court found that Garbarino was the sole owner of the entire interest in the ditch and in the water it takes from the creek, and gave judgment as prayed for in the complaint, but without damages. It is the contention of the defendants that this finding is contrary to the evidence. This is practically the only question in the case.

[1] Upon a review of the evidence we are of the opinion that it is sufficient to sustain the finding. The plaintiff discusses at some length his claim that the defendants cannot prove title by adverse possession under the issues made by the pleadings. The complaint alleges that Garbarino is the owner of the ditch and of the water taken from the creek and flowing therein. The answer of each defendant alleges in general terms the ownership by such defendant of a one-third interest in said ditch and water right, consisting of the right to use the same one day in each three days during the irrigating season, as above stated. The rule is that such a general allegation may be supported by proof of ownership acquired by deed, by prescription, or in any other lawful manner. Rogers v. Miller, 13 Wash. 82, 42 Pac. 525, 52 Am. St. Rep. 20; Raymond v. Morrison, 9 Wash. 156, 37 Pac. 318; Cooper v. Blair, 50 Or. 394, 92 Pac. 1074; Gray v. Walker, 157 Cal. 381, 108 Pac. 278.

[2-4] There was testimony that the ditch was in existence as early as the year 1860, and that from that time until Garbarino acquired his land in the year 1871 the ditch and the water therein was used each year on the land of each of the parties to this action one day in each three during the period of the year above mentioned, and that this was done without asking permission of the owner of the Garbarino lot and without interference by him. There was no testimony with respect to this period that the owner of the Garbarino lot had made any statement regarding the title or right of the other parties to the ditch or water or whether or not it was

done by his permission. It appears that during the years 1872 to 1875, inclusive, the Oak Flat Company turned water from Boneyard creek into Maxwell creek, increasing its flow in the dry season, so that the persons occupying the lands in question were able to take water from the enlarged stream directly to their lands, and that during that period they did not use the Garbarino ditch. They paid for this water directly to the Oak Flat Company. After the year 1875, and until July, 1916, the water was used on the land owned by Noce every year during the time above mentioned, and was carried thereto through the said ditch one day in three, and so on in succession, during each season. Garbarino himself testified to this continuous use of the water in the manner stated. His testimony also shows a similar use by Mrs. Cammissiona on her lot, at one time for a period exceeding five years continuously.

From this evidence of long-continued use without interference, if unexplained, the court could have inferred that the use of each party was rightful and adverse, and therefrom might have concluded that each had thereby acquired title by prescription to a one-third interest in the water and ditch, as claimed by defendants. But there was other evidence to the contrary. Garbarino also testified that each year during this time the other parties, before beginning to use water from the ditch, asked his permission to do so, and that when so asked he gave such permission to each of them to use the ditch and water one day out of each period of three days; that he did this out of friendship, and for no other consideration; and that he refused permission in the year 1916, because at that time he needed all the water on his own land. The appellant contends that this testimony is incredible; that the statement that one would continuously, for so many years, give away a valuable right, especially in view of his own testimony that it was necessary for his own land, and that the loss of the use of part of the water during that period of the season was injurious to him, surpasses belief. We cannot take this view of the testimony. The court below saw and heard the witness, and is the better judge as to whether he was sincere in his statement. In the words of Mr. Justice Burnett, in deciding the case in the District Court of Appeal:

> "We cannot say that, even in this period of thrift and fierce competition, the claim of such generosity is so extraordinary as to cause us to reject it as inherently improbable."

There was also other evidence of admissions by the other owners tending to prove that they acknowledged the title and ownership of Garbarino in the ditch and the water and that they had the use of it only by his permission. If this were true, it would disprove the theory of a tenancy in common acquired by continuous adverse use and would be sufficient to support the finding in question.

Other evidence tends to confirm this view. Neither of the defendants introduced any evidence tending to show the acquisition of the right they claim in any other manner than by continuous adverse use under claim of right. There was no direct evidence of the original construction of the ditch, but there was evidence justifying an inference regarding the same. A deed executed on October 6, 1862, for the Garbarino lot by one Comisione to the predecessors in interest of Garbarino, under whom he claims title, purports to convey the lot in question and the "garden thereon," and it describes the appurtenances thereto as follows:

> "Two water ditches connected with the garden taken out of Maxwell's creek, one opposite of Chinatown and the other below the same, both on the same side of the creek of the garden, made and purchased to supply the garden with water."

It is admitted that the ditch coming out opposite Chinatown is the one now in controversy, although some changes in the place of diversion at the head thereof have been made since that time. A later deed in the chain of title of Garbarino also specifically describes the said ditch as an appurtenance to the lot. None of the deeds in the chain of title of the other lots to the defendants mentions this ditch in any manner. The deed to Noce from Cassacia not only fails to mention the Garbarino ditch as an appurtenance, but it does mention another ditch, known as the Cassacia ditch, leading from the creek on the opposite side from the Garbarino ditch to the Noce land. The deed of October 6, 1862, aforesaid, purported to convey the full title to the property described, including the ditch. Having been executed more than 50 years before the present controversy arose, it comes within the rules of evidence applicable to ancient deeds, and hence the recitals therein relating to the property conveyed are competent evidence of the facts recited, even against strangers to the title. Randall v. Chase, 133 Mass. 210; Drury v. Midland Railroad Co., 127 Mass. 581; Casey's Lessee v. Inloes, 1 Gill (Md.) 430; Den ex dem. Saxton v. Fuller, 20 N. J. Law, 65; Morris v. Callanan, 105 Mass. 132; Ryle v. Davidson (Tex. Civ. App.) 116 S. W. 828. It is also competent as a declaration of the grantor while in possession, as evidence that he then claimed full ownership of the ditch and water right. Cannon v. Stockmon, 36 Cal. 541, 95 Am. Dec. 205; Stockton Savings Bank v. Staples, 98 Cal. 193, 32 Pac. 936. The recitals quoted tend to show that the ditch was originally constructed by the owner of the Garbarino lot for the purpose of conveying water from the creek to that lot. The fact that the title deeds of the Garbarino lot show this particular ditch as an appurtenance, while the title deeds of the other lots make no mention thereof, is some evidence, at least, that the right thereto was not claimed by the owner of the other lots at the time of making the conveyances thereof. All this evidence, we think, sufficiently supports the finding of the court that the defendants had not acquired title to any interest in the ditch or the water it carried.

[5] With respect to the Cammissiona lot, it further appears from the evidence that water from the ditch was not used on that lot for the period of 10 years preceding the beginning of the action. If we assume that by her previous use of the ditch and water under claim of right for a period of more than 5 years prior to that time she had acquired the right she claims thereto, the evidence just referred to would show that she subsequently had lost it by disuse. An easement acquired by enjoyment is lost by a disuse thereof for the period of 5 years. Civ. Code, § 811, subd. 4; Drake v. Russian River Land Co., 10 Cal. App. 666, 103 Pac. 167.

There are no other points made in support of the appeal. It may be added that the evidence was very conflicting in many matters of detail. The conflict, however, was substantial, and the court cannot interfere on appeal.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; WILBUR, J.; OLNEY, J.; MELVIN, J.; LAWLOR, J.

(181 Cal. 119)

GAUME v. SHEETS et al. (L. A. 5203.)

(Supreme Court of California. Aug. 25, 1919.)

1. VENDOR AND PURCHASER ⚷85—RESCISSION BY AGREEMENT.

A vendor's notice, declaring contract void for nonpayment of a purchase price installment and that he would commence an action to quiet title within 60 days, unless vendees surrendered possession, *held* a repudiation of the contract, which justified vendees in surrendering property and treating contract as rescinded.

2. VENDOR AND PURCHASER ⚷334(3)—RESCISSION—RECOVERY OF MONEY PAID.

Where a land sale contract is mutually rescinded, the vendees may recover purchase price installments paid by them.

3. TRUSTS ⚷79—RESULTING TRUST—CONTRIBUTING TO PURCHASE PRICE OF REAL ESTATE.

Persons contributing toward the purchase price of real estate *held* entitled to a resulting trust in property in proportion that their contribution bore to total purchase price.

4. VENDOR AND PURCHASER ⚷49—CONSTRUCTION OF CONTRACT—ATTORNEY'S FEES.

Vendees' agreement to pay expenses incurred by the vendor in clearing title to property refers only to expenses in perfecting title to be tendered vendees, and does not include attorney's fees incurred in an action to quiet title by vendor against vendees.

Department 2.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action to quiet title by Joseph Gaume against William P. Sheets and others. Judgment for plaintiff, and defendants appeal. Reversed, with instructions.

Hales & Cunningham, of Redlands, for appellants.

Earl D. Finch, of Redlands, for respondent.

WILBUR, J. [1-3] This is an action by a vendor to quiet title against his vendees. The defendants, in their answer and cross-complaint, set out certain arrangements and contracts entered into by the defendant and one Wells at the time of the execution of the contract of sale and as a part of the transaction. Portions of the answer were stricken out, and evidence in support of defendants' claims was objected to by plaintiff, and objection sustained. For the purpose of this decision we will assume the facts to be as stated by the defendants in those portions of the answer stricken out. Upon such assumption it appears that one K. C. Wells was the owner of the property in question, and that plaintiff held a mortgage thereon which was overdue, and upon which he was threatening a foreclosure. An agreement was entered into on August 7, 1915, between plaintiff and defendants and Wells, by which the defendants conveyed to Wells some real property owned by them, valued at $3,000, and in consideration thereof, and of the agreement of plaintiff to cancel the mortgage thereon, amounting to $5,600, Wells conveyed the property to the plaintiff and plaintiff entered into an agreement with defendants by which plaintiff agreed to sell and defendants to purchase the land in question for the sum of $5,600, which amount was to be paid in monthly installments of $50, payable on the 10th of each month, and, in addition thereto, the entire proceeds of the crops grown on the property in question, until the amount of such proceeds, together with the $50 payable each month, equaled the sum of $1,200 per year, and if such proceeds, together with the payments so made, did not equal said amount, to add thereto sufficient to make the total payment for the year $1,200. In addition thereto, the vendees agreed to take possession of the property and care for it in a good and husbandlike manner, keep the property in good condition of repair, pay all taxes levied and assessed thereon, and to assume and pay the taxes for 1915–1916, then a lien on the premises. The vendees entered into possession of the property and cared for the same, but whether they did so in a good and husbandlike manner was one of the facts in dispute. Defendants defaulted in the payment due April 10, 1916. Time was expressly made the essence of the contract. The agreement in that regard is as follows:

> "It is understood and agreed that time is the essence of this contract, and should the parties of the second part fail to comply with the terms hereof, then, upon sixty days' notice in writing, the party of the first part shall be released from all obligations in law and equity to convey said property, and the parties of the second part shall forfeit all rights thereto and to all money paid under this contract. And the parties of the second part agree to reimburse said party of the first part for any and all expenditures of whatsoever nature which may be incurred by said first party in clearing the title to the property herein agreed to be conveyed, and for the payment of all sums expended by said first party for taxes, assessments, incumbrances, adverse claims, insurance, repair, cultivation, irrigation, fertilization and protection."

Thereafter, on April 28, 1916, the vendor served notice upon the vendees, stating that they had defaulted in the payments to be made under the contract; that—

> "by reason of said default the said Joseph Gaume has elected and does hereby elect to declare said agreement null and void and all right which you have acquired thereunder forfeited. You are notified that unless you surrender possession of said premises to said Joseph Gaume or his attorney on or before sixty days from the date hereof, that he will commence an action against you to quiet title to said above described premises, and will ask for a decree against you requiring you to pay all delinquent taxes and assessments, together with reasonable attorney's fees to be determined by the court for the quieting of the title to said premises."

Upon the receipt of said notice the vendees surrendered the possession of said property to the vendor. Defendants allege in their answer and cross-complaint "that because of the acts of the plaintiff, as above specified, the defendants elected to treat the contract set out in paragraph I of plaintiff's complaint as rescinded by the plaintiff," and seek by such answer and cross-complaint to recover the sum of $350 which they had paid in monthly installments on account of the purchase price, and have it declared that the conduct of the plaintiff amounted to a rescission of the contract, and pray for a judgment that they own fifteen forty-thirds of the property, upon the theory that on the cancellation of the contract of sale between the vendor and vendees by mutual consent the vendees are entitled to recover the moneys paid and in addition thereto be relegated to the position they occupied at the time the contract between the vendor and vendees was entered into, namely, that, having paid Wells fifteen forty-thirds of the purchase price of the land, they are therefore the beneficiaries of a resulting trust in the property pro tanto. The vendees seek to excuse the nonpayment of the $50 installment due April 10th by claiming that they were prevented from making such payment by reason of the fact that the vendor served a notice upon a packing house to which the vendees had delivered a part of the crop, directing the owner of such packing house not to pay to the vendees the proceeds, amounting to $52, derived from the sale of oranges raised upon the place, but to pay the same to the vendor. This claim, however, is not sustainable, for the reason that the vendor was entitled to the amount as a part of the proceeds of the crop in any event, and for the further reason that the state and county taxes for 1915–1916 were then due, and by the terms of the contract were payable by the vendee, and the further fact that the vendee had assigned the claim due from the packing house to Wells in payment of a note executed by the vendees to Wells at the time of the original transaction for the repayment to Wells of the state and county taxes of 1914–1915 then paid by Wells. In other words, on April 10, 1916, there was due from the vendees not only the $50 installment, but also the taxes for 1915–1916, and such portion of the proceeds derived from the sale of oranges grown upon the place as were then available. Consequently any interference by the vendor with the collection of the $52 cannot be considered as excusing the default of the vendees in making the payment referred to. Under the ordinary provision that time was of the essence of the contract, the effect of this failure of the vendees to make the payments due was, at the option of the vendor, to terminate the rights of the vendees. The contract, however, contained the unusual proviso for a 60 days' notice in writing; that after such 60 days the parties of the first part shall be released from all obligation in law and equity to convey said property. The evident purpose of such provision of the contract was to give 60 days' grace, after notice to the vendees, in which to comply with the contract. The notice given, however, declares that "the vendor has elected and does hereby elect to declare said contract null and void and all rights which you have acquired thereunder forfeited." This construction of the notice as declaring an immediate forfeiture is in accord with the allegations of plaintiff's complaint as to the nature and effect of such notice, as follows, to wit:

> "That on or about the 28th day of April, 1916, plaintiff served upon the defendants a notice in writing that he had declared the said contract null and void, and would recognize no further interest of the defendants, or any of them, in the premises hereinbefore described."

The notice also demands that the vendees surrender possession "on or before sixty days from the date hereof," in default of which "an action will be commenced to quiet title." There is no suggestion in the notice that the vendees, by paying the installments of the purchase price then due within a period of 60 days, could retain their rights in the property and in the contract. This notification that the contract was already null and void, and that the possession should be surrendered within 60 days, was in effect a repudiation of the contract by the vendor, and justified a rescission by the vendees. They alleged, in their pleadings, that they elected to treat the contract as rescinded by the plaintiffs, and that they surrendered possession of the property to the vendor, and that the vendor immediately took possession thereof. It is true that, subsequent to the taking of possession by the vendor, one of the vendees, according to the testimony of the vendor, stated that they were unable to make further payment thereon. The case then comes within the principle stated in Glock v. Howard, 123 Cal. 1, 13, 55 Pac. 713, 717 (43 L. R. A. 199, 69 Am. St. Rep. 17), where it is said:

> "It has been said that after the vendee's breach the vendor may agree to a mutual abandonment and rescission, in which last instance, and in which alone, the vendee in default would be entitled to a repayment of his money."

See, also, Phelps v. Vrown, 95 Cal. 574, 30 Pac. 774; Easton v. Cressey, 100 Cal. 75, 34 Pac. 622; Lemle v. Barry, 183 Pac. 148. The taking of the possession of the property by the vendor, on his demand, was particularly significant under the circumstances as indicating a mutual abandonment of the contract. In Bray v. Lowery, 163 Cal. 256, 124 Pac. 1004, a vendor of personal property under a conditional contract of sale wrongfully retook possession of the property before the vendee was in default, and it was held that the vendee, without any formal rescission of the contract, could treat the contract as abandoned and annulled by the vendor, and maintain an action against him for money had and received, and recover the portion of the purchase price theretofore paid. The contract in this case having been mutually rescinded or abandoned, the vendees were entitled to a return of the money paid by them and such rights as grow out of the fact that the contract has been rescinded. In that event the vendees, having, according to their allegations, paid $3,000 to Wells on account of the purchase price thereof, are entitled to have a resulting trust declared in said property for the proportion thereof which the amount paid by them to Wells bears to the amount of the purchase price paid by plaintiff to Wells, if the court should find upon a new trial any amount was so paid.

The order striking out those portions of the defendants' answer alleging the terms of the agreement whereby defendants transferred property worth $3,000 in connection with the transfer of the property from Wells to plaintiff was erroneous. Leave should be given to the defendants to amend their answer and cross-complaint, if they so desire.

[4] In view of the necessity of a new trial in this action, it is necessary to pass upon another point raised by appellants with reference to the payment of attorney's fees, as this question will arise upon a subsequent trial in the event that the plaintiff is again successful. The trial court allowed attorney's fees to the vendor for the prosecution of this action to quiet title against the vendees, under the above-quoted provision of the contract requiring the payment by the vendees of "all expenditures of whatsoever nature which may be incurred by the first party in clearing the title to the property herein agreed to be conveyed." In that regard it may be said that, in our opinion, such provision of the contract did not contemplate the payment of attorney's fees in this action, but the expenditures of perfecting the title to be tendered to the vendees upon the fulfillment of their contract.

The judgment is reversed, and the trial court instructed to grant defendants leave to amend their pleadings, if they so desire.

We concur: LENNON, J.; MELVIN, J.

181 Cal. 150

BANK OF LOS BANOS et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA. (Sac. 2926.)

(Supreme Court of California. Aug. 26, 1919.)

1. MASTER AND SERVANT ⚷383—WORKMEN'S COMPENSATION ACT—SELF-INSURANCE—DEPOSIT OF SECURITIES — DISCRETION OF COMMISSION.

Under Workmen's Compensation Act, § 29, requiring an employer to secure payment of compensation in one of specified ways, discretion of commission, when giving consent to self-insure, to require deposit of bond or securities, is not limited to a case where there is reasonable doubt at the time of the employer's ability; a purpose of the act being to secure prompt payment, and such ability being subject to change.

2. MASTER AND SERVANT ⚷383—WORKMEN'S COMPENSATION ACT—SELF-INSURANCE—DEPOSIT OF SECURITIES—DISCRETION of COMMISSION.

For Industrial Accident Commission, on granting employer certificate of consent to self-insure, under Workmen's Compensation Act, § 29, to require it to deposit $20,000 in bonds *held*, in view of magnitude of its business and probability of frequent injuries to its employés, not an abuse of discretion.

In Bank.

Application by the Bank of Los Banos and others for certiorari to review action of the Industrial Accident Commission of California. Order to show cause discharged.

Edward F. Treadwell, of San Francisco, for petitioners.

Christopher M. Bradley and A. E. Graupner, both of San Francisco (W. H. Pillsbury, of San Francisco, of counsel), for respondent.

MELVIN, J. Application was made for certiorari to review the action of the Industrial Accident Commission in requiring of Miller & Lux, Incorporated (a corporation), the filing of a bond in the sum of $20,000, or the depositing of securities of that value, as a prerequisite to the carrying of its own compensation insurance by the corporation. The other petitioners are corporations, and are companies subsidiary to Miller & Lux, Incorporated. Upon filing of the petition an order to show cause was made.

All of the petitioners asked permission to demonstrate their ability to self-insure. Their applications were heard, and the counsel for the Industrial Accident Commission wrote to counsel for petitioners a letter containing, among other things, the following language:

"The commission notes that Miller & Lux, Incorporated, has listed among its assets 'United States Liberty Bonds' (first and second issues), $28,000. If you will deposit $20,000 of the 'Liberty Bonds' listed by you in the manner and form prescribed by the commission, certificate of consent to self-insure will be issued to Miller & Lux, Incorporated, and that company will be acceptable to the Industrial Accident Commission as the surety for the San Joaquin & Kings River Canal & Irrigation Company, West San Joaquin Valley Water Company, Bank of Gustine, and Bank of Los Banos."

The showing made by Miller & Lux, Incorporated, before the Industrial Accident Commission, indicates that it has many millions of dollars surplus and that it is amply able to self-insure. The petitioners contend that solvent employers, having assets commensurate with the hazard, should be permitted to self-insure without the deposit of security or the giving of a surety bond, and that the exacting of such security or bond as prerequisite to permission for petitioners to self-insure amounts to an abuse of discretion on the part of respondent.

Petitioners first attack the action of respondent on the ground that it is based upon an arbitrary rule applied to all corporations or others seeking self-insurance, and not upon any real investigation of the merits of these particular requests. The letter of the counsel for the Industrial Accident Commission indicates, however, that there was some consideration of the facts, both of solvency and of corporate association, because, instead of demanding a bond or a deposit from each petitioning corporation, the commission was willing to allow Miller & Lux, Incorporated, to carry the insurance for itself and its subsidiary corporations.

[1] We must decide, therefore, whether or not any bond or deposit may be required, and if that question be answered in the affirmative, whether or not the amount ($20,000) is reasonable, under all the circumstances.

By the Workmen's Compensation Act of 1917 (Stats. 1917, p. 831), it is provided (page 857) that—

> "Every employer as defined in section seven hereof, except the state and all political subdivisions or institutions thereof, shall secure the payment of compensation in one or more of the following ways:
>
> "1. By insuring and keeping insured against liability to pay compensation in one or more insurance carriers duly authorized to write compensation insurance in this state.
>
> "2. By securing from the commission a certificate of consent to self-insure, which may be given upon his furnishing proof satisfactory to the commission of ability to carry his own insurance and pay any compensation that may become due to his employés. The commission may, in its discretion, require such employer to deposit with the state treasurer a bond or securities approved by the commission, in an amount to be determined by the commission.

Such certificate may be revoked at any time for good cause shown."

Petitioners insist that the commission may require the bond or securities specified in the statute when there is any reasonable doubt of the employer's ability to carry his own insurance, but that where no such doubt exists the commission must grant the certificate of consent without the giving by the applicant of any security. There might be some force in this position if solvency of the petitioning employer were the only matter involved, but the highest purpose of the workmen's compensation statutes is not merely to obtain payment of just claims, but to have such demands promptly adjudicated and paid in such way as to be available to the injured employés when most needed. Any corporation, no matter how rich, may be subject to lawsuits, and it is easily conceivable that all the funds of a given corporation might be held by injunction, or other order of court, in such manner as not to be immediately available for settlement of awards of compensation found by the Industrial Accident Commission. It is therefore highly desirable that a proper fund or bond be provided and that such security be under the control of the Industrial Accident Commission. The requirement of security is also justified by the fact that payments of compensation sometimes extend over long periods of time. A corporation solvent at the time it may secure permission to carry its own compensation insurance may have many changes in its financial status during the years of its obligation to pay persons who may be injured while in its service. The fund, or bond, authorized by the statute not only keeps safe the installments of indemnity due from time to time to the injured employés, but it makes unnecessary the otherwise constant watchfulness of the Industrial Accident Commission over the possibly diminishing resources of the self-insurer.

Upon this phase of the discussion we are constrained to quote some of the language of Mr. Justice Pitney, who delivered the opinion of the Supreme Court of the United States in the case of New York Central R. R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629. To be sure, the exact question here under discussion was not there involved. Nevertheless, the observations of the learned justice, made while expressing the court's opinion, are quite pertinent. At page 208 of the report in 243 U. S., at page 255 of 37 Sup. Ct. (61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629), we find the following language:

"We conclude that the prescribed scheme of compulsory compensation is not repugnant to the provisions of the Fourteenth Amendment, and are brought to consider, next, the manner in which the employer is required to secure payment of the compensation. By section 50, this may be done in one of three ways: (a) State insurance; (b) insurance with an authorized insurance corporation or association; or (c) by a deposit of securities. The record shows that the predecessor of plaintiff in error chose the third method, and, with the sanction of the commission, deposited securities to the amount of $300,000, under section 50, and $30,000 in cash as a deposit to secure prompt and convenient payment, under section 25, with an agreement to make a further deposit if required. This was accompanied with a reservation of all contentions as to the invalidity of the act, and had not the effect of preventing plaintiff in error from raising the questions we have discussed.

"The system of compulsory compensation having been found to be within the power of the state, it is within the limits of permissible regulation, in aid of the system, to require the employer to furnish satisfactory proof of his financial ability to pay the compensation, and to deposit a reasonable amount of securities for that purpose. The third clause of section 50 has not been, and presumably will not be, construed so as to give an unbridled discretion to the commission; nor is it to be presumed that solvent employers will be prevented from becoming self-insurers on reasonable terms. No question is made but that the terms imposed upon this railroad company were reasonable in view of the magnitude of its operations, the number of its employés, and the amount of its pay roll (about $50,000,000 annually); hence no criticism of the practical effect of the third clause is suggested."

Section 50 of the New York act of 1914 (chapter 41, Laws of 1914) is substantially the same as our own statute with reference to self-insurance.

[2] Undoubtedly, following the suggestion set forth above, this court would not so construe the statute as to give "unbridled discretion to the commission." We cannot say, however, from the record before us, that the Industrial Accident Commission abused its discretion when acting upon the applications of these petitioners. This record discloses the fact that petitioners are engaged in very extensive business operations of many sorts. These activities are only made possible by the employment of many persons. It is not improbable that casualties may occur within the near future and we cannot justly say that the security demanded is disproportionate to the reasonable probability that such unfortunate happenings may be more than a few. Payments of compensation usually extend over a considerable period of time, being frequently made weekly for 240 weeks. The liability of the employer is therefore cumulative, and may increase from year to year. As counsel for respondent well say:

"If an employer had one maximum liability a year for five years, he would, during the fifth year, be paying upon all five injuries, and his total liability to all claimants during that year would be in the neighborhood of $20,000, without allowance for any further injuries occurring in that year."

In view of the magnitude of the business of petitioners, and the probability of frequent injuries to their employés, we cannot say that this record reveals an abuse of discretion on the part of the Industrial Accident Commission.

The order to show cause is discharged.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LAWLOR, J.; OLNEY, J.; WILBUR, J.; LENNON, J.

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181 Cal. 147

UNITED STATES FIDELITY & GUARANTY CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (S. F. 9017.)

(Supreme Court of California. Aug. 26, 1919.)

1. Master and Servant 🔑405(4) — Workmen's Compensation Act — Decision by Commission—Opinion Evidence.

The Industrial Accident Commission is not bound to decide in accordance with opinion evidence as to the speed at which an employé was driving an auto by the overturning of which he was killed; but it is its duty to pass on the evidence, and decide the fact.

2. Master and Servant 🔑405(4)—Workmen's Compensation Act—Award by Commission — Review — Sufficiency of Evidence.

Circumstantial evidence that an employé when killed by overturning of auto was exceeding the speed limit *held* insufficient, particularly in view of the presumption against commission of crime, to justify annulling of award of Industrial Accident Board as unsupported by evidence.

In Bank.

Proceeding under the Workmen's Compensation Act for death of Joe Marrazzo, employé of Bisceglia Bros. Canning Company. Award was made to heirs by the Industrial Accident Board, and the United States Fidelity & Guaranty Company, insurer, petitions for review. Award affirmed.

Thomas, Beedy & Lanagan, of San Francisco, for petitioner.

Christopher M. Bradley, of San Francisco, for respondent.

WILBUR, J. [1, 2] Respondent commission made an award in favor of the heirs of Joe Marazzo, an employé of Bisceglia Bros. Canning Company. Marazzo was killed while driving an automobile on his return from San Felipe Rancho to San Jose. The only point made by the petitioner is based upon the claim that at the time of the accident the deceased was driving more than 30 miles an hour, in violation of the motor vehicle act, and that, therefore, he was not engaged in the course of his employment. The commission found that the deceased was engaged in the course of his employment at the time of his death, and if we assume, as contended by the petitioner, that the fact that the deceased was violating the motor vehicle act by exceeding the speed limit took him out of the course of his employment, then the finding is, in effect, a finding that the deceased was not exceeding the speed limit. The petitioner applied for a rehearing before the commission, averring "that all the evidence supports but one inevitable finding, that said automobile was being operated at a rate of speed in excess of 30 miles per hour; * * * that the death of the deceased was caused by an accident which was due to driving said automobile at a speed in excess of 30 miles per hour." In the order denying the rehearing the commission found "that the allegation that the said injury was caused by driving in excess of 30 miles per hour, in violation of the statute and orders of the employer was not substantiated by the evidence." The commission having found, in effect, that the deceased was not violating the law with reference to speed, the question for our consideration is whether there was substantial evidence to support the finding. It is true that there was evidence offered tending to show that the speed exceeded 30 miles an hour. This evidence was wholly circumstantial, and consisted in showing the power and the condition of the capsized automobile, and of marks upon the highway, showing that the automobile had swerved from the paved portion thereof, first to the right and then to the left, and had skidded about 90 feet before overturning. Witnesses testified that the automobile—a heavy two-ton Hudson Super-six—in their opinion must have been going at a rate of speed in excess of 30 miles an hour. It was conceded by these witnesses, however, that such marks as were found upon the highway might have been made by such an automobile going 30 miles an hour or less. The commission was not bound to decide in accordance with the opinion evidence. It was its duty to pass upon the evidence and decide the fact, and we cannot say that the circumstantial evidence of excessive speed is sufficiently compelling to justify us in annulling the award as unsupported by the evidence, particularly in view of the presumption of law that the deceased was not committing a crime, viz. violating the motor vehicle act.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; MELVIN, J.; LAWLOR, J.

SHAW, J. (concurring). I concur in the judgment, but for reasons different from those stated by Mr. Justice WILBUR. In my opinion the evidence showed conclusively that the automobile was going at a rate exceeding the lawful limit of 30 miles an hour at the time it overturned. The marks upon the highway were of a character that could not have been made unless the speed was in excess of that limit. There is no direct evidence, however, tending to prove that Marazzo was knowingly driving in excess of the speed limit. The accident occurred about 11 o'clock at night. He may not have been able to see the speed gauge of the automobile, assuming that there was one, owing to the darkness. The difference between a speed in excess of 30 miles an hour and a speed under that rate, especially at night, is often imperceptible to those in the vehicle. The fact that the accident which caused the injury was the result of willful negligence of the injured employé is not a defense to an application for an award under the Workmen's Compensation Act of 1917 (St. 1917, p. 831) when the injury causes his death. The act does not provide that the employer shall not be liable where the act of the employé which causes death is a violation of law. The theory that such fact is a defense can only be sustained upon the general principle that no one can be allowed to receive the benefit of the workmen's compensation law for an injury resulting from a violation of some other law by the injured party. I do not say that such principle should be laid down as a matter of public policy in such cases as the one at bar. The act does not so declare, and it would seem to be a matter of policy properly within the control of the Legislature. But if such principle should prevail, I think that, as applied to this law, it should be limited to cases where the act of the employé was either morally vicious in itself, as well as a violation of express law, or a conscious violation of a law that is merely prohibitory in character. Nothing of the kind appears, and therefore the evidence sustains the award.

I concur: OLNEY, J.

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181 Cal. 155

BERGER v. BRIGHT et al. (L. A. 5248.)

(Supreme Court of California. Aug. 26, 1919.)

1. TRIAL 🔑395(1)—FINDINGS—SUFFICIENCY.

A finding that defendants executed and agreed to all terms of a written contract *held* a sufficient finding on defendant's allegations that contract did not express real intent of parties.

2. APPEAL AND ERROR 🔑1011(1)—FINDINGS—CONCLUSIVENESS.

A finding based upon a substantial conflict in the evidence will not be disturbed upon appeal.

Department 2.

Appeal from Superior Court, Los Angeles County; E. P. Shortall, Judge.

Action by W. E. Berger against M. R. Bright, J. Brombacher, and H. F. Wagner. Judgment for plaintiff, and defendants appeal. Affirmed.

Frank C. Hill, George S. Hupp, and G. E. Delavan, Jr., all of Los Angeles, for appellants.

Seaver & Seaver, Frank R. Seaver, Byron D. Seaver, and Harold E. Thomas, all of Los Angeles, for respondent.

LENNON, J. Defendants appeal from a judgment for plaintiff in an action to recover the sum of $750 alleged to have been received by defendants for the plaintiff's use.

Gilbreth & Co., entered into a contract with the Los Angeles school district whereby the company agreed to erect a school building to be known as the "Amelia Street School." In consideration of defendants' promise to become sureties on its bond, the company assigned to defendants, as trustees, the right to receive all moneys due from the school district and to disburse all moneys owing laborers and materialmen. The company at the time owed plaintiff the sum of $1,000. Plaintiff's attorney having threatened to put the company into bankruptcy, defendants, after figuring that there would be a profit of at least $2,000 on the erection of the school building, promised to pay plaintiff out of the payments received from the school district. After some preliminary discussion, defendants signed an agreement by which they promised to pay to plaintiff the sum of $250 on the date of the agreement, and, in addition, "such sum of money as shall amount to 8 per cent. of all future payments made by the owner of said Amelia Street School for the construction thereof, until said indebtedness is satisfied in full." Although about $10,000 was received under the contract for the construction of the school building, defendants have made no payment to plaintiff, other than the initial payment of $250. The work, on its completion, showing a deficit of $4,000, defendants refused to make any further payment to plaintiff, who thereupon brought this action.

In their answer, and in a cross-complaint praying a reformation of the written agreement, defendants admitted the signing and execution of the agreement, but alleged that it did not express the real intent of the parties, which was that plaintiff should be paid only out of the profits, if any, realized on the work.

[1] One of the main contentions of defendants on this appeal is that the trial court failed to find upon the issues presented by this allegation in the answer and cross-

complaint. The court, however, found that defendants signed and executed and agreed to all of the terms and provisions of the written agreement. This was a sufficient finding adverse to the defendants on the issues tendered in the answer and cross-complaint.

[2] Defendants also present an analysis of the evidence offered in support of their defense and prayer for reformation, which was intended to and does in a measure tend to show that defendants did not agree to the terms and provisions of the written agreement. The transcript, however, reveals a substantial conflict in the evidence presented upon this phase of the case, and it is therefore impossible for this court to undertake to disturb the finding.

There is obviously no merit in the contention of defendants that the judgment should have been so framed as to make subject to execution only such property as they might hold under the trust agreement with Gilbreth & Co.

The judgment appealed from is affirmed.

We concur: MELVIN, J.; WILBUR, J.

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181 Cal. 158

PRATT v. ROSENTHAL et al., Civil Service Com'rs. (S. F. 7938.)

(Supreme Court of California. Aug. 28, 1919.)

1. MUNICIPAL CORPORATIONS 🔑216(1) — CHARTER—BOARD OF HEALTH—CIVIL SERVICE COMMISSION.

Under the San Francisco City Charter, the board of health and the Civil Service Commission are independent of each other, and the board has no authority to prescribe qualifications for civil service eligibles.

2. MUNICIPAL CORPORATIONS 🔑133—CIVIL SERVICE COMMISSION — DISCRETIONARY POWER.

Under the San Francisco City Charter, the Civil Service Commission has a wide discretion regarding the manner in which it performs its duties and exercises its powers.

3. INJUNCTION 🔑126—PRESUMPTIONS—CIVIL SERVICE EXAMINATIONS.

In an action to enjoin civil service examinations, the court cannot assume that the proposed method of examination is impractical.

4. MUNICIPAL CORPORATIONS 🔑216(2)—CIVIL SERVICE COMMISSION—ABUSE OF DISCRETION.

The fact that the Civil Service Commission of a city placed veterinarians on the same basis as persons experienced in handling meat, fish, and fowl in examinations for market inspectors does not show an abuse of discretion.

5. MUNICIPAL CORPORATIONS 🔑217(3)—CIVIL SERVICE EXAMINATIONS—VALIDITY.

A civil service examination notice which stated that copies of certain regulations would be distributed as long as the supply held out does not indicate a violation of San Francisco City Charter, prohibiting special information being furnished any applicant, since it will be presumed that any applicant failing to secure a copy would be allowed to inspect the original records.

6. INJUNCTION 🔑11—CIVIL SERVICE COMMISSION—THREATENED ABUSE OF POWER.

A civil service examination notice, stating that certain deductions would be made if an applicant's experience was not considered satisfactory, does not authorize an injunction without a showing that the commission is threatening to abuse its discretionary power.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. J. Van Nostrand, Judge.

Action by Augustus David Pratt against B. B. Rosenthal, Earl A. Walcott, and John J. O'Toole, as Civil Service Commissioners of San Francisco. Judgment granting an injunction was affirmed in the District Court of Appeals, and defendants appeal. Reversed.

Percy V. Long, George Lull, Joseph T. Curley, and Maurice T. Dooling, Jr., all of San Francisco, for appellants.

Edward F. Moran, of San Francisco, for respondent.

SHAW, J. The case is stated in the following part of the opinion rendered therein by the District Court of Appeal of the First District:

"Plaintiff brought an action, as taxpayer, against the Civil Service Commissioners of the city and county of San Francisco, alleging in his complaint that prior to the bringing of the action the Civil Service Commissioners classified for purposes of examination certain places of employment in the department of public health, which places were designated as market inspectors. The complaint further alleged that prior to the institution of the action the board of health adopted the following regulations governing the inspection of meat-food products:

" 'Section 1. All employés of the Department of Health engaged in the work of meat inspection shall be appointed from eligibles certified by the Civil Service Commission, and such employés include veterinary inspectors, market inspectors, inspectors' assistants, patrolmen and skilled laborers.

" 'Sec. 2. *Veterinary Inspectors.* All applicants examined for these positions must be graduates of recognized veterinary colleges having a course of not less than three years leading to the degree. All final ante mortem and post mortem examinations are conducted by veterinarians. At establishments where slaughtering is conducted only veterinary inspectors shall be placed in charge.

"'Sec. 3. *Market Inspectors.* These employés are laymen experienced in the curing, canning, packing, or otherwise preparing of meat; they shall supervise the work and the use of permitted preservatives, specially set forth in regulation No. 21 of these regulations.'

'The complaint further alleged that the Civil Service Commission gave notice that on Saturday, January 15, 1916, said commission would hold an examination of applicants for positions as market inspectors on the subjects, General Knowledge of Duties, Writing of Report and Experience. The said notice was as follows:

"' "General Knowledge of Duties" will cover the laws and ordinances pertaining to abattoirs, packing houses, meat markets, sausage factories, etc., the inspection of meats, fish and fowl, and general duties of a market inspector. (The commission has a limited supply of the regulations of the board of health governing meat inspection and while the supply lasts a copy of the regulations will be given to each person filing an application. A copy of the questions asked in the last examination held for this class also will be given to each applicant.)

"' "Writing of Report" will be a test of the applicant's ability to write a correct report upon a subject to be named by the Civil Service Commission.

"'The subject "Experience" will be rated as follows: 5 years' first-class experience had within the last 8 years as a veterinarian or in the handling of meats, fish and fowl, 100 credits; 4½ years, 95 credits; 4 years, 90 credits; 3½ years, 85 credits; 3 years, 80 credits; less than 3 years and intermediate periods will not be rated. Deductions will be made when the experience is not considered first-class. Experience had prior to January 15, 1908, will not be rated. Proof of graduation as a veterinarian will be considered equal to 3 years' first-class experience.'

'It was alleged in the complaint that the holding of said examination by defendants would be in excess of their powers and jurisdiction as civil service commissioners, and contrary to the procedure and limitations prescribed for the conduct of civil service examinations in the San Francisco charter; and that in conducting said examination certain indebtedness would be incurred against the city by reason of the employment of help to assist the commission in the examination. The defendants interposed a general demurrer to the complaint, which the court overruled, and upon the defendants' refusing to answer further to the complaint, the court ordered judgment for the plaintiff, restraining the defendants, as civil service commissioners, from holding an examination for market inspectors pursuant to the provisions of the charter of the city and county of San Francisco."

The charter of San Francisco provides that the civil service commissioners "shall classify, in accordance with duties attached thereto, all places of employment in or under the offices and departments of the city and county" (section 2, art. 13, Stats. 1913, p. 1611), and that the examinations to be conducted by said commission "shall be public, competitive and free. Such examinations shall be practical in their character, and shall relate to those matters only which will fairly test the relative capacity of the persons examined to discharge the duties of the positions to which they seek to be appointed, and shall include, when appropriate, tests of physical qualifications, health, and of manual or professional skill." Section 4, art. 13, Stats. 1899, p. 350. With respect to the board of health, the charter provides for the appointment of a board of seven members, and declares that "the board may appoint such officers, agents, and employés as may be necessary for the proper and efficient carrying out and enforcement of the purposes and duties of the board, and may fix their salaries and prescribe their duties." Section 5, art. 10, Stats. 1899, p. 343. The duties of the board of health, generally stated, are to manage and control all matters pertaining to the preservation, promotion, and protection of the lives and health of the inhabitants of the city and county, provide for the abatement of nuisances, supervise the sanitary condition of municipal institutions and buildings, the disposition of the dead, the disposition of garbage, offal, and other offensive substances, and to enforce all ordinances, rules and regulations of the board of supervisors for said purposes. It also provides that the board of health shall, from time to time, submit to the board of supervisors a draft of such ordinances, rules, and regulations as it deems necessary to promote the objects for which the health board is established. Sections 3, 4, art. 10, Stats. 1899, p. 343. The regulations of the board of health above quoted were adopted under the authority of these provisions of the charter. The Civil Service Commission is further empowered to make rules for the examination of persons to be employed in the service of the city (section 3, art. 13), to control all examinations (section 5, art. 13), and to give, in a prescribed manner, "notice of the time, place and general scope of every examination." Section 6, art. 13. The aforesaid notice of examination was given in pursuance of these powers.

It is contended by the plaintiff that in providing that a given number of years of experience as a veterinarian should be equal, for grading an applicant for employment, to a like number of years' experience in the handling of meats, fish, and fowl, and that graduation should equal three years' experience, the commission exceeded the scope of its powers and duties under the charter, that the board of health had determined that market inspectors should be "laymen experienced in the curing, canning, or packing or otherwise preparing of meat," and that the commission had no authority to substitute for these qualifications any number of years of experience or graduation as a veterinarian.

[1] In making the appointment of a market inspector the board of health is required to select the appointee from a list furnished by the Civil Service Commission, taken from those who have been examined, approved, and classified by the commission. Article 13, §§ 7, 10, Stats. 1913, p. 1613; Stats. 1899, p. 351. It may be conceded that the board of health has discretion in selecting the person appointed from the list furnished. But the board has no supervisory power over the proceedings of the commission in the matter of making examinations classifying the persons who pass, or in furnishing the list. It is not empowered to make regulations which shall control the commission in ascertaining the relative capacity of the persons examined for the eligible list, or the tests it will apply in so doing. These matters the charter commits exclusively to the commission. It follows that while the board of health may make regulations concerning the qualifications of its appointees, and may apply such regulations in making its appointments, so far as the charter permits in selecting from the list of eligibles furnished to it by the commission, it can do no more, and the regulations the board may make respecting such qualifications or capacity have no effect whatever on the powers of the commission, and cannot be considered as a limitation thereof. If the regulations of the board were intended to limit or affect those powers, or to give the board any power additional to that just mentioned, they were in excess of the powers of the board, and it is the board, and not the commission, that has exceeded its powers. The two bodies are independent of each other with respect to their powers. Each derives its power and authority from the charter, and neither is given authority to modify the duties of the other, except as the charter may provide. No authority is given to the board to invade the province of the commission by determining, contrary to the rules and decisions of the commission, the qualifications or capacity of the persons to be entered on the lists of eligibles in the classified civil service. The commission is not exceeding its powers in the particulars mentioned.

[2-5] The plaintiff further contends that the scope of the examination as declared in the above-quoted notice is not "practical" within the meaning of the charter (section 4, art. 13) that, by giving the experience of laymen in the actual work of handling meats, fish, and fowl no greater, indeed less, weight than the experience of a veterinarian who has never done such work, the commission has exceeded its power, and that by including in its notice the statement that they had a limited supply of the regulations of the board of health, and would furnish them to applicants so long as that supply lasted, thereby implying that they would not furnish them thereafter, the commission has violated the provisions of section 18 of article 13 of the charter. The latter section provides that no person or official shall "furnish to any person any special or secret information for the purpose of either improving or injuring the prospects or chances of any person of being appointed, employed, or promoted."

It is a well-established proposition that a commission with the powers conferred upon the Civil Service Commission in the examination of applicants for public employment has a wide discretion with regard to the manner of performing its duties and exercising its powers. "Where the position is one as to the proper mode of filling which there is fair and reasonable ground for difference of opinion among intelligent and conscientious officials, the action of the commission should stand, even though the courts may differ from the commission as to the wisdom of the classification. In other words, if the classification of the commission clearly violates the Constitution or the statute, mandamus should issue to correct the classification. If the action of the commission is not palpably illegal, the court should not intervene." 1 Dillon on Mun. Corp. (5th Ed.) pp. 700, 701. This court has said in a case involving the powers and duties of the San Francisco Civil Service Commission:

> "Courts should let administrative boards and officers work out their problems with as little judicial interference as possible. They may decide a particular question wrong—but it is their question. Such boards are vested with a high discretion, and its abuse must appear very clearly before the courts will interfere." Maxwell v. Civil Service Comm., 169 Cal. 339, 146 Pac. 871.

No facts are presented in the complaint which even tend to indicate that the method of holding the examination as outlined in the notice thereof above quoted is not practical. The courts are certainly not at liberty to assume that it is not practical, in the absence of some affirmative fact showing that, as a matter of law, it is impractical. The same reasons apply with equal force to the complaint that the commission has placed a veterinarian on the same plane as one experienced in the handling of meats, fish, and fowl. We cannot say that the commissioners abused their discretion in concluding that a person with the prescribed experience as veterinarian might be as well qualified to supervise the work of canners, curers, packers and preparers of meat and to inspect meat and meat products on sale as one of actual experience in the handling of meats, fish and fowl. The statement in the notice informing applicants that they could obtain copies of the regulations of the board of health from the commission so long as its supply held out does not appear to us to be a violation of section 18 of article 13 of the charter. It is to be presumed that the printed regulations of the board of health could be obtained from the board itself, or, if not, that any applicant could examine the same by demanding an inspection of the record thereof. They could not, lawfully, be kept secreted from such applicants.

[6] The point that the provision in the notice that deductions would be made if the experience shown was not considered first-class would authorize an abuse of the discretionary powers of the commission seems to us to be without force. Obviously, it would be the duty of the commission to determine the nature of the experience shown to be possessed by the applicant, and if they did not consider it first class they should take due weight of that fact in giving to the applicant a certificate of qualification. Any power may be abused. But to enjoin its exercise on that ground, without showing that the abuse is threatened and imminent, would defeat a lawful grant of power, a thing not to be done by the courts. We find no ground upon which the complaint can be held to be sufficient to justify an injunction. The court below erred in overruling the demurrer.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; WILBUR, J.; OLNEY, J.; MELVIN, J.; LAWLOR, J.

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181 Cal. 66

PEOPLE v. LAPARA. (Cr. 2176.)

(Supreme Court of California. Aug. 25, 1919. Rehearing Denied Sept. 22, 1919.)

1. Criminal Law 🔑814(17)—Instructions—Circumstantial Evidence.

Where prosecution relies upon direct evidence, and any circumstantial evidence is merely incidental to and corroborative of direct evidence, an instruction on circumstantial evidence is unnecessary.

2. Criminal Law 🔑718—Argument of Counsel—Circumstantial Evidence.

Where prosecution relies on direct evidence, and any circumstantial evidence is incidental to and corroborative of the direct evidence, defendant's counsel may be prevented from arguing law of circumstantial evidence to jury.

3. Criminal Law 🔑407(1)—Admissions—Denial of Charge.

Where accused denied charges made in his presence, the accusatory statements are inadmissible.

4. Criminal Law 🔑1186(4)—Harmless Error—Evidence.

Error in admitting accusatory statements, which defendant denied, in a murder case, *held* harmless, where facts in statements were established by other proof, in view of Const. art. 6, § 4½, prohibiting reversals except for errors substantially injuring accused.

5. Homicide 🔑308(5)—Requested Instructions—Murder in Second Degree.

Refusing a requested instruction that accused could be convicted only of second degree murder if jury had reasonable doubt as to degree of his guilt is not erroneous, where accused was clearly guilty of first degree murder, and only defense was that of mistaken identity, although issue as to second degree murder was submitted to jury.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Antone Lapara was convicted of murder, and appeals. Affirmed.

Nathan C. Coghlan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., J. H. Riordan, Deputy Atty. Gen., J. J. West, of San Francisco, of counsel, C. M. Fickert, Dist. Atty., and Fred L. Berry, Asst. Dist. Atty., both of San Francisco, and Jas. F. Brennan, of San Francisco, Special Prosecutor, for the People.

LENNON, J. Antone Lapara, the defendant herein, was charged with the crime of murder. He was convicted of murder in the first degree. This appeal is from a judgment of the superior court of the city and county of San Francisco imposing a death sentence as the penalty for the crime.

The principal points presented in support of the appeal involve the correctness and consequences of a ruling of the trial court concerning the admissibility of certain evidence and the refusal of the trial court to permit counsel for the defendant to argue the case to the jury upon the theory that it was one of circumstantial evidence. The evidence adduced upon the whole case, in so far as it is pertinent to the points presented, may be epitomized as follows:

On the morning of the 28th day of November, 1917, one Mario Alioto was shot and killed while riding in an automobile truck which he was driving on Columbus avenue, in the city of San Francisco. The murderer fired the fatal shot while standing on the running board of the truck, and then fled. The defendant was identified as the slayer of Alioto by the direct testimony of two witnesses. Witness Root, a special police officer, testified for the people that he was standing on a street corner near the scene of the murder when his attention was arrested by the sound of a shot. Looking along Columbus avenue, he noted a man, whose face he did not see, but whom he identified as the defendant, standing on the truck by Alioto. He testified that he saw this man fire two shots into the body of the deceased and then run. Root gave chase, twice losing sight of the defendant momentarily, but never being more than 135 feet distant from him, and captured the defendant on Stockton street and took him to the Hall of Justice. Witness Drolet testified that at the time of the shooting she was standing on Columbus avenue with her friend, Mrs. Leonardine, waiting for a street car at a point about 40 feet ahead of the truck. She saw a man, whom she identified as the defendant, mount the truck. Shortly after this, her attention was again directed to the truck by the sound of the explosions caused by the firing of the shots. She then observed the murderer leaping from the truck, and at that moment she obtained a view of his face, which she said was that of the defendant. Mrs. Leonardine testified as a witness for the people that she was unable to identify the defendant as the man who shot Alioto, because she had only seen the back of the murderer. The defendant was also recognized and identified by the witness Emmons as the man who fled from the scene of the crime. Hon. John J. Sullivan, police judge of the city and county of San Francisco, as a witness for the people, testified to a conversation occurring in the Hall of Justice with Special Officer Root, the defendant being present and in the custody of Root, wherein Root, in response to an inquiry as to why he had the defendant in custody, said that he, the defendant, had "shot somebody on Columbus avenue," and that thereupon the defendant said, "Did you see me shoot him?" Root replied, "Yes, I did, and I have you here." Whereupon the defendant "in somewhat of an indifferent manner shook his head, but did not make any reply." Two firemen, Baldwin and Shay, testified to having observed the pursuit of the defendant. Baldwin joined in the chase, and, when he came up with the defendant, the latter was breathing heavily and said, "It's all over now," or something to that effect. It was shown by the witness Cuneo that three shots were fired, and that the assassin, whom she saw running, threw away some object in the course of his flight. By witness Zecker it was shown that a revolver with three empty shells was found at the place indicated by the witness Cuneo.

It will be noted that only one man was observed running from the scene of the murder. In this particular, the testimony of eyewitnesses is agreed, although they differ in the details of their description of the clothing worn by the fleeing man. Some witnesses swore that the man running had a coat on. Other witnesses, one in particular, who was standing within a few feet of the fleeing man, testified that he wore a cap, but no coat. Other witnesses were positive that the fleeing man had on neither cap nor coat. At the time of his arrest on Stockton street, between Chestnut and Lombard, within a few blocks of the scene of the murder and very shortly thereafter, the defendant was wearing a coat and a cap. Two witnesses for the defense, who saw the murderer in full flight, swore that they knew the defendant, and that they glimpsed the face of the murderer as he ran, and that he was not Antone Lapara, the defendant. Testifying in his own behalf, the defendant denied that he did the killing, or that he was, at any time during the day of the killing, at the scene of the killing. Other witnesses for the defendant gave testimony intended to, if not tending to, support the testimony of the defendant. The eight year old daughter of the defendant, after qualifying as a witness, testified that while near the scene of the killing, on her way home from school, she saw one of two men on an automobile shooting, and then saw one of these men run down Columbus avenue, and that the man was not her father.

An analysis of the evidence thus outlined demonstrates that the prosecution relied primarily for a conviction upon direct evidence, and that whatever circumstantial evidence appears in the case was developed incidentally and for the purpose of corroborating the direct evidence. Witnesses Root and Drolet did not undertake to identify the defendant by means of his clothing. The discrepancies existing in the descriptions of the clothing worn by the man observed fleeing from the scene of the crime did not suffice to make the case one of circumstantial evidence. These discrepancies tended to do no more than discredit the testimony of the eyewitnesses to the killing, and create a doubt as to the identity of the man who was observed fleeing from the scene of the crime. True, the testimony of Root and Drolet was in a measure contradicted by the testimony of those witnesses for the defendant who swore that they glimpsed the murderer in full flight and that he was not the defendant; but this contradiction, coupled with the discrepancies of description, at most did no more than create a conflict in the direct evidence, which it was the province of the jury to resolve. Doubtless, such being the nature of the evidence, it was competent for counsel for the defendant to argue to the jury, as he very likely did, that the witnesses Root and Drolet were mistaken as to the identity of the defendant as the man who shot Alioto.

[1, 2] It is not now open to question that in a criminal case in which the prosecution relies for conviction upon direct evidence, the circumstantial evidence, if any, being merely incidental to and corroborative of the direct evidence, an instruction on the law of circumstantial evidence need not be given, and that, in such case, it should not be intimated to the jury that the case of the people is one of circumstantial evidence. People v. Lonnen, 139 Cal. 634, 73 Pac. 586; People v. Burns, 121 Cal. 529, 53 Pac. 1096; People v. Holden, 13 Cal. App. 354, 109 Pac. 495.

The reason for the general rule in this behalf is to be found in the danger of misleading and confusing the jury, where the inculpatory evidence consists wholly or largely of direct evidence of the crime. In such cases, as courts have repeatedly pointed out, it would be most mischievous to intimate to the jury that the prosecution was relying for a conviction upon circumstantial evidence. Rains v. State, 88 Ala. 91, 7 South. 315; Coleman v. State, 87 Ala. 14, 6 South. 290; People v. Kaatz (N. Y.) 3 Parker Crim. 129; Langdon v. People, 133 Ill. 382, 24 N. E. 874. By a parity of reasoning it follows that, where the prosecution relies for conviction upon direct evidence, and the circumstantial evidence developed in the case is in fact merely incidental to and corroborative of the direct evidence, the trial court may well refuse to allow counsel for the defendant to argue the law of circumstantial evidence to the jury. The declaration of the trial court in the present case that "there is no such thing as circumstantial evidence with regard to this case" was tantamount to saying that the case was not one of circumstantial evidence, and, this being true as a matter of law, the trial court did not err in refusing to permit counsel for the defendant to argue the case to the jury upon the theory that it was one of circumstantial evidence.

[3, 4] Counsel for the defendant contends that the trial court erred to the prejudice of the defendant when it overruled an objection to and denied a motion to strike out evidence elicited from Police Detective James T. Gallagher, who testified as follows:

> "I was detailed to investigate this affair, and in pursuance of that I went to the city prison with Detective Bunner, and when I went into the prison this man [the defendant] was there, and I was informed what he was there for, and I said, 'Oh, so you are Lapara, are you, the star witness in the Pedoni Cases. You are the fine gentleman who worked for the Simon Mattress Company, who did not know anybody, but who just accidentally came in the neighborhood. Why did you kill this man—you knew Alioto? You were the star witness in the Pedoni Cases, and you are the man. Now,' I said, 'why did you kill this man—what was your reason for doing it?' and he said, 'I did not kill him.'"

This testimony of the witness Gallagher was objected to, and followed by a motion to strike out upon the ground of its incompetency, irrelevancy, and immateriality, and upon the further ground that a denial by the defendant of the accusation of guilt rendered the accusation and the conversation which led to it inadmissible for any purpose. It was error to overrule the objection, and likewise error to deny the motion to strike out.

> "It is only the guilty conduct or incriminating reply of a defendant in response to an accusation of crime or statements implicating him in its commission that constitute relevant and competent evidence" of that crime. "Ordinarily, when a defendant, under conditions which fairly afford him an opportunity to reply, stands mute in the face of an accusation of crime, the circumstance of his silence may be taken against him as evidence indicating an admission of guilt. Jones on Evidence, § 291; People v. McCrea, 32 Cal. 98; People v. Ah Yute, 53 Cal. 614; People v. Louie Foo, 112 Cal. 24, 44 Pac. 453; People v. Mallon, 103 Cal. 513, 37 Pac. 512; People v. Amaya, 134 Cal. 536, 66 Pac. 794. But if he promptly and fully deny the charge, the accusatory statements, standing alone, are not in any sense competent evidence of the defendant's guilt (People v. Estrado, 49 Cal. 171; People v. Ah Yute, 54 Cal. 90), and should in such a contingency be excluded from the consideration of the jury. * * * As was said in the case of People v. Teshara, 134 Cal. 542, 66 Pac. 798, 'the court and the district attorney seem to have lost sight of the fact that it is not the accusation but the conduct of the accused that is evidence in such cases, and that the only reason for admitting the accusation is to explain the conduct.'" People v. Ayhens, 16 Cal. App. 618, 117 Pac. 789.

In the Teshara Case, this court declared that the district attorney should not have offered the statement, knowing, as he did, that the accused had not stood silent before the accusation, but had repelled it at the time it was made; and it may not be amiss to reiterate that, for the same reason, the district attorney in the present case should not have offered the accusatory statement complained of.

Conceding that the fact that the defendant had appeared as a witness for the defendant in the case of People v. Pedoni tended, in connection with other circumstances, to show that the defendant was possessed of a motive which prompted him to commit the murder of which he was charged and convicted, still evidence of that fact should not have been presented by indirection through the medium of an inadmissible accusatory statement. But the error of its admission, in the form stated, must be held to have been harmless in the presence of previous proof, properly presented and received, without objection, of the defendant's participation as a witness in the Pedoni Case. Closely scrutinized, remaining portions of the accusatory statement may perhaps, depending upon the intonation, carry an insinuation against the probity of the defendant's testimony in that case. But upon the cold record before us we are not prepared to say that the jury so closely considered and critically construed the statement in question. But if, perchance, they did so construe it, the evil thereof was undoubtedly reduced to a harmless minimum, if not entirely eradicated, by the court's charge to the jury that the law presumed that the defendant testified honestly and truthfully when a witness in the other case. Then, stripping Gallagher's statement of the text thus shown to have been harmless, there is left merely an inadmissible accusation the error of which, standing alone, will not suffice, in the light of the entire record, to warrant a reversal. This is so because there is no presumption of prejudice to a defendant from such an error or irregularity arising during the course of a criminal trial. On the contrary, it must affirmatively appear to the satisfaction of this court that a defendant may well have been substantially injured by the error complained of before a reversal of a judgment of conviction may be had. Section 4½, art. 6, Const. We have carefully reviewed and considered the entire record, including the evidence, with the result that we are satisfied that the accusatory statement erroneously admitted in no degree contributed to or affected the verdict. This being so, a reversal cannot be ordered on account thereof. People v. Lawlor, 21 Cal. App. 63, 131 Pac. 63; People v. O'Bryan, 165 Cal. 55, 130 Pac. 1042; People v. Fleming, 166 Cal. 357, 136 Pac. 291, Ann. Cas. 1915B, 881; People v. King, 23 Cal. App. 259, 137 Pac. 1076; Jameson v. Tully, 173 Pac. 577; People v. Flood, 182 Pac. 766; People v. Laine, 182 Pac. 986.

[5] We find no error in the instructions. The court defined every element of the offense charged clearly and correctly. While the court did not charge, as requested, that if the jury should find that the defendant did shoot and kill the deceased, but should entertain a reasonable doubt as to whether the defendant was guilty of murder in the first or second degree, they should find him guilty of the lesser degree, still, it being unquestionably clear from the evidence that the man who did the killing was guilty of murder in the first degree, and the defense interposed being solely that of mistaken identity, the court did not err in refusing to give the requested charge. The situation was not altered by the fact that the court defined murder in the second degree and submitted to the jury a form of verdict for that degree.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; OLNEY, J.; SHAW, J.; LAWLOR, J.; MELVIN, J.

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181 Cal. 73

Ex parte RUST. (Cr. 2242.)

(Supreme Court of California. Aug. 25, 1919.)

1. PHYSICIANS AND SURGEONS 🔑6(3) — OPTOMETRY ACT NOT APPLICABLE TO OSTEOPATHS.

Optometry Act 1913, § 10, permitting "physicians and surgeons" to treat eyes, etc., is inapplicable to osteopaths, in view of Medical Act of 1913, providing that osteopaths be given different certificates from those issued to physicians and surgeons, and prior legislation in which osteopaths were placed on a different basis than physicians and surgeons.

2. PHYSICIANS AND SURGEONS 🔑6(5)—PRACTICE OF OPTOMETRY NOT PERMITTED BY LICENSE AS OSTEOPATH.

A license to practice "osteopathy" does not authorize the practice of optometry, since the quoted word does not include the treatment of eyes, fitting of glasses, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Osteopathy.]

3. CONSTITUTIONAL LAW 🔑328—PHYSICIANS AND SURGEONS 🔑2—OPTOMETRY ACT NOT DISCRIMINATING AGAINST OSTEOPATHS.

Optometry Act 1913, § 10, authorizing physicians and surgeons, but not osteopaths, to treat eyes, etc., does not unreasonably discriminate against osteopaths, in violation of Const. art. 1, §§ 1, 11, 21, article 4, § 25, subds. 19, 33, and the Fourteenth Amendment to the federal Constitution.

4. CONSTITUTIONAL LAW 🔑88 — OPTOMETRY ACT NOT INTERFERING WITH LIBERTY OF CITIZEN.

St. 1913, p. 1097, prohibiting the practice of optometry without a license, is not invalid upon the ground that it interferes with personal liberty of citizen to fit glasses, etc.

In Bank.

Habeas corpus proceeding by C. G. Rust against Thomas F. Finn, Sheriff of the City and County of San Francisco. Application denied, and petitioner remanded.

See, also, 35 Cal. App. 422, 169 Pac. 1050.

Chas. F. Hanlon, of San Francisco, for petitioner.

Oliver Dibble and John T. Williams, both of San Francisco, for respondent.

WILBUR, J. [1] Petitioner, being held under a commitment from the police court, seeks his release from the custody of the sheriff of the city and county of San Francisco. He is licensed to practice osteopathy. His license was issued March 6, 1907, under the law regulating the practice of osteopathy, passed in 1901 (Stats. 1901, p. 113). This statute was repealed by the General Medical Act of 1907 (Stats. 1907, p. 252), and this in turn by the Medical Act of June 2, 1913 (Stats. 1913, p. 722), which was amended in 1915 (Stats. 1915, p. 187), and in 1917 (Stats. 1917, p. 93), but petitioner's license to practice osteopathy has been continued in force by such statutes and proceedings thereunder (Stats. 1907, p. 258, § 16; Stats. 1913, p. 722, § 21). Petitioner was found guilty of a violation of the statute making it unlawful to engage in the practice of optometry without a license from the state board of optometry (Stats. 1913, p. 1097), which act, for convenience, we will hereafter refer to as the Optometry Act. Petitioner contends that he is a physician, and is entitled to practice optometry by reason of the exceptions contained in section 10 of that act (Stats. 1913, p. 1101, § 10), which is as follows:

> "Sec. 10. The provision of this act shall not be construed to prevent duly licensed physicians and surgeons from treating or fitting glasses to the human eye; nor to prohibit the sale of complete ready-to-wear eyeglasses as merchandise from a permanent place of business in good faith and not in evasion of this act by any person not holding himself out as competent to examine and prescribe for the human eye."

To support his contention that the practice of osteopathy is the practice of medicine, and, hence, that he is a physician, petitioner relies upon the general definition of a physician as one who practices the art of healing (citing Century Dictionary; Black's Law Dictionary), and upon cases in which those engaged in the practice of osteopathy have been held guilty of violating laws regulating the practice of medicine, such as Bragg v. State, 134 Ala. 165, 32 South. 767, 58 L. R. A. 925. He also cited People v. Siman, 278 Ill. 256, 115 N. E. 817, where the court held that an osteopath was a physician within the meaning of the law requiring physicians to register under what was known as the Vital Statistics Act. He also claims that he is a "physician" practicing "medicine" within the meaning of the Medical Act of 1901, in force at the time his license to practice osteopathy was issued. This act provided:

> "Sec. 16. The following persons shall be deemed as practicing medicine or surgery within the meaning of this act: * * * 4. Those who, for a pecuniary or valuable consideration, prescribe or use any drug or medicine, appliance, or medical or surgical treatment, *or perform any operation for the relief or cure of any bodily injury or disease.*" (Italics ours.)

The question is not free from difficulty, for the reason that neither the medical act of 1876 (Stats. 1876, p. 792), nor any of the succeeding acts (Stats. 1901, p. 56; Stats. 1907, p. 252), defines a "physician" or "surgeon," or a "physician and surgeon," or expressly provides for the license of a "physician." The Optometry Law of 1903 (Stats. 1903, p. 288, § 16), in stating the exception, is similar to that of 1913, § 10, as is the amendment of 1907, § 16 (Stats. 1907, p. 63), in using the term "physician and surgeon," etc.; but the amendment thereto in 1909 of section 16 uses the expression "physician *or* surgeon." (Italics ours.) There is therefore some basis for the claim that at the time of the issuance of petitioner's license (March 6, 1907) these terms "physician" and "surgeon," not being defined by statute, should be construed in their broad and general acceptation. However, the same Legislature which adopted the Optometry Law of 1913 also adopted a law regulating the practice of all systems of healing. Stats. 1913, p. 722. By this law provision was made for the issuance of a certificate known as a "physician and surgeon's" certificate, and another to be known as a "drugless practitioner's" certificate, the latter certificate covering the right to practice osteopathy, and also continued in force all licenses previously issued under "any medical act of this state." Section 21 provided:

> "Nothing in this act shall be construed to prohibit the practice by any person holding an unrevoked certificate heretofore issued under or validated by any medical practice act of this state, but all such certificates may be revoked for unprofessional conduct in the same manner and upon the same grounds as if they had been issued under this act."

It also provided (sec. 22):

> "Nor shall this act be construed so as to discriminate against any particular school of medicine or surgery, or any other treatment, nor to regulate, prohibit or apply to, any kind of treatment by prayer, nor to interfere in any way with the practice of religion."

For the reasons stated by the District Court of Appeal of the First District, in deciding upon a previous application of petitioner (In re Rust, 35 Cal. App. 422, 169 Pac. 1050), we hold that the provision of section 10 of the Optometry Law of 1913 refers to those holding a "physician and surgeon's certificate," as authorized by the Medical Act of the same year. This construction of these two acts is, however, not altogether decisive of the question arising as to certificates issued under preceding statutes. The Medical Act of 1913 recognized the right of holders of licenses under previous "medical acts" to practice, and to that extent, in effect, continued the preceding acts in force. We think it fairly apparent, however, that the Legislature has, in effect, always used the terms "physician" or "surgeon" and "physician and surgeon," as applied to those practicing medicine and surgery within the meaning of the various medical acts, as contradistinguished from the practitioners of osteopathy. For instance, the first law regulating the practice of osteopathy provided: "The system, method, and science of treating disease is hereby declared not to be the practice of medicine or surgery within the meaning of" the act of 1876, regulating the practice of medicine. The corresponding Medical Act passed by the same Legislature a few days previous (Stats. 1901, p. 56) declared that those were deemed to be practicing medicine or surgery who held themselves out "as being engaged as doctors, physicians, or surgeons," etc. (Stats. 1901, p. 63, § 16, sub. 1). We thus have the legislative declaration that an osteopath is not practicing medicine or surgery, and that "physicians" and "surgeons" are practicing medicine. The reference to the Medical Act of 1876 (repealed by the Medical Act of 1901) may be disregarded, as evidently the two acts of 1901, the Osteopathic and Medical Acts, are to be construed together. The Medical Act of 1907 (Stats. 1907, p. 252), in which for the first time medicine and surgery and osteopathy are treated in one legislative act, is entitled "An act for the regulation of the practice of medicine and surgery, osteopathy," etc; and in section 2, providing for the organization of a joint board, it is provided that "each member of said board shall, before entering upon the duties of his office, * * * make oath that he is a graduate in medicine and surgery or osteopathy, and a licensed practitioner of medicine and surgery, or of osteopathy, of this state"; thus recognizing a distinction between "medicine and surgery" and "osteopathy" existing before its passage; and in section 6 (Stats. 1907, p. 252, § 6), provides for the issuance of a license to practice "medicine and surgery," and a separate and distinct license "to practice osteopathy." This distinction, requiring separate and distinct licenses for the practice of medicine and surgery and of osteopathy, is maintained in the amendment of 1911 to the Medical Act (Stats. 1911, p. 1437, § 6). The same distinction is also made in the title to this amendment of 1911. In section 13a of the latter amendment, while we have the phrase, "pursuant to any laws regulating the license and registration of physicians, osteopathic physicians, or persons lawfully engaged in practicing any other system or mode of healing the sick or afflicted," we also have the phrase, "medicine, surgery, osteopathy, or any other system or mode of treating the sick or afflicted," used nine times in that section (pp. 1439-1440), and also a provision prohibiting the use of the word "doctor" in any advertisement by any person as indicating or implying that he is a doctor of medicine. It follows that when the Optometry Law of 1903, and its amendment of 1907, and 1909, used the phrase "physician and (or) surgeon authorized to practice under the laws of the state of California," the phrase is synonymous with the phrase "licenses to practice medicine and surgery," used in the acts regulating the practice of medicine, then a part of "the law of California," and thus excludes the holder of a license to practice osteopathy, although in the broad sense of the term an osteopath may properly be said to be a "physician." The phrase "duly licensed physicians and surgeons," used in section 10 of the Optometry Law of 1913, excludes osteopathic practitioners, and includes those licensed to practice "medicine and surgery" under previous medical laws of the state. We hold, therefore, that the license of petitioner, although issued before the Optometry Act and the Medical Act of 1913, does not authorize him to practice optometry under the exception in favor of physicians and surgeons in section 10.

[2] The petitioner also contends that his license to practice osteopathy authorizes the practice of optometry because the practice of optometry is included in the practice of osteopathy, and that, therefore, the law prohibiting the practice of optometry without a license should not be construed as prohibiting that practice by one authorized so to do by a license issued under another statute, even though no express exception is contained in the statute. If it is true that the general license to practice osteopathy does authorize the practice of optometry, the point may be well taken. The statute of 1901, regulating the practice of osteopathy, does not define osteopathy, nor is the definition contained in the present state Medical Act. Webster defines osteopathy as follows: "A system of treatment based on the theory that diseases are chiefly due to deranged mechanism of the bones, nerves, blood vessels, and other tissues, and can be remedied by manipulations of these parts"; while optometry is defined by statute "to be the employment of any means other than the use of drugs for the measurement of the powers or range of human vision, or the determination of the accommodative and refractive states of the human eye, or the scope of its functions in general, or the adaptation of lenses or frames for the aid thereof." Osteopathy is discussed at length in the Encyclopedia Americana, vol. 11 (see, also, the title "Osteopathy, its discovery, development, and institutions"; see, also, Parks v. State, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190); and it is sufficient to say that we cannot see therefrom that the fitting and prescription of eyeglasses comes properly within the practice of that mode of healing. But petitioner's argument that osteopathy includes optometry is based rather upon legal considerations than upon the meaning and significance of the word "osteopathy." It is argued, in effect, that the license to practice osteopathy includes all means of healing other than major surgery or the use of drugs. This claim is based upon the statute and license issued thereunder. It is true that under the law the certificate issued to petitioner expressly provides: "This certificate does not authorize the holder thereof to prescribe or use drugs nor to perform major surgery." See Stats. 1901, p. 114, § 5. This provision was, no doubt, intended to assure what is elsewhere declared, namely, that the license to practice osteopathy should not be deemed to authorize the practice of medicine within the meaning of the state Medical Act then in force. Stats. 1901, p. 115, § 9; Stats. 1876, p. 792. It does not follow, however, that the license to practice osteopathy issued under the law of 1901 authorizes the licensee to practice every known healing art which does not involve the use of drugs, nor major surgery, including optometry. The present law authorizes the petitioner to practice osteopathy, and nothing more (Stats. 1913, p. 722, § 21), by reason of his license issued under the law of 1901 and its registration. We cannot say

that the science of osteopathy includes optometry.

[3] Petitioner claims that if he is not authorized to practice optometry by his license to practice "osteopathy," and a physician and surgeon is authorized to practice optometry by his license as a "physician and surgeon," the law in question is unconstitutional, as violative of article 1, §§ 1, 11, and 21, and article 4, § 25, subds. 19 and 33, of the California Constitution, and also of the Fourteenth Amendment of the federal Constitution, because the law unreasonably discriminates between the holder of a "physician and surgeon's" license and the holder of an osteopathic license. But, as has been stated, the law under which the petitioner received his license to practice osteopathy recognized that that practice was separate and distinct from the practice of medicine and surgery, and the requirements for a license to practice osteopathy and for a physician and surgeon's license have always been different. Under the law of 1913, passed by the same Legislature that adopted the law regulating the practice of optometry, provision was made for the issuance of different forms of certificate—one a "physician and surgeon's" certificate, another a "drugless practitioner's certificate." Those applying for the first time to practice osteopathy were required to secure a "drugless practitioner's" certificate, while those desiring to practice medicine and surgery were required to secure a "physician and surgeon's" certificate. The applicant for the latter was required to have 4,800 hours' study to his credit, including 60 hours' study of opthalmology, which includes optometry, while no study of that branch was required of the drugless practitioner. Stats. 1913, p. 722. With some modifications these distinctions were continued by the amendment to the Medical Act, which also expressly authorized the issuance of a physician and surgeon's license to the holder of a license to practice osteopathy, upon proof that the applicant has practiced osteopathy for four years, and upon passing "an oral, practical, or clinical examination" for a physician and surgeon's license. Stats. 1917, p. 105, § 6, amending § 121, Stats. 1915. It also provides for the issuance of a physician and surgeon's certificate to persons who hold a drugless practitioner's certificate, upon the completion of the course required for a physician and surgeon's certificate. Stats. 1917, p. 102, § 5, amending § 11, Stats. 1915. The discrimination complained of between the holder of the physician and surgeon's certificate and the holder of a certificate to practice osteopathy is not unreasonable, for it is based upon different training. See Ex parte Whitley, 144 Cal. 168, 77 Pac. 879, 1 Ann. Cas. 13; People v. Jordan, 172 Cal. 391, 156 Pac. 451.

[4] Petitioner also contends that the law regulating the practice of optometry is unconstitutional for the reason that it interferes with the personal liberty of a citizen to perform the "merely mechanical act of fitting glasses." Bessette v. People, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558, People v. Smith, 208 Ill. 31, 69 N. E. 810, and Martin v. Baldy, 249 Pa. 253, 94 Atl. 1091, are cited as authority for this proposition. In Bessette v. People, supra, the Supreme Court of Illinois held an act unconstitutional which required a blacksmith to practice the business of horseshoeing for four years and to submit to an examination by a state board of examiners and pay a license fee for the privilege of exercising his calling as horseshoer. In the case of Martin v. Baldy, supra, it was held that the action of the state board of medical examiners in attempting to regulate the practice of optometry was without legal authority, for the reason that optometry was not included in the practice of medicine or surgery within the meaning of the statute, which declared it should not be lawful "for any person in the state of Pennsylvania to engage in the practice of medicine or surgery or to hold himself or herself forth as a practitioner in medicine or surgery, or assume the title of doctor of medicine or surgery, or doctor of any specific disease, or diagnose diseases, or to treat diseases by the use of medicine or surgery," etc. But it is conceded in that case that the practice of optometry might properly be regulated by legislative action. The case of People v. Smith does not deal with the legislative power to regulate optometry, but holds that the Medical Act of that state does not prohibit the practice of fitting and grinding of eyeglasses, or optometry. The distinction between fitting eyeglasses and horseshoes is too obvious to require comment.

We find nothing in these latter cases which would indicate that a law requiring some evidence of skill as a prerequisite to fitting glasses to the human eye is not a valid exercise of the police power. The same considerations of public health which justify the requirement of a license to practice medicine and surgery and osteopathy authorizes the legislation in question. It is therefore a valid exercise of the police power of the state. See Dent v. West Virginia, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623; Ex parte Whitley, supra; People v. Jordan, supra.

The finding of the court in this case is that the petitioner "adjusted various lenses to the eyes of said Knox and finally fitted glasses to his eyes and sold the same to him"; that he was "guilty of a misdemeanor, to wit, the practice of optometry without having a license for so doing," etc. The law prohibits such conduct, and is constitutional.

The petitioner is remanded.

We concur: LENNON, J.; SHAW, J.; LAWLOR, J.; MELVIN, J.; OLNEY, J.

181 Cal. 82

In re McNAMARA'S ESTATE.

McNAMARA v. McNAMARA et al.

(L. A. 5530.)

(Supreme Court of California. Aug. 25, 1919. Rehearing Denied Sept. 22, 1919.)

1. Appeal and Error 🔑833(5)—Rehearing in Bank—Order.

A written order for a rehearing in bank, made within 30 days after the decision in department, as prescribed by Const. art. 6, § 2, is not invalidated because erroneously dated a day later, or because not marked as filed by the clerk until after the 30-day period.

2. Bastards 🔑3—Presumption.

In determining the legitimacy of a child born after its parents had separated, it will be assumed the parents had intercourse during the last night they lived together.

3. Evidence 🔑6, 51 — Judicial Notice — Gestation.

Judicial notice may be taken regarding the period of gestation, and the court may inform itself from technical publications, etc.

4. Evidence 🔑6 — Judicial Notice — Gestation.

Judicial notice will be taken that 304 days exceeds the normal gestation period.

5. Bastards 🔑3 — Presumptions — Statute.

Civ. Code, § 194, providing that children born within 10 months after dissolution of a marriage are presumed to be legitimate, creates only a prima facie presumption.

6. Bastards 🔑3 — Presumption — Statute—Construction—Ten "Months."

In Civ. Code, § 194, creating a presumption that children born 10 "months" after dissolution of a marriage are legitimate, the quoted word refers to periods of 30 days although under section 14, Civ. Code, provisions refer to calendar months, unless the context requires a different meaning.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Month.]

7. Bastards 🔑3 — Presumptions — Conclusiveness.

There is no conclusive, but only a prima facie, presumption regarding the legitimacy of a child born during wedlock, where the mother left her husband to cohabit with another 304 days before the child's birth, since such period exceeds the normal time for gestation.

8. Bastards 🔑6 — Sufficiency of Evidence.

Evidence that a child was born 304 days after its mother left her husband to cohabit with another, etc., *held* to overcome the prima facie presumption regarding legitimacy of children born during wedlock, and sustain a finding of illegitimacy.

9. Bastards 🔑13 — Legitimation — Receiving into "Family"—Statute—Construction.

In Civ. Code, § 230, providing that a father may legitimate a child by receiving it into his "family," etc., the quoted word does not necessarily mean the father's relations, but may mean the family in which the father resides, even though it consists of the child and its mother.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Family.]

10. Bastards 🔑13 — Legitimation — Evidence—Sufficiency.

Evidence *held* to sustain a finding that a father had legitimated his child by adopting it pursuant to Civ. Code, § 230, requiring a public acknowledgment of paternity, treatment of child as if legitimate, and its reception into father's family.

11. Bastards 🔑5 — Evidence — Admissibility.

In action involving the legitimacy of a child, the mother's testimony that her husband had no access to her during the normal gestation period prior to the child's birth is admissible under Code Civ. Proc. § 1870, subdivisions 1, 15, specifying facts which may be proved, and section 1879 making all persons, with immaterial exceptions, competent witnesses.

12. Evidence 🔑291 — Declarations by Decedent—Admissibility.

In action involving the legitimacy of a child, declarations by the mother's deceased paramour that he was the child's father is admissible to show legitimation by adoption, pursuant to Civ. Code, § 230, and also under Code Civ. Proc. § 1870, subd. 4, providing that declarations by a deceased regarding persons related to him constitute competent evidence.

13. Trial 🔑59(2)—Order of Proof—Evidence.

In action involving the legitimacy of a child, admitting declarations by the mother's paramour that he was the child's father, before it was shown that the mother's husband could not have been its father, involves merely the order of proof, and is almost entirely within the trial court's discretion.

14. Evidence 🔑269(2) — Declarations — Admissibility.

In action involving the legitimacy of a child, declarations by the mother's husband, made when she left him, that he was going to another town, *held* admissible.

15. Appeal and Error 🔑1050(2)—Harmless Error—Evidence.

In action involving the legitimacy of a child, any error in admitting declarations by the mother's husband that he intended to go to another town *held* not prejudicial.

Melvin, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of John A. Mc-

Namara, deceased. Petition by John Hamilton McNamara, a minor, by Rosalie Nettie Bettencorte, guardian of his person and estate, for partial distribution of the estate. From an order awarding partial distribution, Mary Jeanette McNamara and Margaret J. McNamara appeal. Reversed in department, and the case ordered reheard in bank. Judgment in department reversed, and order of Superior Court affirmed.

Rehearing denied in bank; Melvin, J., dissenting.

Daniel M. Hunsaker, Joseph L. Lewinsohn, Hunsaker & Britt and Le Roy M. Edwards, all of Los Angeles, and Boyd C. Barrington, for appellants.

John W. Carrigan, of Los Angeles, for respondent.

OLNEY, J. [1] Preliminary to the discussion of this appeal it is advisable to correct the record of this court regarding it. It was decided by us in department on December 18, 1918. A petition for rehearing in bank was duly filed, and on January 17, 1919, an order was signed by the Chief Justice and two Associate Justices directing a rehearing. This was within 30 days after the judgment in department, and therefore within the time prescribed by the Constitution within which rehearings may be granted. It appears, however, that the order was given the date of January 18, 1919, which was 31 days after the department decision, and not within the prescribed time. The order was also marked by the clerk as filed on January 18, 1919.

The fact that the paper on which the signed order was written was not marked by the clerk as filed until after the expiration of the period of 30 days from the time of the department decision is not material to the validity of the order. The joint action or concurrence of four Associate Justices or of the Chief Justice and two Associate Justices "is the thing required to constitute the action of the court" (Const. art. 6, § 2), and, in contemplation of law this joint action is taken when the required number of justices "have, in writing, declared their concurrence in the order with intent to make it an order." "The filing of the order in the clerk's office within the prescribed time was not essential to its validity," if it was regularly made within that time by the necessary number of justices. People v. Ruef, 14 Cal. App. 624, 626, 114 Pac. 48, 54; Niles v. Edwards, 95 Cal. 47, 30 Pac. 134; Von Schmidt v. Widber, 99 Cal. 515, 34 Pac. 109. It is therefore unnecessary, as matter of law, to correct the entry as to the time of filing, or to order a filing nunc pro tunc as of January 17, 1919. But as the date of the order makes it appear that it was made after the expiration of the 30 days, contrary to the fact, and might tend to cast doubt on the validity of further action by the court in the case, we deem it advisable to correct the order in that respect.

It is therefore ordered that the order heretofore made in this case vacating the judgment previously entered herein in department, and directing a hearing thereof before the court in bank, be, and the same is hereby, corrected as to its date by striking out the words "January 18th, 1919," as written therein, and inserting instead thereof the words "January 17th, 1919," the same being the true date of the making of said order.

Passing now to the consideration of the appeal itself, it appears that the decedent, John A. McNamara, died May 10, 1916, unmarried and without a valid will. In the course of the administration of his estate, one John H. McNamara, a minor, through his guardian, presented a petition for partial distribution of the estate to him, alleging that he was the illegitimate child of the decedent, and that he had been legitimated by adoption in the manner prescribed by section 230 of the Civil Code. The section mentioned provides for legitimation rather than for adoption in the ordinary sense, and, in order that the petitioner's right of heirship be established, it was necessary for him to show that he was in fact the illegitimate son of the decedent, and also that he had been adopted by the decedent in the manner specified by the Code section. The heirs of the decedent, if the child were not his heir, were two sisters, and these sisters filed objections to the child's petition, and in particular took issue with the allegations of the petition as to both of the two elements required by the Code section for legitimation; that is, as to the petitioner being in fact the offspring of the decedent, and as to his having been adopted by him. There were other issues made, but the two issues mentioned were the real issues and alone need to be considered. The cause was tried without a jury, the lower court found for the child upon both issues, and made an order of partial distribution in his favor. From this order the sisters appeal, and urge that the finding of the lower court in the child's favor is not supported by the evidence as to either issue. Certain rulings in the admission of evidence are also complained of. The chief contention is over the finding of paternity, and will be first considered.

The salient facts are that the petitioner is the child of a Mrs. Bettencorte. She was quite a young woman, and had married one Antonio F. Bettencorte in July, 1913, and lived with him, occupying the same apartment, up to and through the night of December 23d of the same year. On the morning of the following day she went with her husband to the city of San Jose, a few miles from where they resided, and there left him about noon to go immediately with McNamara, the decedent, with whom she lived practically continuously thereafter until his death. She never saw her husband again but once, and then under circumstances that preclude the possibility of intercourse between them. As throwing some light on the relations of the parties and the character of the mother, it may be mentioned that she had been engaged to McNamara, had had some quarrel with him, and had immediately married Bettencorte. She seems to have found herself very unhappy in her marriage, never to have lost her affection for McNamara, and in her unhappiness to have turned to him. She had no illicit relations with McNamara prior to her finally leaving her husband, and there is in the record no evidence, in fact no breath of suspicion, that she had illicit relations with any one but McNamara.

On October 24, 1914, just 10 calendar months, or 304 days, after Mrs. Bettencorte left her husband, the child was born. No question seems ever to have occurred to anyone until after McNamara's death but that the child was his. Certainly no question occurred to him. No physician was present at the birth, and McNamara himself made out and signed the birth certificate, specifying himself as the father. In letters to the child's mother he addresses her as his wife, and speaks of her as such and of the child as their child. He endeavored to make a will leaving his property to "Rosalie A. Bettencorte, the mother of my son, and with whom I have been living as my lawful wife for the past year pending the securing of a divorce by her. She is to have all and everything that I die possessed of for the benefit of herself and her child." He also directs Mrs. Bettencorte, in case of his death, to communicate with his sister, one of the appellants here, saying that she will see that his wishes are carried out. The will failed because not witnessed and not entirely written in McNamara's own hand. The child and the mother lived with him, accompanied him on trips away, and he supported them both. So far as appears, the relations between the three were the usual relations of a family of father, mother, and child.

In addition to the foregoing Mrs. Bettencorte testified (and in view of the court's finding her testimony must be taken as true, if competent) that she had her regular menstrual period commencing December 20, 1913, four days before she left her husband, and ending the day she left, and that she had another regular and full period commencing January 23d or 24th following, and that she had another menstruation, apparently shorter, in February. She also testifies that she first suspected she was pregnant in March or April. It also appears that the child when born was a fully developed and normal baby. It was not weighed, but the mother testified that her mother said at the time it was born that it weighed about 11 pounds. Another witness testified that it weighed 8 or 9 pounds. If the child did in fact weigh 11 pounds at birth, it was exceptionally large, and this fact might be a slight indication of a prolonged pregnancy. But estimates as to the weight of a new-born baby are proverbially unreliable, and the most that can be said is that the child was full-sized. On the other hand, there was no unusual circumstance accompanying either the pregnancy or the birth, and the fact of the mother's safe delivery without a physician may be a slight indication that the child was not of unusual size. The only medical evidence introduced was that of a physician called by the appellants, who testified that a period of gestation of 304 days or more was possible and not *very* unusual.

Upon the foregoing facts and evidence the point most strongly urged upon us on behalf of the appellants is that the question of the child's paternity is determined by a conclusive presumption of legitimacy. It is urged that it appearing that Mrs. Bettencorte and her husband were together on the night of December 23d, it must be presumed, as a matter of law, that intercourse took place between them at that time, and it further appearing that a child was born of Mrs. Bettencorte 304 days thereafter, and that this period is within the period of possible gestation, there is a conclusive presumption of law that the child is legitimate; that is, is the offspring of Mrs. Bettencorte's husband and not of the decedent.

[2] That it must be assumed, as urged by appellants' counsel, that the husband and wife had intercourse on the night of December 23d, when they were together, cannot be doubted. That such is the rule in cases where the issue of legitimacy is involved is established in this state by Estate of Mills, 137 Cal. 298, 70 Pac. 91, 92 Am. St. Rep. 175. The question, therefore, presented by appellants' contention is this, Is there a conclusive presumption of legitimacy when it appears that the mother has had intercourse with her husband 304 days before the birth of the child, but not subsequently?

The presumption of legitimacy is discussed in Estate of Walker, 181 Pac. 792. It is there said that if it appear that it is possible by the laws of nature for the husband to be the father of the child—that is, if he had intercourse with his wife during the period of possible conception—he is conclusively presumed to be the father, that the law will permit no guessing or weighing of probabilities as between the husband and some other man, when both have had intercourse with the mother during the critical time, and either may in fact be the actual progenitor. This rule in cases where only a usual and normal period of gestation is involved is thoroughly well established, and the reasons of policy upon which it is based are so strong that it is the rule of both the civil and the common law. There was, however, no attempt in the Walker Case to do more than state the rule in a general way. Nothing more was necessary, as the evidence of intercourse with the husband there relied on to prove legitimacy was of intercourse during the time when, according to the usual operation of the laws of nature, the children involved must have been conceived. The application of the rule to such a case is not open to doubt.

But in the present case it appears conclusively that the husband did not have intercourse with his wife for a period of 304 days preceding the birth of the child. This period, if not exceeding, at least approaches, an exceeding of the usual and normal period of gestation. Two questions, therefore, present themselves, neither of which was presented in the Walker Case or there determined. The first of these is, Is the period of 304 days greater than the usual or normal—not merely the average—period of gestation—that is, is it contrary to the usual operation of the laws of nature? This is a pure question of fact. The second question is one of law, namely, Does the conclusive presumption of legitimacy apply where the period of gestation necessary in order that the husband be the father is not an impossible one, but is yet exceptional, and not according to the usual operation of the laws of nature?

[3, 4] The first question, while one of fact, is one as to the operation of natural laws, and therefore as to a fact of which the court may take judicial notice, and as to which it is not confined to the evidence in the record, but may seek information elsewhere, and in particular in published technical works and articles by those recognized as authorities in this branch of human knowledge. An examination of recent medical text-books and articles leaves no doubt as to two points: First, that 304 days is a possible period of gestation; and, next, that it is quite an exceptional one. While the average period of gestation is generally taken as 280 days, there are instances vouched for by reputable authorities where the period has exceeded 330 days, and there are instances, too well authenticated apparently to admit of reasonable question, where the period has exceeded 320 days. See, for instance, the case reported by Dr. Taussig in his monograph on Prolonged Pregnancy, appearing in XLIV American Journal of Obstetrics, 519. In this same article also Dr. Taussig compiles (page 524) a list of well-authenticated cases which would seem to justify his conclusion that "in this total of 61 reliable cases of partus serotinus (delayed birth) we have a mass of evidence that should make even the most conservative acknowledge that this condition occurs in the human race, just as it has long since been proved to exist in the lower animals." See, also, Cragin, The Practice of Obstetrics, pp. 156–164; Edgar, The Practice of Obstetrics, vol. 1, p. 128; 2 Witthaus and Becker, Medical Jurisprudence, pp. 507–520; 3 Wharton & Stille, Medical Jurisprudence, pp. 30–39.

On the other hand, a reading of these same authorities makes it plain that any period in excess of 300 days is quite exceptional, and that with each day over 300 the exceptional character of the case is much intensified. Dr. Taussig in his article endeavors to compile all well-authenticated cases where the period exceeded 300 days, and accepts but 61 as falling with reasonable certainty within this class. This small number strongly evidences the exceptional character of such cases, as does also the fact that those investigating the subject concern themselves with every case where the period may be supposed to exceed 300 days. This would not be true if such cases were not looked upon as quite exceptional, and therefore worthy of note and investigation. A number of authorities (see page 514 of 2 Witthaus & Becker) fix 300 days as the extreme limit, a conclusion which apparently must be abandoned in the light of more recent information; but the fact that such an opinion could be held at all by capable modern investigators indicates that instances of more than 300 days are entirely beyond the usual order of things. That this is the common experience of mankind is also indicated by the fact that in other countries 300 days has been adopted by statutes as the limit of the presumptive period of gestation. Article 315 of the French Civ. Code; McNeely v. McNeely, 47 La. Ann. 1321, 17 South. 928. Dr. Edgar quotes Von Winckel (2 Witthaus & Becker, 575) as saying that "in 6.8 per cent. [of cases] the duration is over 300 days." But the article in which this statement was made was published in 1890, and in 1900 or 1901 Von Winckel published the results of his examination of 30,500 cases, in which as best we can judge from the references to the article, he found but 31 cases, or less than one-tenth of one per cent., wherein it was reasonably certain the period was 302 days or more. We can but conclude that the period involved in this case, 304 days, is quite exceptional, and not according to the usual and normal operation of the laws of nature.

This conclusion makes necessary a consideration of the second question, Is the conclusive presumption of legitimacy applicable to such a case? This is not determined by any statutory provision. Section 1962, subdivision 5, Code of Civil Procedure, provides: "The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate." Read literally, this section would apply only where the wife is cohabiting with her husband at the time of issue; that is, of birth. This was not the fact in the present case. But putting upon the section the meaning it undoubtedly should have, namely, that issue of a wife cohabiting with her husband at the time of conception must be indisputably presumed legitimate, it yet does not determine the present case, for it still leaves open the very question involved of when was conception or during what period must it be presumed to have taken place?

[5] Section 194 of the Civil Code provides: "All children of a woman who has been married, born within ten months after the dissolution of the marriage, are presumed to be legitimate children of that marriage." This presumption is but prima facie. Estate of Walker, 176 Cal. 402, 408, 168 Pac. 689. It is urged, however, in effect, that it is a statutory declaration of policy that 10 months is to be taken by the law as not exceeding the reasonable or normal period of gestation, so that all the incidents of birth within the normal period, such as the conclusive presumption of legitimacy, attach. There are several answers to this, but two will suffice. The presumption of the Code section is but prima facie, and the reasons of policy which would justify or induce a prima facie presumption in such a case are very different from those which would justify or properly induce a conclusive presumption. The Legislature might well deem it wise to provide that a child born within 10 or 11 or even 12 months after separation of husband and wife, as was actually done in Pennsylvania, should be presumed legitimate in the absence of any other evidence, when it would be wholly unwilling to make such presumption apply contrary to all other evidence.

[6] In the next place the 10 months mentioned by the statute must be taken to be months of 30 days. No other construction will give it a reasonable operation. It is dealing with the working of natural laws, where any proper measure of time must be an absolute and regular one, such as days or hours, not an irregular one, such as calendar months. If this be not so, the legitimacy of a child might depend on the purely fortuitous circumstance that the marriage of its mother was dissolved in one month of the year instead of another. The long months occur irregularly during the year, and more of them accumulate in one period of 10 months than in another. For example, if the child were born 306 days after the dissolution of its mother's marriage, it would be presumed legitimate if the dissolution had happened to occur on any day in April prior to the 29th, while, if the child were so unfortunate as to have had the dissolution of its mother's marriage occur in any day in February, it would not be presumed legitimate by the statute unless it were born within 303 days thereafter. Such arbitrary and unreasonable inconsistencies and distinctions affecting so vital a matter would make the law ridiculous, and are to be avoided if by reasonable construction of the statute they can be. The word "month," when spoken of as a regular and constant measure of time—each month having the same length—as is not infrequently done, is commonly conceived of as having 30 days. The statute is applying the measure of months to something which should be measured by a constant and regular standard, where each month must have the same length, and the reasonable construction is to put upon the word "month" as so used the meaning which it commonly has when used in that manner, that is, a month of 30 days, so that the ten months' period specified is one of 300 days. We believe that the necessity for this meaning is so plain that it is one "apparent from the context" within the language of section 14, Civil Code. This construction we are the more willing to put upon the statute in view of the fact that in those countries where there is a presumptive period of gestation it is more usually this time.

[7] Other than the two Code sections mentioned, there is no statutory provision which bears upon the question. Nor is much assistance to be derived from previous decisions. So far as the question has been presented to the courts at all, the trend is apparently to the view that the conclusive presumption does not apply where the period of gestation required, in order that the husband be the father, is an exceptional, although a possible, one.

The point was presented in the Gardner Peerage Case (Le Marchant's report). There the child was born 311 days after the wife left the husband to join her paramour, with whom she continued for some time. There was much testimony pro and con as to this time being a possible period of conception, and counsel for the child urged strongly that the testimony showed it was a possible period, and that, this being the fact, a conclusive presumption of legitimacy followed. The House of Lords determined that the child was illegitimate. The decision, however, cannot be given much weight here, for the reason that the evidence that 311 days was a possible period was strongly controverted, and the two lords delivering opinions put them briefly on the ground that they were convinced of the fact of illegitimacy without stating anything more. It may fairly be said that they may have believed 311 days was not a possible period, and have reached their conclusion for that reason.

In Burnsby v. Baillie, L. R. 42, Ch. Div. 282, the period between the separation of husband and wife and the birth of the child was 279 days. The child was found to be illegitimate. There was a good deal of testimony as to the ordinary period of gestation, and Judge North, who decided the case, in his opinion says that, "having regard to the normal or usual period of gestation," he is unable to come to a positive conclusion, and finally puts his decision on the ground that he was satisfied the parties had not had intercourse for some time before their separation. The inference from the decision, but it is only an inference, is that the conclusive presumption was applicable in the court's mind only in the case of intercourse by the husband within the usual period of gestation.

Bosville v. Attorney General, L. R. 12, Prob. Div. 177, comes nearest to being directly in point. The facts are practically identical with those of the case at bar, except that the period intervening between separation of husband and wife and the birth of the child was but 277 days. The medical testimony introduced was to the effect that the normal time of gestation was from 270 to 275 days, and that a longer time, although not unknown or even uncommon, was exceptional. The case was left to the jury, which found the child illegitimate. On review the very argument here urged upon us was urged upon the court. It was contended that, it appearing that the husband and wife had occupied the same apartments up to 277 days before the birth, it must be presumed that intercourse was had between them as late as 277 days before birth, and that, such time being within the period required for gestation, a conclusive presumption of legitimacy followed. This contention was overruled and the verdict of the jury upheld. The case may, therefore, be fairly considered as directly holding in opposition to the contention of appellants here. It is not entitled to particular weight, however, because of the unsatisfactory reason given, which is that one presumption cannot be built upon another, a proposition which we do not believe applicable to such a case.

People v. Case, 171 Mich. 282, 137 N. W. 55, may perhaps be considered as tending the other way. It was there held in a bastardy proceeding that a child born only 253 days (8 months and 13 days) after the husband's liberation from jail and a renewal of relations with his wife must be conclusively presumed legitimate. The decision was based on evidence that the maximum period of gestation was 300 days and the minimum 240. The point under discussion here, however, was not considered or apparently suggested.

So far as we are aware, the foregoing are all the authorities which can be said to have any real bearing on the question. We are therefore compelled to treat it as one of first impression. So approaching it, it is apparent at the outset that the conclusive presumption of legitimacy must either be extended to apply to every case where the period of gestation necessary in order that the husband be the father is a possible one, no matter how exceptional or extraordinary such period may be, or else it must be limited in its application to those cases where the period necessary to make the husband the father is within normal or usual limits. There is no middle ground. It is apparent also, from what has already been said, that the facts with which the law has to deal in this regard are that while the average period of gestation is 280 days there are exceptional and rare instances where it exceeds 320 days, and it is probable that there are instances where it exceeds 330 days. The situation therefore is either that a child born 320 days after separation of husband and wife, and probably a child born 330 days or more after, must be conclusively presumed to be legitimate, regardless of what the evidence may show as to the mother having intercourse with another man than her husband during the normal period of conception and the entire absence of any symptoms of prolonged pregnancy, or else the conclusive presumption must be limited to cases where the husband has had intercourse with the wife during the normal period of conception. The mere statement of this proposition involves its answer. The conclusive presumption cannot be applied to such extreme and exceptional cases. To do so would be wholly unreasonable, and would be contrary to the legal presumption which exists in this state, that "things have happened according to the ordinary course of nature." Section 1963, subd. 28, Code Civ. Proc.

Nor is there any reason of public policy which requires such extending of the conclusive presumption. The prima facie presumption of legitimacy, which requires clear and satisfactory proof for its overcoming, is founded on the policy of protecting the integrity of the family, of preventing the bastardizing of issue born in wedlock except upon clear and certain evidence. The reason for going beyond this prima facie presumption, and applying a conclusive presumption wherever the husband has had intercourse with the wife during the time when the child must normally have been conceived, although others as well may have had intercourse with her during the same period, is the impossibility of determining under such circumstances who is the father. As was said in Com. v. McCarty, 2 Clark (Pa.) 356, the process of conception is a hidden one, and the organs perform their appropriate functions without the volition of the female and without her being conscious that the process is going on. Where she has had intercourse with more than one man at about the same time, and a child has resulted, neither she nor any one else can say with reasonable certainty which is the father. Any weighing of probabilities under such circumstances is but guessing, and, where the husband is one of the possible fathers, he must bear the burden of his relation to the woman and be taken to be the father of her child.

There is one class of cases where it is recognized, in this country at least, that the husband is not to be taken as the father of the child, even though he had intercourse with his wife during the normal period of conception. That instance is where the husband and wife are of the same race, as for instance white, and it appears that the wife has had intercourse with a man of another race, as for instance a negro, and the child is of mixed blood. Watkins v. Carlton, 10 Leigh (Va.) 560; Bullock v. Knox, 96 Ala. 198, 11 South. 339; Wright v. Hicks, 12 Ga. 161, 56 Am. Dec. 451; Cross v. Cross, 3 Paige (N. Y.) 139, 23 Am. Dec. 778. The reason why the conclusive presumption is not applied in such instances is that the element of indeterminability which is the reason for the presumption in the ordinary case is absent. It is clear that the husband is not the father. The actual fact, in other words, is capable of definite determination, and for this reason the conclusive presumption which is a substitute for such determination is not properly applicable.

The same element of indeterminability is lacking in the class of cases under consideration where, in order that the husband be the father, the period of gestation, while a possible one, is exceptional and contrary to the usual course of nature. The actual fact as to paternity can be determined with reasonable certainty, if the probative facts capable of being known are made to appear. The courts must reason in accordance with the usual operation of the law of nature, and where it appears that the child was born at such a time that the husband might possibly be the father, but only in case of a very exceptional departure from the usual operation of the laws of nature, and it also appears that the wife has had intercourse with another at the time when by the usual operation of these laws he would be the father, the conclusion that the latter is the father is, in the absence of any symptoms or circumstances indicating an exceptional period of pregnancy, well nigh irresistible. Nor is there any reason why this conclusion should not be followed in this class of cases as in other cases where the fact that the husband is not the father is capable of being shown clearly and satisfactorily and is so shown. The courts are reluctant to reach the conclusion of illegitimacy in any case, but, reaching it, there is no hesitation, and should be none, in giving it effect. Our conclusion in the present case is that the issue of paternity is not determined by any conclusive presumption of legitimacy.

It does not follow that the prima facie presumption of legitimacy is not applicable. That presumption applies in every case of a child born in wedlock and can be overcome only by clear and satisfactory evidence. Estate of Walker, supra. It remains to consider whether the evidence in the present case is of that character.

[8] The circumstances in evidence leave no room for reasonable doubt. In addition to the fact that the child was born at a time much exceeding the normal period, if the husband were the father, we have the further circumstances that during all the time when normally it would have been conceived the mother was cohabiting with McNamara; that in January, nearly a month after leaving her husband and after conception must have taken place if he were the father, she had a full menstrual period—something which may occur after conception, but ordinarily does not; that computing from the commencement of this menstrual period as that preceding conception, as is usually done, the period of gestation was 274 days, or only 6 days removed from the average period of 280 days, and wholly within the limits of normal variation; and, finally, that every one concerned—McNamara, the girl, the girl's family, and so far as appears Bettencorte himself —believed without question that the child was McNamara's. The combined force of these circumstances is sufficient certainly to justify the finding of fact of the lower court as to paternity.

[9, 10] The evidence is likewise fully sufficient to sustain the finding on the issue as to adoption. The requirements of the Code (section 230, Civ. Code) for legitimation by adoption are two: First, that the father must publicly acknowledge the child as his; and, next, that he must treat it as if it were legitimate, and in particular must receive it into his own family as his child. The evidence is ample on both points. A more public acknowledgment than the act of McNamara in signing the child's birth certificate, describing himself as the father, it would be difficult to imagine. In addition the child was with him and its mother most of the time after its birth, and the evidence shows that the relation openly assumed by him was that of father. His statements and his actions were both a public acknowledgment of the child as his, and a consistent treatment of it as if it were legitimate. It was also received into his family within the meaning of the Code. It has already been decided by this court that the word "family," as used by the Code in this connection, does not necessarily mean relations, but may mean the family in which or as part of which the father abides. Estate of Gird, 157 Cal. 542, 108 Pac. 499, 137 Am. St. Rep. 131; Estate of Jones, 166 Cal. 108, 135 Pac. 288. In this sense the only family McNamara had after the birth of the child was the child and its mother, with whom he abided, with occasional absences, until his death, with full assumption of the relation of father, mother, and child. It is worthy of note in this connection that while McNamara was so living with Mrs. Bettencorte and her child, his sister, one of the appellants, visited and stayed with them for some days. The relation between McNamara and Mrs. Bettencorte was, to be sure, unlawful, but this does not negative the plain fact that the family relation existed. It is attempted to distinguish this case from Estate of Jones, supra, where the facts establishing an adoption were much weaker, on the ground that McNamara had no fixed habitation. The par-

ties did change their abode several times, but it was a change of abode. They were not mere wanderers or travelers. Where they were, they made their home. When they finally moved to the place where McNamara died, they did not rent the place, but actually arranged to purchase it.

The alleged errors in the admission of evidence are three: First, the admission of testimony by Mrs. Bettencorte that she left her husband on December 24, 1913, and, except on one occasion immaterial here, did not see him again, in other words, testimony by a wife tending to show nonaccess by her husband; second, the admission of evidence of declarations by McNamara that he was the father of the child; and, third, the admission of testimony as to a declaration of Bettencorte at the time (December 26, 1913) he left the residence of Mrs. Bettencorte's parents, where he and she had been residing, that he was going to Redding, in the northern part of the state.

[11] The admission over objection of testimony by Mrs. Bettencorte, tending to show nonaccess by her husband, presents a question on which the courts are in hopeless confusion. So far as rulings in this state are concerned, it was held in Estate of Mills, 137 Cal. 298, 70 Pac. 91, 92 Am. St. Rep. 175, that testimony by a wife that she did not have intercourse with her husband at a time when she was cohabiting with him was not competent on an issue as to the legitimacy of her child. This ruling is a necessary result of our Code provision that the issue of a wife cohabiting with her husband is indisputably presumed legitimate. It not being permitted to dispute the presumption of legitimacy under such circumstances, evidence disputing it is of course incompetent. Further than this our decisions have not gone. Mrs. Bettencorte's testimony does not come within the rule of Estate of Mills, supra, for she did not testify, nor was it claimed, that she did not have intercourse with Bettencorte as long as they cohabited. Her testimony was as to a separation between them and that she did not meet him afterwards.

A reading of our Code sections would seem to settle the question. Section 1870, Code of Civil Procedure, reads:

> "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: 1. The precise fact in dispute; * * * 15. Any other facts from which the facts in issue are presumed or logically inferable."

Section 1879, Code of Civil Procedure, reads (the italics are ours):

> "*All persons, without exception,* otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses. * * *"

The next two sections (sections 1880 and 1881, Code of Civil Procedure) purport to set forth the instances in which a person having direct knowledge of the facts is yet not competent as a witness. Testimony by a wife showing, or tending to show, nonaccess by her husband is not mentioned in either section. More explicit language could not well be devised, and these sections are in our judgment controlling. It is true that they were considered in Estate of Mills, and it was there said, in effect, that they do not abrogate the rule of the common law on this particular point. But this statement was not necessary for the decision, which could have been rested solely on the ground that the evidence there presented was inadmissible, because material only to dispute an indisputable presumption. Even if the Code sections were not controlling, from which conclusion we see no escape, the fact that any such rule of incompetency as is contended for by appellants actually exists at the common law has been seriously questioned, and the reasons of policy advanced to justify it severely criticized. See 3 Wigmore on Evidence, §§ 2063 and 2064.

Our conclusion on this branch of the case is that the rule of Estate of Mills, supra, should not be extended further than it was actually there set down and applied—that is, to evidence by either wife or husband of nonintercourse between them at a time when they were cohabiting together—the evidence being offered on an issue as to the legitimacy of a child born to the wife; and that the rejection of the evidence in that instance is justified not so much because it is incompetent, as because it is immaterial, being offered to dispute an indisputable presumption. Within this rule the testimony of Mrs. Bettencorte does not come.

[12] The next objection is to the evidence of declarations by McNamara that he was the father of respondent. The objection made is not so much that such evidence was wholly incompetent as that it was incompetent until it had been shown the husband, Bettencorte, was not the father. As to its competency generally there can be no doubt. It was clearly competent for the purpose of proving the acknowledgment of paternity by McNamara and his adoption of the child in the manner required by the Code for legitimation. Being competent and material upon that issue it was, of course, admissible. Furthermore, McNamara being deceased, his declarations as to the relationship of the child to him were also admissible under the familiar pedigree rule. On this latter point section 1870, subdivision 4, Code of Civil Procedure, provides that evidence may be given of "the act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person." See, also. section 1852, Code

Civ. Proc.; Estate of Heaton, 135 Cal. 385, 67 Pac. 321.

[13] As to the point that the evidence was incompetent until it had been shown that Bettencorte was not the child's father, this, in the first place, was a matter of the order of proof, and almost entirely within the discretion of the trial court. In the next place, such evidence is not incompetent on the issue of paternity, which is the point really made on behalf of the appellant. Hargrave v. Hargrave, 9 Beavan, 552; Morris v. Davies, 5 Cl. & Fin. 163; The Aylesford Peerage, L. R. 11 Ap. C. 1. The real point of the authorities cited by appellants' counsel in this connection is either that declarations by the putative father are not alone sufficient to overcome the presumption of legitimacy, or else that, where nonintercourse between husband and wife is not shown, such declarations are wholly immaterial. Both of these propositions are true, but neither has application here.

[14] The final objection of appellant is to the admission of declarations by the husband, Bettencorte, immediately after his wife left him, that he was going to Redding. These declarations were made at the time he left the residence of his wife's parents, where he had been residing, and in connection with his actual departure. The fact that he went to Redding, where his wife was not, was material on the question of their separation. The fact that he departed, and that he intended to go to Redding, is some evidence that he did go, and it is well established that declarations of intention are admissible under such circumstances. For a quite notable case where, on this particular point the facts are almost identical with those presented here, see Mutual, etc., Co. v. Hillman, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706.

[15] It should perhaps also be stated that even if this evidence were strictly inadmissible, its bearing on the real matter in dispute is so slight that it is impossible that the appellants were prejudiced by its reception.

There are no other material errors complained of.

Order affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LAWLOR, J.; WILBUR, J.; LENNON, J.

MELVIN, J. I dissent. The policy of the law has always been to favor legitimacy, and to prevent, except upon the most convincing proof, the bastardization of a child born to a married woman. I believe the opinion of Mr. Justice OLNEY, in which all of my other Associates concur, forsakes this oft-declared policy, and is, moreover, against the letter of our statute. I believe this decision, as a result of which a woman is permitted successfully to attach the stigma of illegitimacy to her little boy, will stimulate many similar efforts on the part of others who desire to spend the money left by deceased bachelors.

The presumption arising because of the ancient policy of the law, to which I have referred above, is well set forth in an opinion written by the learned author of the prevailing opinion in this case. I refer to Estate of Walker, 181 Pac. 792, at page 794. In the opinion in that case I find the following language:

> "There is no doubt but that the presumption of legitimacy goes at least to this extent: That if it appear that by the laws of nature it is possible that the husband is the father (that is, if it appears that the husband had intercourse with the mother during the period of possible conception), legitimacy is conclusively presumed, and no guessing or weighing of probabilities as to paternity because of relations between the mother and other men will be permitted."

In the opinion delivered by Mr. Justice Victor E. Shaw upon the former appeal in that case (Estate of Walker, 176 Cal. 402, 168 Pac. 689) he quoted approvingly the following language from Powell v. State, 84 Ohio St. 165, 95 N. E. 660, 36 L. R. A. (N. S.) 255:

> "Public policy requires that the status of a child born or begotten in lawful wedlock should be fixed and certain, and the immediate exigencies, or even the apparent justice, of any particular case, will not justify a departure from the rule so necessary and salutary to the best interests of society. The law is not willing that a child shall be declared a bastard to suit the whim or purpose of either parent, nor upon evidence merely that no actual act of intercourse occurred between husband and wife at or about the time the wife became pregnant."

Continuing, Mr. Justice Victor Shaw used the following language:

> "Before such a child can be adjudged a bastard, the proof must be clear, certain, and conclusive, either that the husband had no powers of procreation, or the circumstances were such as to render it impossible that he could be the father of the child."

The court cited the following authorities: Dennison v. Page, 29 Pa. 420, 72 Am. Dec. 644; Kraus v. Kraus, 98 Mo. App. 427, 72 S. W. 130; Orthwein v. Thomas, 127 Ill. 554, 21 N. E. 430, 4 L. R. A. 434, 11 Am. St. Rep. 159; Egbert v. Greenwalt, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260; Ewell v. Ewell, 163 N. C. 236, 79 S. E. 509, Ann. Cas. 1915B, 373. (It is to be noted that, through a printer's error, the last quoted sentence, as appears on page 410, of 176 Cal., 168 Pac. 689, is erroneously credited to the opinion in Powell v. State, supra.) It is true that the old English rule known as the "quattuor maria rule," which conclusively assigned legitimacy to a child born to a married woman while the husband was within the four seas, except upon proof of his impotence, has been modified by modern decision. Generally, courts have adopted the rule laid down by Lord Langsdale to the effect that "the presumption may be wholly removed by proper and sufficient evidence showing that the husband was impotent; entirely absent, so as to have no intercourse or communication of any kind with the mother; entirely absent at the period during which the child must, in the course of nature, have been begotten; or present only under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse." 3 R. C. L. 727. This rule, however, is still based upon the presumption arising from the policy of the law in favor of legitimacy. That policy was in existence when subdivision 5 of section 1962, Code of Civil Procedure, was adopted. That subdivision declares that "the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate." Read in view of the policy of the law in favor of legitimacy, it seems to me that this subdivision means that the issue of a wife, born within the possible period of gestation, after proven access of her husband, he being not impotent, is indisputably presumed to be legitimate. Mr. Justice OLNEY, in the prevailing opinion, concedes that the subdivision applies to the issue of a wife cohabiting with her husband at the time of conception. Let us suppose that in the present case the period of separation of the spouses instead of ten months had been nine. It seems to me that under the logic of the opinion the child would be conclusively presumed legitimate, for the case would then be like that of a husband living with his wife during all of the usual period of gestation. In such a state of facts I take it the paternity might not be impeached by a showing that the infant was small and probably a child born eight months after conception. What reason is there for preventing inquiry in possible cases of subnormal pregnancy and permitting it in instances of that which may be abnormal? I can see none. Undoubtedly, in the operation of subdivision 5 of section 1962, Code of Civil Procedure, some children who are actually bastards will be held legitimate without power on the part of any one to attack their standing in that regard. But that is in accord with the policy of the law, which looks not to the possible foisting of a child upon a husband who might not have been the father, but seeks to prevent all possibility of a legitimate child having the stain and sorrow of illegitimate birth unjustly attributed to it as a sinister inheritance.

Does the unquestionable presumption of legitimacy cease with the period of 280 days after the last cohabitation of man and wife, that being, as we are informed, the average period of gestation? If not, when does the whole matter become open to the court's inquiry? Is it open to fully inquiry on the 281st day or any day thereafter on which a child shall be born to the woman? Would this court sustain a finding that the child in this case was illegitimate if, instead of a little more than three weeks, the birth had passed the average period by only a day? If not, when would the passage of time become sufficient to justify such a finding? Would it be one minute after 300 days, since we are told that instances of pregnancy of more than 300 days are "entirely beyond the usual order of things"? Is the period covered by the indisputable presumption subject to the guessing of each judge of the superior court who may have a problem of this sort, he to be governed not by the testimony of experts, but by such knowledge of the laws of nature as he may be able to acquire from medical works to which he may have access? These are questions no one of which is answered by the prevailing opinion.

Suppose, for illustration, a case exactly like this, except that instead of being true to one lover, after deserting her husband, the woman had possessed half a dozen to whom she had yielded herself very soon after the desertion.

According to the logic of the opinion, it would then be the duty of the court to guess whether the husband, the deceased lover, whose estate was sought, or some one of the living but possibly impecunious Don Juans, was the father, or as some one jestingly said at the oral argument, whether or not the baby was "of the progeny of a syndicate." It seems to me that many evils must flow from the announced rule of this court, and that the wisdom of extending the presumption of the statute to the utmost possible period of gestation is enforced by the illustration.

If the matter of legitimacy or bastardy is one purely of fact, to be drawn from the evidence adduced as in any other case, then the presumption of intercourse from possible access should be abolished; but this court upholds the doctrine of Estate of Mills, 137 Cal. 298, 70 Pac. 91, 92 Am. St. Rep. 175, and by it supports the conclusion that the husband and wife had sexual relations on the last night on which they were together, which is founded, as was declared in the opinion in that case, upon "good morals and public policy." To allow cohabiting married people thus to impeach the legitimacy of children born in wedlock would be, as well stated in the opinion in Estate of Mills, "to allow evidence which shocks every sense of decency and propriety." Yet in the case at bar evidence quite as shocking was permitted, namely, the statement of Mrs. Bettencorte regarding her alleged menstrual periods. This is the sort of testimony which may be manufactured without fear of contradiction. Its admission puts a premium upon perjury. In the case at bar it is evident that one of the controlling elements of the finding of the probate court was the testimony of the woman regarding her menstrual periods. Such testimony should have been excluded under what I believe to be the true interpretation of subdivision 5 of section 1962, Code of Civil Procedure.

All of these considerations make me adhere to the doctrine now repudiated by this court, but expressed so clearly and forcibly by Mr. Justice Olney in the opinion in the Walker Case that I venture to quote it here a second time (following the pious example of clergymen who sometimes emphasize a text by repetition):

> "There is no doubt but that the presumption of legitimacy goes at least to this extent: That if it appear that by the laws of nature it is possible that the husband is the father (that is, if it appears that the husband had intercourse with the mother during the period of *possible* conception), legitimacy is conclusively presumed, and no guessing or weighing of probabilities as to paternity because of relations between the mother and other men will be permitted." (The italics are mine.)

181 Cal. 135

SLANKARD v. WAGNON. (Sac. 2663.)

(Supreme Court of California. Aug. 26, 1919. Rehearing Denied Sept. 25, 1919.)

1. EVIDENCE 🔑460(3) — PAROL EVIDENCE IDENTIFYING LAND TO BE CONVEYED ADMISSIBLE.

In action for breaching a contract which compromised defendant's failure to convey certain property, oral testimony identifying the land which it had been agreed to convey *held* admissible.

2. VENDOR AND PURCHASER 🔑344 — THAT VENDEE DID NOT OFFER TO RECONVEY ON VENDOR'S BREACH IMMATERIAL.

In action for breaching a contract which compromised defendant's failure to convey certain land, the fact that plaintiff did not offer to reconvey land outside the agreed boundaries which had been conveyed to him by defendant *held* immaterial.

3. TRIAL 🔑395(2)—WHEN FINDINGS AS TO BREACH OF CONTRACT TO CONVEY LAND SUFFICIENT.

In action for breaching a contract which compromised defendant's failure to convey certain land, a finding, setting forth the original contract for conveyance between the parties and defendant's failure to comply with it, *held* not uncertain or argumentative.

4. VENDOR AND PURCHASER 🔑345—EFFECT OF ACCEPTANCE OF DEED CONVEYING LESS THAN CONTRACTED FOR.

In an action for breaching a contract which compromised defendant's failure to convey certain land, it is no defense that plaintiff accepted a deed from defendant from which the deficiency in the land conveyed might have been discovered.

5. APPEAL AND ERROR 🔑959(2)—RULINGS AS TO AMENDMENTS TO PLEADINGS IN DISCRETION OF COURT.

Rulings on requests to file new pleadings will not be disturbed on appeal, except for an evident abuse of discretion.

6. PLEADING 🔑140 — FILING CROSS-COMPLAINT AFTER RESTING IN DISCRETION OF COURT.

In action for breach of contract, refusing to receive a cross-complaint for a rescission of the contract after defendant had rested *held* not an abuse of discretion.

7. APPEAL AND ERROR 🔑1050(1)—ERROR IN ADMISSION OF EVIDENCE HARMLESS.

Any possible error in admitting evidence containing a suggestion of compromise in a breach of contract case *held* not reversible error, since action was based on a written contract, which was not altered by defendant's belief as to whether he was or was not bound by its terms.

In Bank.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by G. F. Slankard against William B. Wagnon. A judgment for plaintiff was reversed by the District Court of Appeal, and case transferred to the Supreme Court in bank. Judgment of District Court of Appeal reversed, and that of superior court affirmed.

Sterling Carr, of San Francisco, for appellant.

McCoy & Gans, of Red Bluff, for respondent.

MELVIN, J. Plaintiff sued sucessfully for damages on account of a breach of a certain contract whereby defendant had promised to indemnify him for a shortage in the acreage of a tract of land in Tehama county sold by Mr. Wagnon to plaintiff, and conveyed on defendant's account to Mr. Slankard by one H. G. Stevenson.

There is little conflict with reference to the facts, which are, substantially, as follows:

Defendant had a contract for the purchase of a tract of 515 acres from Mr. Stevenson. On August 2, 1913, the parties hereto entered into a written agreement for the purchase by plaintiff of a portion of the 515 acres, and in the fulfillment of that contract defendant, Wagnon, caused the owner to make a deed to plaintiff, Slankard. The property was described in said deed as follows:

> "Lots 1, 2, 3, and 4 of block 31; lots 5, 6, 7, and 8 of block 30; lots 5, 6, 7 and 8 of block 29; lots 1, 2, 3 and 4 of block 32; and the westerly 456 feet of lots 6 and 7 of block 28, and the westerly 456 feet of lots 2, 3, 6 and 7 of block 33, as the said lots and blocks are laid out, designated and delineated upon a certain map entitled 'Richfield Colony Tehama County,' surveyed by H. C. Shackelford, licens-

ed surveyor, filed in the County Recorder's office, of Tehama County February 6th, 1899. Containing 215 acres, more or less."

Before closing the transaction of the purchase of the land from Stevenson, the defendant engaged a surveyor to run the lines of the property. Owing to the shortness of time in which he was required to report, the surveyor did not promise absolute accuracy, but agreed to do his best. He reported, soon afterwards, that the property described in the contract with Stevenson was 59 acres short of the amount agreed to be conveyed. Believing that the land conveyed to Slankard was short of the acreage specified in the deed, Mr. Wagnon sought an interview with Mr. Slankard. Their negotiations at that time resulted in the written agreement upon which this action was subsequently based. That contract, dated August 31, 1914, recites that Wagnon had agreed to convey to Slankard the most westerly 215 acres of the land which Stevenson had promised to sell to the former; that Wagnon had caused Stevenson to give the former's grantee a deed which was supposed to convey the most westerly 215 acres of said land; that subsequently it appeared that the land described in the deed did not contain 215 acres; that Wagnon, not having received a deed from Stevenson, was unable then to make good the shortage; that a suit was pending in the superior court by Wagnon against Stevenson and wife for the purpose of compelling conveyance of all the land described in the contract of May 22, 1913, between said Stevenson and said Wagnon; and that Wagnon desired "to secure said G. F. Slankard in the conveyance of said remaining 59 acres of land in case he, the said William B. Wagnon, obtains the same from said H. G. Stevenson, or in lieu thereof to properly indemnify said G. F. Slankard for such shortage." In consideration of these premises and of certain covenants of the party of the second part (Slankard) and for other good and valuable considerations the party of the first part (Wagnon) covenanted and agreed in the event of full recovery in his action against the Stevensons to convey to Slankard within two months "the remaining fifty-nine (59) acres of the land described and referred to in said contract of August 2, 1913, between said William B. Wagnon and said G. F. Slankard, said land to be free and clear from all incumbrances or liens of any nature whatsoever," or in lieu thereof certain described lots situated in the tract known as the Corning Irrigated Farms.

The party of the second part (Slankard), in consideration of the premises, of the covenants of the first party and the performance thereof, and for other good and valuable considerations, agreed to forbear from bringing any suit upon his previous contract with Wagnon, or for the recovery of the lands therein described, or for the moneys therein specified until two months after the entry of judgment in the suit by Wagnon against the Stevensons.

It was also agreed that in the event of a compromise of that litigation William B. Wagnon would immediately convey to G. F. Slankard the 59 acres "constituting the remainder of the land referred to in said contract" of August 2, 1913, or in lieu thereof the specified lots in Corning Irrigated Farms.

There was a settlement of the lawsuit of Wagnon against Stevenson and wife, but he refused to comply with the terms of the agreement of August 31, 1914. The result was this suit, based upon the alleged breach of that agreement by the defendant.

By his answer defendant admitted the execution of the agreement of August 31, 1914, but asserted that the information upon which he relied in making that contract was erroneous. It was averred in the answer that plaintiff did receive and then held 215 acres of land—all that was called for in the deed from Stevenson. It was further alleged that the deed from Stevenson was a warranty deed, that it was accepted by plaintiff in full performance of defendant's contract of sale, and that plaintiff's remedy, if the actual land received by him was less than that for which the deed was given, was against Stevenson. There was no prayer for the cancellation of the agreement of August 31, 1914, nor for its amendment.

Upon the issues thus joined the cause was tried before the court, without a jury, and judgment for plaintiff in the sum of $4,987.65, with interest, was given.

The appellant denies that there was sufficient evidence to support four certain findings. Another finding is attacked as uncertain and argumentative and the evidence in support of it is declared to be inadmissible, but appellant contends that, even if it was properly admitted, the conclusion drawn from it is erroneous. Error is also predicated upon the admission of testimony regarding offers of compromise, and upon the court's refusal of defendant's request for permission to file a cross-complaint.

Finding No. 10, one of those attacked by appellant, was to the effect "that the property conveyed to plaintiff by the Stevenson deed was 44.24 acres short, and that plaintiff does not now hold any greater acreage than 170.76 acres." The other questioned findings are of like import. The theory upon which these findings, and, indeed, all the material ones, were made may be best understood by reading the following paragraphs from the clear and logical opinion of Judge Ellison, who tried the case:

> "From the testimony introduced and the measurements made by certain surveyors employed for that purpose, it must be held that the calls in the deed from Stevenson to the

plaintiff, when measured out upon the ground, make an area of 215 acres, provided the section lines are where they locate them.

"If this were all of the case, it would seem that the defendant would be entitled to a judgment, but the fact, as disclosed by the evidence, is that before the plaintiff contracted to buy the 215 acres he was taken upon the ground by the defendant, Wagnon, and thereon the westerly boundary of the land which he contracted to sell to him was pointed out to him as being a fence running north and south. The land east of this north and south fence deeded to the plaintiff does not contain 215 acres.

"A plat of the subdivision showing the land described in the deed to the plaintiff, when placed upon the ground, would seem to run some distance westerly of this fence, to what is claimed to be the section lines. It is this land between the fence that was pointed out, and the so-called location of the section lines that caused the dispute between the parties.

"It sufficiently appears from the testimony that at the time the deed was made to the plaintiff, and now, the land west of this fence, and between it and what is supposed to be the section lines, was in the possession of other parties, and had been for a great many years, they claiming to be the owners thereof, and that said fence was the easterly boundary line of their lands.

"When the contract of August 31, 1914, was entered into it was clearly the belief of both the plaintiff and defendant that the westerly boundary line of the land deeded to the plaintiff was this fence, and it was clearly their understanding that the land easterly of the fence deeded to the plaintiff contained 59 or thereabouts acres less than the amount agreed to be conveyed to him, to wit, 215 acres, and with this knowledge the contract of August 31, 1914, was entered into.

"It is now claimed by the defendant that, as the calls in the plaintiff's deed extend westerly from the fence far enough to make 215 acres, he has received from the defendant all that he was entitled to. But it was evidently not the intention of the parties in executing the contract of August 31, 1914, to put the plaintiff to the expense or trouble of bringing litigation against the occupants of the land west of the fence to recover the same. The defendant definitely contracted to convey to him 59 acres more land than he had received, or in lieu thereof to convey him certain lots. He has done neither.

"The rule is invoked that a party who buys land in the possession of another must ascertain the rights of the person in possession, or buys the land at his peril without making such investigation. But this rule is not applicable to this case, because the plaintiff was not informed that any one was in possession of any part of the land that he was buying. In fact, no one was in possession, so far as the evidence shows, of any of the property east of the fence referred to, and no intimation was made to him that he was buying any land west of the fence, but the contrary was stated. Hence he was under no obligations to make any inquiries as to the ownership or possession of the lands lying west of the fence.

"Interpreted in the light of all the facts and circumstances of the case, the defendant's contract with the plaintiff was to convey to him 215 acres lying easterly of the fence that was pointed out to him as the westerly boundary of the land that he was to buy, and it was not contemplated or expected that he should bring any suits to recover any lands lying west of said fence, or make any effort to take possession of the same. And it was in the light of this situation that the defendant agreed that upon the determination or compromise of the suit which he had brought against Mr. Stevenson he would make a conveyance to the plaintiff of 59 acres of land, or in lieu thereof convey to him the lots in the Corning Irrigated Farms tract.

"The contract between the parties is in writing, and is supported by an adequate consideration, to wit, the mutual promises of the parties and the settlement of a controversy then existing between them as to the acreage the plaintiff was to receive compared with the acreage he had received, the consideration on the part of the plaintiff being that he would forbear to bring any suit against the defendant until the final determination or compromise of the suit of Wagnon against Stevenson. This the plaintiff has done, as is alleged in his complaint and admitted on the trial, and the contract, so far as he is concerned, is fully executed, and the defendant has received the consideration therefor, to wit, the forbearance to bring any suit."

[1] But it is earnestly asserted that the oral statements of defendant with reference to the location of the fence upon the westerly boundary of the land were not admissible, because their effect was to vary by parol the terms of a written contract. These statements were not admitted, however, for any such purpose. It is to be remembered that this action was based, not upon the original contract of sale, but upon the later compromise agreement. It was proper to show the circumstances attending, surrounding, or explaining its execution. There was, perhaps, a mutual mistake of both parties to the agreement regarding the paper title—that is to say the area included within the description in the deed—but there was no mistake about the land actually occupied by the plaintiff and the fact that it was far short of containing 215 acres. This shortage gives the reason for the contract of August 31, 1914. The oral testimony explains the intention of both Wagnon and Slankard regarding the land agreed to be conveyed, and it also identifies the said land. The written instrument of August 2, 1913, and the deed from the Stevensons to Slankard were varied (so far as it lay in Wagnon's and Slankard's power so to vary them) by the agreement of August 31, 1914. It is by this last specified instrument, and not by the parol testimony, that the terms of those instruments were changed, or, rather, superseded. The authorities cited by appellant upon the subject of attempted variation of written agreements by oral testimony are consequently not in point.

[2] Nor was there any significance in the fact that plaintiff did not offer to restore to defendant the former's title, if any, in and

to the land to the west of the fence. It does not appear that Wagnon completed his purchase from the Stevensons, nor that he would be entitled in any event to a quitclaim deed to that part of the property deeded to Slankard but never possessed by him.

[3] The other finding attacked by the appellant is the one numbered 15. That finding is one whereby it is set forth that—

> At the date of the execution of the original contract of sale between Wagnon and Slankard "it was the understanding and belief of both parties thereto that the westerly line of the 215-acre tract contracted to be sold to the plaintiff by the defendant was certain old established fences running north and south; that at said time all of the lands lying west of said fence lines were in the possession of other persons claiming said fence lines as the eastern boundaries of their lands, and they had been so in possession and so claiming for many years."

The finding then sets out the going of plaintiff upon the land with defendant, and the latter's act of pointing out the fences as the western boundary of the land to be sold, and, further, that—

> "The land contracted to be sold to said plaintiff, and which was deeded to him by said H. G. Stevenson and wife, does not contain 215 acres, if said fence lines were the western boundary thereof, but it contained 44.24 acres less than 215 acres; that it was by reason of these conditions that said defendant herein brought the suit against said Stevenson and wife referred to in said Exhibit B [the contract dated August 31, 1914], and while said suit was pending said Exhibit B was executed; that it is true that if the western line of the land conveyed to plaintiff herein by said Stevenson and wife can be placed west of the said fence lines and on certain section lines, he would then have title to 215 acres of land, but all of the land west of the said fence lines would be of lands in the possession of other persons claiming to own the same, and with no certainty that they can be dispossessed by litigation, or otherwise; that it was to meet this situation that said Exhibit B was executed; that said Exhibit B was not executed by reason of any mistake on the part of the defendant herein, nor by reason of any mistake on the part of the plaintiff herein, but it was executed for a valuable consideration, which has been fully executed by the said plaintiff, and for the purpose of placing upon said defendant the burden and duty of securing title to the additional 44.24 acres of land comprising said shortage, so that said plaintiff would have the beneficial use and enjoyment thereof, or, failing to convey the same to him, then to convey to him the other lands described in said Exhibit B."

We fail to agree with appellant in his statement that this finding is uncertain and argumentative. On the contrary, it is a clear statement of the facts and of the reasoning of the court as given also in the opinion which we have quoted above.

Nor is the objection to the evidence upon which finding 15 is based a valid one. It is aimed particularly at the statements of Mr. Slankard that Mr. Wagnon and a surveyor both pointed out the old fence as being on the western boundary of the land. In the first place it appears that there was no objection to this line of testimony until all of the essentials had been twice stated by the witness. Then objection was made to a recapitulating question involving the very matter regarding which the witness had spoken without objection. The basis of the objection was that the parol statement tended to vary the terms of the written agreement. This was not a tenable objection for reasons which we have heretofore discussed.

Finding 15 is also supported by the evidence which clearly showed the understanding of the contracting parties that the fence marked the western property line, and that Exhibit B was not executed solely by reason of this mistake, but also for the valuable consideration which had been subsequently fully executed by plaintiff.

[4] The conclusion of law based upon finding 15 is declared by appellant to be erroneous. Appellant cites authorities holding that acquiescence in a wrong boundary is treated as a mistake when the true boundary may be ascertained by a deed and neither party is estopped from claiming the true line. But this is not a controversy between coterminous owners, and the authorities invoked are not applicable. Mr. Wagnon had pointed out to his vendee certain lands east of a certain fence, and had made a contract to sell said lands. Later he learned that these lands did not contain the represented area, and he made a new agreement, supported by a valuable consideration, that he would make the shortage good. With all of the conditions of this agreement plaintiff complied.

[5, 6] During the trial the court made a ruling that if plaintiff should prevail in the action the measure of damages would be the value of the lots in the Corning Irrigated Farms, rather than that of the acreage in the other tract. Plaintiff thereupon asked and was given permission to amend his complaint so that it should contain an allegation of the area and the market value of the said lots. Defendant specifically waived objection to such amendment. After the testimony had been taken and during the progress of the argument the following occurred, as shown by the record:

> "Mr. McCoy (counsel for plaintiff): I forgot to offer this morning that amendment.
>
> "The Court: All right.
>
> "Mr. Carr (counsel for defendant): We will have time, I presume, to answer this?
>
> "Mr. McCoy: Well, yes; you can have time, or you can consider it answered.
>
> "Mr. Carr: And I wish at this time—I over-

looked it—to file a cross-complaint for the rescinding of this contract.

"Mr. McCoy: The evidence is all in, and we are arguing the case, and the case has been tried on the issues made, and we shall object to the filing of a cross-complaint.

"Mr. Carr: My cross-complaint would be for the rescinding of the contract, Exhibit B, and I will consider it denied.

"The Court: I don't think I will permit the cross-complaint to be filed at this late stage of the case.

"Mr. Carr: At this time may it be stipulated that there is a denial of the value of this land?

"The Court: It is denied it has any value exceeding $25 an acre?

"Mr. Carr: Yes.

"The Court: All right."

Appellant now insists that he was refused permission to amend his answer and to file a cross-complaint, and that such refusal was error necessitating reversal of the judgment, citing in that behalf Third Street Improvement Co. v. McLelland, 23 Cal. App. 369, 137 Pac. 1089. It will be apparent at once that defendant was only refused permission to file a cross-complaint, and that the amended complaint was deemed answered by stipulation or understanding that defendant denied a greater value than $25 an acre for the lots in question. Amendments to pleadings and the filing of new pleadings are so thoroughly within the discretion of the superior court that this court is slow to hold as serious error a refusal to permit a change in the theory of a defense or a case for plaintiff at the eleventh hour. On appeal this discretion of the court in which the trial took place either in granting or refusing permission to file new pleadings will not be disturbed except in case of evident abuse thereof. 21 Ruling Case Law, 573; Hawthorne v. Siegel, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291; Brittan v. Oakland Bank of Savings, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58; Dunphy v. Dunphy, 161 Cal. 380, 119 Pac. 512, 38 L. R. A. (N. S.) 818, Ann. Cas. 1913B, 1230; Postlethwaite v. Minor, 168 Cal. 227, 142 Pac. 55. We find no abuse of discretion in the ruling here attacked. In this case the defendant knew, long before he went to trial, that the deed to plaintiff, by its terms, included 215 acres. He knew all of the circumstances surrounding and preceding the execution of the last agreement with plaintiff, yet he did not ask for a rescission thereof until after he had put in all of his evidence and rested. In the case cited by appellant the facts were quite different, for there it appeared that at the trial a circumstance most essential to plaintiff's cause of action, namely, a mistake, consisting of defendant's failure to give it a proper credit, was discovered during the trial. It was there properly held that the court abused its discretion in refusing plaintiff's request to amend in accordance with the facts.

[7] Finally, appellant contends that the court erred in admitting testimony tending to show an offer of compromise on his part. Plaintiff testified that defendant had called upon him, and in answer to the question, "What did he say?" replied:

> "He said he would fix it up with me and give me the land when Mr. Crittenden got back from New York. I waited on him something like—well, until that date I brought suit there, and I didn't even hear nothing from any of them, and so I come up here and brought the suit. And, in fact, I wrote him a couple of letters, and he has never answered them."

The objection to this testimony probably should have been sustained, but it did not, accurately speaking, amount to an offer of compromise, but merely to a declaration that defendant felt himself at that time bound by his written contract. However, treating it as an offer of compromise and objectionable under the authority of Scott v. Wood, 81 Cal. 398, 22 Pac. 871, we do not see how plaintiff was injured by its admission. The action was based upon the written contract, and that instrument was neither altered nor strengthened by defendant's subsequent belief either that he was or was not bound by its terms.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; WILBUR, J.; OLNEY, J.; LAWLOR, J.

42 Cal. App. 206

ELMER BROS. v. CARPENTER. (Civ. 1960.)

(District Court of Appeal, Third District, California. July 12, 1919.)

1. SALES 🔑347(2)—BREACH OF WARRANTY—PURCHASE-PRICE NOTES—CONSIDERATION.

Where fruit trees, expressly warranted to be merchantable, were, in fact, unmerchantable under Pol. Code, § 2322, as amended St. 1917, p. 627, and section 2322i, as added by St. 1917, p. 637, purchase-price notes were without consideration except as to amount received for a portion buyer was able to sell to other parties.

2. TRIAL 🔑360—FINDINGS—SURPLUSAGE.

In seller's action on purchase-price notes, where buyer set up, and court found, breach of express warranty, and where there was no attack on sufficiency of evidence to sustain findings, the force and validity of the findings *held* not affected by statement in conclusion of law that there was an implied warranty; such statement being mere surplusage.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by Elmer Bros. against W. H. Carpenter. From judgment for plaintiff giving him insufficient relief, he appeals. Affirmed.

R. M. Wright, of San Jose, and Webster & Blewett, of Stockton, for appellant.

Keyes & Thomas, of Oakland, for respondent.

BURNETT, J. The action was brought on two promissory notes given in consideration for the sale by plaintiff to defendant of about 1,200 fruit trees. The defense was based upon the claim of the violation of an express warranty as to the quality of the trees. There were two counts in the complaint, relating separately to the two notes, and as to the first the court found: "That the said note referred to in paragraph 2 of these findings was wholly without any consideration whatever, in this, that the said note was executed by this defendant for fruit trees bought from the plaintiff by the said defendant; that the said purchase was made prior to the delivery and inspection of the said fruit trees; that the plaintiffs and each of them represented to the defendant that the fruit trees aforesaid were good, sound, and healthy fruit trees, and were not diseased; that this defendant believed the representations of the said plaintiffs and each of them; and relied implicitly upon their representation that the said fruit trees were good, sound, and merchantable fruit trees, and, relying upon said representations, which he believed at the date he executed the said note, he did execute the same to the said plaintiffs; that the said fruit trees were not merchantable trees, and were diseased with a black rot, and were prohibited from being sold or planted or used as such fruit trees under the provisions of section 2322 of the Political Code of the state of California as amended by St. 1917, p. 627, and under the provisions of section 2322i of the said Political Code as added by St. 1917, p. 637, the said trees were condemned as not merchantable."

The finding as to the second count is similar, except, that it appears the defendant sold to other parties a portion of the trees, receiving therefor the sum of $52.60, and hence the judgment was in favor of plaintiff for that sum. Being dissatisfied, it appealed therefrom.

Appellant says:

> "The sole question to be determined by this court in this matter is whether or not an implied warranty arose from the transaction in question. The lower court specifically found that there was an implied warranty that the fruit trees sold by plaintiffs to defendant for which the notes were given were merchantable, and that the consideration for said notes failed by reason of the unmerchantable character of said trees sold."

Appellant then proceeds to argue, with quotations from certain cases, that the facts are not sufficient to show an implied warranty, the point of contention being that the general rule is that there is no implied warranty in a mere contract of sale (section 1764, Civ. Code), and that the evidence does not show the case to be within the exception provided in section 1771 of the same Code, as follows: "One who sells or agrees to sell merchandise inaccessible to the examination of the buyer, thereby warrants that it is sound and merchantable." The matter is discussed because among the conclusions of law the trial court stated: "That there was an implied warranty that the fruit trees sold by plaintiff to defendant, for which said notes were given, were merchantable."

[1, 2] But it is clear that this may be entirely ignored without affecting the integrity of the judgment. The court fully found the facts as we have shown, from which the conclusion necessarily follows that the consideration for the notes failed, except as to the said $52.60, and that plaintiff was entitled to a judgment for only that amount. Indeed, from the facts the court properly concluded:

> "That the consideration for said notes failed by reason of the unmerchantable character of the trees sold, except to the extent of $52.60, value received by said defendant; that plaintiff is entitled to judgment in the sum of $52.60 without costs."

The force and validity of these findings are not affected in the least by the erroneous inference that there was an implied warranty, instead of stating it to be, as it was, an express warranty.

We may add that as to this objection urged by appellant there is evidence in the record to the effect that when the trees were purchased they were not accessible to the examination of respondent, as that term should be applied in a case like this, and the court might have found the fact in the language of said section 1771 of the Civil Code. The defendant, however, set up in his answer an express warranty and its violation. The court so found, and the sufficiency of the evidence to support that finding is not attacked. We may therefore disregard the said statement as to an implied warranty as mere surplusage.

We conclude, after an examination of the record, that the decision was entirely just, and the judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

42 Cal. App. 198

GREEN et al. v. HYNES. (Civ. 2839.)

(District Court of Appeal, First District, Division 1, California. July 11, 1919. Rehearing Denied Aug. 9, 1919.)

1. GIFTS ⚷30(1), 66(1)—BANK BOOK.

That there was found among decedent's personal effects a bank book showing a deposit of $2,500 and a paper on which was written in German, "Money and all that I have give you to," certain persons, *held* not to show a gift of the bank deposit inter vivos or causa mortis by decedent to such persons.

2. PRINCIPAL AND AGENT ⚷43(1)—REVOCATION OF AGENCY—DEATH OF PRINCIPAL.

One's agency to deliver for the donor property to the donee is revoked by death of donor prior to delivery.

3. PLEADING ⚷36(3)—EFFECT OF ADMISSIONS IN ANSWER.

Defendant may not contend he should not have been sued as administrator, but individually; the complaint, which, after setting forth defendant's representative capacity of administrator, alleging he as such administrator obtained possession of money and property, and, after demand for delivery thereof to plaintiffs, refused and still refuses to so deliver them, not having been demurred to, but such allegations having been specificially admitted by the answer.

4. APPEAL AND ERROR ⚷1177(8)—DISPOSITION OF CAUSE—ERROR IN FINDINGS.

Though on the facts the findings and judgment should to a certain extent have been for the other party, and it is unlikely that there can be materially different testimony, yet it not being in the province of the appellate court to correct findings, the case must be remanded for new trial.

Appeal from Superior Court, City and County of San Francisco; Thos. E. Graham, Judge.

Action by Frances Green and another against W. J. Hynes, administrator. Judgment for plaintiffs, and defendant appeals. Reversed and remanded for new trial.

Cullinan & Hickey, Shelton & Levy, and David L. Levy, all of San Francisco, and Lawrence L. Levy, of New York City, for appellant.

R. W. Gillogley and Algernon Crofton, both of San Francisco, for respondents.

WASTE, P. J. Frederick Driessen died intestate. After his death there were found among his personal effects, among other things, a bank book showing that the deceased had a deposit in the Bank of South San Francisco, in the sum of $2,584.70, a promissory note and mortgage securing the same, in the sum of $1,250, executed by Ambrose D. Savage and Emma J. Savage, to said Driessen and a paper on which was written in German, the following: "Money and all that I have give you to Mrs. Green and Miss Green." This note was in the handwriting of Driessen, and was signed by him. The bank book and these papers were delivered to a former employer of Driessen, and were afterwards delivered to the defendant as administrator of the estate of said deceased. The plaintiffs, claiming to be the owners of and entitled to the possession of the money on deposit in the bank, and the promissory note and mortgage, brought suit for the recovery thereof against Hynes, in his representative capacity, as administrator of the estate of Driessen, and obtained judgment. From this judgment defendant appeals.

The court found that on the 24th day of September, 1914, plaintiffs gave to said Frederick Driessen the sum of $1,339, which said money belonged to the plaintiffs; that said Driessen, at the time of receiving the said money, agreed with the plaintiffs to invest the same, for and on behalf of said plaintiffs, and to lend the same to Ambrose B. Savage and Emma J. Savage and take a mortgage executed by said parties therefor; that the said Driessen, on the 25th day of September, 1914, loaned to Ambrose B. Savage and Emma J. Savage the sum of $1,250, the same being a part of said sum of $1,339, and took as security therefor the promissory note and mortgage of said Ambrose B. Savage and Emma J. Savage, executed to said Driessen as mortgagee; that said mortgage and promissory note stand in the name of said Driessen, but belong to, and are the property of, these plaintiffs.

This finding, supported by the uncontradicted testimony of both plaintiffs, and by Ambrose B. Savage and Emma J. Savage, who executed the note and mortgage for $1,250, is not challenged by appellant, who distinctly disavows any claim for the note and mortgage, or the money secured thereby.

The court also found that the plaintiffs were the owners and entitled to the possession of the $2,584.70 in cash, which, at the time of the death of said Driessen, was on deposit in his name in the Bank of South San Francisco. We fail to find any evidence supporting this finding.

As before stated, the bank book showing this deposit was in Driessen's personal effects, at the home of the witness Elvizio Cassellini. A few days before Driessen's death, he called at the Cassellini home, where he kept his effects, took the note and mortgage, and bank book showing his account with the South San Francisco bank, from his pocket, and placed them in a valise, containing his personal effects, which he gave to Mrs. Mary Cassellini, saying, "This is for you." Her further testimony concerning what happened is as follows: "When he handed the valise to me, he said, 'Keep it for yourself,' and he mentioned the name of Mrs. Green, but I did not know what he meant by it or who Mrs. Green was, because I did not understand everything. On the last day when Fred went away, he said it was better to die, and that it was better down at Holy Cross." On cross-examination she testified that he said: "I want you to have $500, and the rest to go to Holy Cross." The witness also testified that Driessen was in the habit of coming in her house and opening this satchel at any time he saw fit. There is not to be found in the testimony of either of the plaintiffs, or of any other witness, a single reference to the money on deposit in the South San Francisco bank. The only testimony concerning the bank book is as to its being found in the valise among the decedent's effects, and by Cassellini turned over to Driessen's former employer.

[1, 2] We are unable to find from the foregoing facts either a gift inter vivos, or a gift causa mortis, by decedent to plaintiffs. Beebe v. Coffin, 153 Cal. 174, 94 Pac. 766; Noble v. Garden, 146 Cal. 225, 79 Pac. 883, 2 Ann. Cas. 1001; Fite v. Perry, 8 Cal. App. 85, 96 Pac 102. Neither does the evidence support the theory advanced by respondent that there was a sufficient delivery to Mrs. Cassellini for the plaintiffs. If Mrs. Cassellini was the agent of the decedent to deliver the property to the plaintiffs the agency was revoked by his death before the delivery was made, and no title passed to them. Trubey v. Pease, 240 Ill. 513, 88 N. E. 1005, 16 Ann. Cas. 370; Beebe v. Coffin, supra; Hart v. Ketchum, 121 Cal. 426, 53 Pac. 931; Daniel v. Smith, 64 Cal. 346, 30 Pac. 575.

The finding of the trial court, and the conclusion of law based thereon, that plaintiffs were the owners and entitled to the possession of the $2,584.70, in the South San Francisco bank, are not supported by the record.

[3] Appellant contends that the plaintiffs cannot maintain this action, to recover the specifically described property and money, against the defendant in his official capacity as administrator of the estate of Driessen; that an administrator, in his individual capacity alone, is liable to the rightful owner for a wrongful conversion of money or property. Assuming this to be true, there is a sufficient reason why appellant should not be allowed to interpose this point.

The complaint, after setting forth the representative capacity of Hynes, as administrator of the estate of Driessen, alleges that he "as such administrator obtained possession of said money on deposit in the Bank of South San Francisco, and the said note and mortgage," and, after demand for the delivery thereof to plaintiffs, "has refused, and still refuses, to deliver to plaintiffs the said money, or any part thereof, or the said promissory note or mortgage." No demurrer was interposed to this complaint, and the answer specifically admits the foregoing allegation. Appellant is bound by the admission on which he submitted himself and the controversy in the lower court.

[4] From the whole record before us it seems unlikely that the testimony on a retrial can be materially different from that already taken. On the facts thus appearing findings and judgment should be in favor of the plaintiffs for the recovery of the note and mortgage and in favor of defendant for the money in the bank. It is not within the province of the appellate court, however, to correct findings. Clark v. Huber, 20 Cal. 196, 198. Consequently, the case must be remanded for a new trial.

The judgment is reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

42 Cal. App. 215

RAMSDELL v. RAYMOND. (Civ. 1881.)

(District Court of Appeal, Second District, Division 1, California. July 15, 1919. Rehearing Denied by Supreme Court Sept. 11, 1919.)

1. Exchange of Property ⚿11—Rescission—Laches—Lapse of Time and Change of Position.

An action, treated as one for rescission of exchange of contracts for lands, *held* barred by laches, being brought 3½ years after plaintiff had demanded rescission and defendant had refused unless he should be paid a certain sum, and after defendant had disposed of the property obtained from plaintiff.

2. Exchange of Property ⚿13(3)—Fraudulent Representations—Evidence.

Fraudulent representations in exchange of contracts for lands *held* not shown by evidence in action based on such representations.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Dora B. Smart Ramsdell against R. R. Raymond. From a judgment for plaintiff and from an order denying motion for new trial, defendant appeals. Reversed.

Valentine & Newby, of Los Angeles, for appellant.

C. S. Foltz, of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment entered against defendant and from an order denying his motion for a new trial.

In the year 1910 defendant had bargained for the purchase of a certain 13 unsurveyed lots then owned by one Clark, and as evidence of his right to such property had received the following writing:

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

> "Received of R. R. Raymond four thousand dollars in payment for (13) thirteen lots in Laurel Canyon known as the Clark addition, a part of the Hermit Place. These lots are to be 25x100 in size and the title to be perfect.
>
> "E. H. Clark."

At the same time plaintiff was the owner of an equitable interest in certain real estate for which she had paid about the sum of $2,500. This equitable interest she agreed to exchange with defendant for the rights which he had acquired in the lots first mentioned, and the exchange was effected. In consummating the deal, plaintiff was taken by defendant into the presence of Clark, and a new receipt was executed by Clark in favor of the plaintiff, which was identical in terms with that above set out, except that plaintiff's name was inserted instead of the name of the defendant. Plaintiff was informed at the time that the lots had not been surveyed. The lots were never surveyed, and deed was never delivered to the plaintiff, notwithstanding her demand therefor, which demand was made upon Raymond; and it appears that at the time of the transaction an attachment had been levied against the property out of which the lots were to be carved by a creditor of Clark's, and the property was afterwards sold under execution. It was bid in by a friend of Clark's for the latter's benefit, but before the period of redemption expired another creditor of Clark's redeemed from the purchaser, and so the legal title which had rested in Clark at the date of the transaction herein referred to was taken away. More than 3 years after the date of the transaction plaintiff brought this action.

It is difficult, indeed, to determine just what character to give the alleged cause of action set forth in plaintiff's amended complaint, for it contains allegations in part appropriate to the equitable action of rescission, and in part allegations appropriate to the legal action for damages by reason of failure of consideration. The action as first brought included both Raymond and Clark as defendants, but before the trial dismissal was made as to Clark. In the complaint it was alleged that Raymond and Clark conspired together to cheat and defraud the plaintiff, and that they falsely and fraudulently represented that defendant Raymond was the owner of 13 lots in Laurel Canyon, the same being known as Clark's addition, and that Clark stated that Raymond had purchased the said 13 lots from him (Clark) and had paid the sum of $4,000 therefor, and that Raymond exhibited a receipt signed by Clark wherein it was fraudulently represented that Raymond had paid to Clark the sum of $4,000 as the purchase price of said lots. It is further alleged—

> "That said receipt and each and every part thereof was a fabrication, false and fraudulent, and was shown to and exhibited to plaintiff for the further purpose of deceiving and misleading her to believe the said false and fraudulent representations and statements so made by defendants and each of them as to the existence of the Clark addition, and of the ownership thereof by Raymond, for which he had paid to defendant Clark in cash a large sum of money, as defendants Raymond and Clark and each of them well knew the same and each and every of said statements to be false. That in fact and in truth the said defendant Raymond had not then and there nor prior thereto and has not since paid to said Clark the sum of $4,000 or anything of value whatever for said Laurel Canyon lots, and the said Clark did not then, nor theretofore, nor at any time thereafter own a clear or an incumbered or any title to 13 lots, or to any lot or piece or parcel of land in Laurel Canyon; that there was not then and there or ever before or since that time any lots in said Laurel Canyon known as lots in the Clark addition, and there never has been any such addition in said canyon laid out or recorded or laid out and recorded or at all, as provided or otherwise or at all, * * * and defendant Raymond then and there, and in the presence of Clark offered to convey and transfer to plaintiff said 13 lots in Laurel Canyon by good and sufficient title thereto free from all liens and incumbrances, in even exchange for plaintiff's interest in real estate in the town of Monte Vista."

Further allegation was made "that, relying upon the integrity and good faith of said defendant Raymond, plaintiff believed said statements, and each of them, as to his ownership of the said described Laurel Canyon lots, and, relying upon his said promise to convey to plaintiff said lots by a good and sufficient title free from all liens and incumbrances, * * *" conveyed the interest owned by her in the Monte Vista property. Allegations followed that Raymond had refused to convey the lots, and that the plaintiff had offered to rescind and demanded that title to her property be restored to her. Further allegation followed to the effect that Raymond had appropriated plaintiff's real estate to his own use and benefit, which she alleged he held "in trust" for plaintiff; and the complaint concluded with the following prayer:

> "Plaintiff prays for judgment against said defendant Raymond upon an implied contract for direct payment of money in the sum of $4,000, the value of the real estate so conveyed away by him in violation of his said trust, and that an attachment against the property of defendant Raymond issue forthwith for the amount of said debt; and for such further relief. * * *"

The court made findings which in general followed the allegations of the complaint as to the alleged fraudulent representations made, and concluded by first entering judgment for the sum of $4,000. Later, when the motion for new trial was presented, the court made an additional order that unless plaintiff remit all amounts except the sum of $2,500 the motion for new trial would be granted. The excess was accordingly remitted.

It will be noted that plaintiff did not allege that Raymond represented that title to the lots which rested in Clark was then free and unincumbered. She does allege that the title was not unincumbered, but she knew when she completed the transactions that by the terms of the receipt itself Raymond had no title which he could then convey to her, and that the legal title rested in Clark; in other words, that Raymond's interest was a mere equitable one evidenced by an unrecorded receipt. She was also informed, as the undisputed evidence shows, that Clark was to survey the property and furnish the deed. That she exchanged her equity for the rights which were evidenced by the receipt from Clark to Raymond seems to us to be beyond the possibility of debate. Plaintiff in her testimony stated that the property composing the 13 lots was shown to her, and offered no evidence to show that the property was not of great value, or that it was not the same property that Clark owned at that time. She offered Clark as a witness, and he testified to his ownership of the same, admitted his obligation to transfer the lots, and explained first that he had not had them surveyed because he lacked the money to pay for the same, and explained also how it happened that title to the property was taken away from him through the attachment proceedings and redemption by his creditors. It appeared by his testimony that he had been a man of considerable wealth. He accounted for the fact that he was not at the time of the trial financially responsible by showing that he had had to respond to the liabilities of others with whom he had become interested or as surety, and that he had given to members of his family large sums of money. It cannot altogether be inferred from his testimony, however, if such matter is material to this controversy, that he had not been, within a reasonable time after the date of the transaction between plaintiff and defendant, of sufficient financial responsibility to make good the value of the lots which he had agreed to convey. It was asserted in the complaint that the recitation in the receipt of the payment of $4,000 was false, and that Raymond had given nothing for his contract with Clark. The evidence showed that Raymond had exchanged with a man named Jones, in whose interest Clark issued the first receipt, property or an equity in property of some considerable value—the evidence fixed it at about $2,500. So, by way of remark, it may be said that under the evidence the defendant had paid for his contract with Clark about the amount that plaintiff had paid for her equity in the Monte Vista property. Considering the question of fraud, it is nowhere contended that the evidence shows that either Clark or Raymond had any knowledge at the time of this transaction that an attachment had been levied upon the property of Clark. So we think, as will appear from what has been stated, that the effect of the exchange transaction between plaintiff and defendant was to invest the plaintiff with the right to have conveyed to her by Clark a good title to 13 lots, or an equivalent amount of the same property. When she concluded her deal it was altogether within her power to have ascertained the condition of the title to the Clark property, and by so doing have become informed of the ability of Clark to convey to her title when demanded. Clark was produced before her, and made assurances that he was an honest man and would carry out his agreement, and plaintiff was in no wise left in the dark as to who was the owner of the legal title to the property and as to who would be her grantor under the receipt. We cannot by any effort of construction say that the complaint states a cause of action against Raymond as a guarantor of the responsibility of Clark.

[1] Defendant specially pleaded that plaintiff had been guilty of laches in pursuing her remedy, and had allowed defendant to change his position of ownership with reference to the property which he secured from plaintiff. This defense, no doubt, is presented with the idea of meeting the claim that this action should be deemed one in equity for rescission, and if we were so to treat the action we think that under the evidence that plea should have been sustained. This transaction occurred in March, 1910. Plaintiff testified that in June of the same year she demanded of Raymond that he return to her her property, and she stated:

> "He said that he would return me my property. I told him that something must be done; the time was going by. Mr. Raymond said he would return me my property if I would give him $500 bonus besides paying up all of whatever interest accrued, or what indebtedness. I told Mr. Raymond that I saw no reason why I should give him $500 bonus when he had given me nothing whatever. He replied that that was the settlement that he would make and no other. I demanded that he return my property to me or give me the deeds, and he refused to return me the property unless I paid him the $500 bonus."

The amended complaint in this action was not filed until November 26, 1913, more than 3 years and 5 months after plaintiff had made her demand for rescission and been definitely informed of the only terms upon which defendant would accede.

[2] The grounds of reversal asserted by appellant and to which we have given consideration are entitled to be sustained. We think that under the complaint and the admitted facts the findings of the court cannot

be confirmed. That the plaintiff had a cause of action against Clark cannot be gainsaid, but she abandoned that action and elected to proceed against this appellant alone.

The judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

42 Cal. App. 232

MACKEY v. BRIDGE. (Civ. 2856.)

(District Court of Appeal, First District, Division 1, California. July 15, 1919. Rehearing Denied by Supreme Court Sept. 11, 1919.)

Evidence ⟹442(1) — Parol Evidence — Mortgage Foreclosure.

Where mortgagor, pending foreclosure, conveyed property to trustee named in a deed of trust constituting another incumbrance upon the property, in consideration of trustee's agreement to try to sell property and give mortgagor half of profit, letter stating such agreement, being silent as to time within which trustee was to try to make sale, could be explained by parol testimony, showing that trustee's efforts to sell were to be made before property had been sold under the mortgage being foreclosed.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by David I. Mackey against Henry S. Bridge. Judgment for defendant, and plaintiff appeals. Affirmed.

Nowlin, Fassett & Little, of San Francisco, for appellant.

Edwin T. Cooper, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the defendant. The action is one to have it declared that a relation of trust existed between one Wm. H. Nelson, the predecessor in interest of the plaintiff, and the defendant, in relation to the ownership and sale of a certain piece of real estate, upon which the plaintiff predicates his demand for an accounting and division of the proceeds of the sale of said real estate. The facts of the case are substantially these:

In the latter part of the year 1906 Wm. H. Nelson was the owner of a certain tract of land in Yuba county, Cal., upon which there were two outstanding incumbrances. The first of these was a mortgage to one Gatkins, securing a note then due from said Nelson to the mortgagee for the sum of $15,500, together with $1,017.10 overdue interest. The second incumbrance was in the form of a deed of trust to H. S. Bridge, the defendant herein, securing an indebtedness of $4,600 due by said Nelson to the wife of said Bridge, which was also, with considerable interest, overdue. An action had been commenced to foreclose the Gatkins mortgage, in which said Nelson had made no appearance and was in default, and in which also the Bridges, husband and wife, having been made parties, had defaulted. The real estate thus affected had been suffered by the mortgagor to be much neglected and out of repair, while the taxes upon the same had for some time been unpaid. While things were in this desperate and deplorable condition, one Herman Murphy, who had been the agent of Nelson in negotiating the loan from the Bridges, had an interview with the defendant, H. S. Bridge, in an endeavor, apparently, to save something out of the impending wreck of Nelson's fortunes, as a result of which said Bridge and Murphy prepared the following letter:

"San Francisco, Nov. 26, 1906.

"Mr. Wm. H. Nelson—Dear Sir: In consideration of your deeding me the ranch at Horncut, instead of my selling it under trust deed, I hereby agree to endeavor to sell it, and agree to give you half the profit beyond cost to me; cost to be estimated as amount of liens now against the property and any advances I may make; said advances to draw interest at 1½% per month.

"Am very truly, Henry S. Bridge.

"Witness: Herman Murphy."

This letter was delivered by Murphy to Nelson, who thereupon executed a quitclaim deed to H. S. Bridge covering his involved property, which deed said Murphy had prepared. Immediately following this letter and deed, H. S. Bridge endeavored to make a sale of the property for a sum slightly in excess of the amount required to pay the indebtedness against it, but was unable to do so, and on February 9, 1907, the property was sold at public auction under the Gatkins foreclosure, and was bought in by Gatkins for the sum of $17,962.08, the amount, with costs, then due upon the judgment in his foreclosure suit. A month or so after this sale Bridge applied to a friend named Aaron for a loan to the former's wife of a sum of money sufficient to enable her to redeem the property from the Gatkins sale. He was able to secure a loan from this source of the sum of $15,000. Mrs. Bridge supplied from her own funds the addition sum of $3,368.56 needed to make up the sum then required for the redemption of the property, which being paid to Gatkins, he executed a quitclaim deed of the property to H. S. Bridge, who took the title to the same as his wife's trustee. Almost immediately after the Bridges had thus taken over the title to the property, a disastrous flood swept over the land, destroying in large part the buildings and fences thereon, and requiring an expenditure of several thousand dollars to put the premises in a state of repair. The money for this outlay was provided by Mrs. Bridge and amounted to about $8,000. Other expenditures to a considerable amount were also made by the Bridges during the years which intervened between the date of their acquisition of the property and the time when they began disposing of the same to various parties. The first of these sales was made to Chas. A. Wetmore, Jr., in September, 1909, who then bought a portion of the property for the purchase price of $35,000. About a year later said Wetmore bought the remainder of the property for the purchase price of $22,000. Both of these purchases by Wetmore were made on long-time payments; the latter evidently expecting to pay for the property by resales to other parties, who, as they bought, took deeds directly from the Bridges. Altogether the Bridges realized from these sales of the property and from rents in the meantime the sum, as the court found, of $67,536.91; the payments aggregating this sum extending over a period of nearly 10 years, and there being still a small amount due from Wetmore upon his contracts of purchase at the time this action was begun in June, 1917.

In the meantime Nelson had disposed of whatever interest he may have had in the matter by virtue of the above-quoted letter from H. S. Bridge. Meeting Murphy in the latter part of 1906, and needing money badly, the latter advanced him $25. It appears that Nelson had already borrowed the sum of $250 from Murphy, acting as the agent of his brother-in-law, David I. Mackey, the plaintiff herein, for which he had taken Nelson's note, and which he now agreed to return to Nelson, if he would sign a written order on H. S. Bridge, directing the latter to pay to Mackey all sums due or to become due Nelson by virtue of the agreement contained in the above-quoted letter from Bridge to Nelson. Murphy prepared and Nelson signed this paper, and it furnishes the foundation for the plaintiff's claim. From the time of the execution of this document in December, 1906, and until the spring of 1916, neither Murphy nor Mackey informed the Bridges of the existence of this writing, or of any interest acquired or held by them or either of them in the proceeds of the sale of the Nelson property, nor asked for any accounting thereof. Their first activities in that direction were manifested in the early part of 1916. This action was commenced on June 14, 1917. Upon the trial of the cause the plaintiff offered in evidence the above-quoted letter from Bridge to Nelson, and also the letter from Nelson to Bridge, purporting to transfer to the plaintiff whatever interest Nelson had acquired in the proceeds of sales of his former property by virtue of the aforesaid letter from Bridge to him. The plaintiff also offered evidence as to the transfer of the property by Nelson to the Bridges and the later transactions involved in its sale by them. With these proofs the plaintiff rested his case, whereupon the defendant undertook to offer parol evidence as to the circumstances surrounding the signing of his said letter to Nelson and the execution of the quitclaim deed from Nelson to him. To these offers the plaintiff objected, upon the ground that such evidence was inadmissible to vary the terms of the writing or to explain its real meaning and effect. The court, however, admitted this evidence, and upon the strength of its admission and effect gave its decision in the defendant's favor. It is upon the alleged error of this ruling that the appellant chiefly relies for a reversal of the case.

We are of the opinion that the trial court was not in error in its admission of the oral evidence offered on behalf of the defendant showing the circumstances under which the letter from Bridge to Nelson was written, and explaining the meaning and effect of its terms. It is to be noted that, although the letter of Bridge to Nelson seems as to some of its phraseology to agree to give Nelson one-half of the profit realized by Bridge as the result of his endeavor to sell the property conveyed by quitclaim deed to him, it is silent as to the time within which such endeavor on Bridge's part was to be exercised. This omission, taken in connection with other clauses of the letter, and particularly with the proofs offered by the plaintiff himself as to the imminent peril of a total loss of the interests both of Nelson and of the Bridges in the event of a sale of the property under the Gatkins foreclosure, involves the writing as a whole in serious doubt as to just what Bridge was to endeavor to do as a consideration for the quitclaim deed to him, and also as to the time within which his endeavor to dispose of the property was to be confined. It is to be noted that the consideration for these endeavors on the part of Bridge was that of "your deeding to me the ranch at Horncut, instead of my selling it under the trust deed." This of itself was a comparatively slight consideration, since by the sale of the property under the terms of the trust deed Bridge could at small expense and in a brief time have acquired the entire interest of Nelson by the purchase thereof at the trustee's sale. It was to save to both Bridge and Nelson this small expense and brief delay that the expedient of giving and taking the quitclaim deed was adopted; and, this being so, the services to be performed by Bridge in his endeavor to sell the property, as well as the time within which these were to be exercised, must be measured by the value of the foregoing consideration.

In view of these facts, it would be an unreasonable interpretation to place upon the writing that Bridge had thereby bound himself for all the future period of his ownership of the property derived from this quitclaim deed to hold the same in trust for Nelson's benefit, and to continue his endeavor to sell it in order that the grantor of the perishing interest in the property transferred by such quitclaim deed might realize half the profits derived from its eventual sale. This much seems certain: That under any construction of the terms of said writing it was not within the contemplation of the parties that the Bridges were to undertake to redeem the property from the threatened foreclosure sale, or to make the large borrowings and advances necessary so to do, nor to meet the other expenditures almost immediately necessary to preserve the property from the effects of neglect and flood. Under the circumstances shown by the plaintiff's own evidence in the case it was, we think, the duty of the trial court to admit oral testimony as to the real intent of the parties in relation to what Bridge was to undertake to do as a consideration for the transfer to him of Nelson's interest in the property in question, and as to the time within which his duty to Nelson in the premises would have been fully performed. This evidence thus properly admitted sufficiently shows that Bridge's endeavors to make a sale of the property were to be exercised before the interest of Nelson had become fully lost by the foreclosure and sale of the property under the Gatkins mortgage. The evidence shows that he did in good faith essay that endeavor, but without success. In due course the interest of Nelson was transferred to Gatkins through the foreclosure sale. Thereafter the interest of the Bridges in the property was precisely the same as it would have been if they had also sold out and bid in the Nelson interest under their deed of trust. They had succeeded to Nelson's right to redeem the property from the foreclosure sale by the payment of the amount due upon the Gatkins judgment. This they chose to do; but to hold that in so doing, and in all of their later outlays and endeavors to dispose of the property, they were acting in the capacity of trustees for Nelson, and were bound to an accounting with him or with his successors in interest for one-half of the profits of their eventual disposition of the property, would be to do violence to the obvious situation and understanding of the parties as disclosed by the evidence in the case.

This conclusion as to the main issue in the case disposes of the other contentions of the appellant as to the sufficiency of the evidence to sustain certain findings of the court as to the profits realized by the respondent through the ultimate disposition of the property in question.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

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42 Cal. App. 361

In re McKAY'S ESTATE. (Civ. 2956.)

(District Court of Appeal, First District, Division 1, California. July 23, 1919. Rehearing Denied by Supreme Court Sept. 18, 1919.)

1. WILLS 🔑440—CONSTRUCTION.

Testator's intention must be extracted from the express terms of his will.

2. WILLS 🔑525 — CONSTRUCTION — SHARES— IMPOSSIBLE DEVISE.

A will devising all of testator's estate as follows: "To my wife one-fifth part thereof, and to each of my children, H. and E., the undivided four-fifths part thereof," when construed in accordance with Civ. Code, §§ 1324, 1325, gives to each child an equal undivided portion of the four-fifths remainder; the use of the word "each" not rendering the devise void for uncertainty and impossibility of consummation.

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

In the matter of the estate of Angus McKay, deceased. From decrees of partial distribution, made upon separate petitions of Horton L. McKay and others, involving the construction of a will, Elizabeth M. McKay appeals. Decrees affirmed.

Wm. M. Cannon and Wm. M. Abbott, both of San Francisco (Kingsley Cannon, of San Francisco, of counsel), for appellant.

Redman & Alexander, of San Francisco, for respondent.

RICHARDS, J. The two appeals in this case are from decrees of partial distribution, made upon the separate petitions therefor of the respondents herein, Horton L. McKay and Ethel M. Newman, formerly Ethel M. McKay. The testator, Angus McKay, made his last will and testament, which was duly admitted to probate, and thereafter, in the course of such probate proceedings, the petitions for partial distribution above referred to were filed. The will of Angus McKay is, in point of brevity, and, with the single exception in respect to which it is assailed herein, in point of clarity, a model. The devising portion of said will is the second paragraph thereof, which reads as follows:

> "2nd. I give, devise and bequeath all my estate, real and personal, whatsoever and wheresoever, in manner following: To my wife Elizabeth M. McKay the one-fifth (⅕th) part thereof, and to each of my children Horton L. McKay and Ethel M. McKay the undivided four-fifths (⅘ths) part thereof."

[1] The point of the appellant's assault upon this will is directed to the concluding clause of the above paragraph thereof, it being the contention of the appellant that the phrase, "to each of my children Horton L. McKay and Ethel M. McKay the undivided

four-fifths (⅘ths) part thereof," renders the entire will void for uncertainty, because a strict, literal, and grammatical interpretation of said clause would result in an attempted disposal of nine-fifths of the testator's estate. It is undoubtedly settled law relative to the interpretation of wills that the intent of the testator must be extracted from the express terms of his will, and that courts are not permitted to indulge in conjecture or surmise, for the purpose of arriving at an intent which is not reasonably to be drawn from the language of the document itself. It is also true that, in accordance with section 1324 of the Civil Code, "the words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained." from the terms of the document and its language. It is, however, also true that, as stated in section 1325 of the Civil Code:

> "The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative."

[2] Bearing in mind the foregoing principles of interpretation, let us look to the four corners of this testator's will, to see whether his intent can be fairly ascertained therefrom, with the view to sustaining said will. It must be evident upon such inspection that the testator had in mind an attempted disposition of the whole of his estate, and no more. The use of the fraction "the one-fifth (⅕th) part thereof" in the bequest to his wife, and of the fraction "the undivided four-fifths (⅘ths) part thereof," in the attempted bequest to his two children, would seem to clearly indicate that it was five-fifths, and not nine-fifths, of his estate which he was proposing to dispose of by will. This being clear, the difficulty which presents itself is that of determining what the testator intended by the use of the word "each" in relation to the bequest to his children. Standing alone and read in its ordinary and accepted sense, the word "each" might seem to require the interpretation which appellant seeks to place upon it, and which would result in giving to these two devisees eight-fifths of the testator's estate, which being impossible of consummation, would render the bequest void.

But the word "each" in this will is not to be given such interpretation, if, taking the language of the will as a whole, it is reasonably susceptible of another interpretation which would sustain the will. Thus regarding this word, it is to be noted that the testator, by his preceding bequest, has disposed of one-fifth of his estate, thus leaving four-fifths thereof subject to further disposition. The use of the word "undivided" in connection with his attempted disposition of this remaining four-fifths of his estate is evidence that he intended that his children share equally therein, and in every part thereof, or, in other words, that he wished the remainder of his estate to go to his children together and in an undivided portion, rather than separately and in a segregated two-fifths bequest to each of them. This evident intent on his part works a modification of the use of the word "each" in the phrase in question, and indicates an intent upon the part of the testator that his two children were to share equally and together the remaining portion of the estate which he was seeking to devise to them. The testator would perhaps have expressed this intent more clearly, had he devised to each of his children an "equal share" in the remaining four-fifths of his estate, in the above precise terms. But, taking his will as a whole, we are of the opinion that this was his real intent, and that such intent is fairly inferable from the entire context of his will.

The principal authority cited by the appellant in support of her contention is the case of Rodisch v. Moore, 257 Ill. 615, 101 N. E. 206, wherein a testator devised one-half of his estate to one person, one-fourth to another, and one-half to a third; but that case is clearly distinguishable from the case at bar, since it would be plainly impossible to determine which one of the above bequests should be diminished in the distribution of the estate.

For the foregoing reasons we think that the will of said testator was susceptible of the construction which the trial court placed upon it, and for that reason the decrees of partial distribution appealed from are affirmed.

We concur: WASTE, P. J.; BARDIN, Judge pro tem.

42 Cal. App. 320

EXPOSITO v. UNITED RAILROADS OF SAN FRANCISCO. (Civ. 2878.)

(District Court of Appeal, First District, Division 2, California. July 21, 1919.)

1. Witnesses 🔑40(2) — Competency of Child in Discretion of Court.

Under Code Civ. Proc. § 1880, the competency of a child under the age of 10 years to testify is a matter left largely to the discretion of the court.

2. Appeal and Error 🔑203(3)—Failure to Object to Withdrawal of Infant Witness, Presumed Acquiescence.

Court's action in requiring 9 year old child, called by plaintiff as a witness, to be withdrawn without an examination as to whether she was mentally capable of receiving an impression and truthfully relating it, where not objected to, will be presumed to have been acquiesced in by plaintiff; such act not being deemed excepted to under Code Civ. Proc. § 647.

3. Evidence 🔑147—Denying Occurrence of Accident Admissible.

In action against street railway for injuries to passenger, where defense was that alleged accident had not occurred, testimony of crews of cars which, according to schedule, passed the point where the passenger claimed to have boarded car, from a short time prior to until a short time after time she claimed to have boarded it, that no such accident occurred upon the cars they were operating, was admissible, though negative in character.

4. Evidence 🔑586(2)—That Evidence is Negative Affects Weight.

The negative character of testimony affects its weight and sufficiency.

5. Evidence 🔑596(1) — Conclusive Proof Unnecessary.

Conclusive proof is never necessary to justify the verdict of a jury.

6. Appeal and Error 🔑996—Jury Can Draw Inferences from Testimony.

The jury had the right to draw its own inferences from the testimony.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Rosina Exposito against the United Railroads of San Francisco. Judgment for defendant, and plaintiff appeals. Affirmed.

Ambrose Gherini, of San Francisco (Edwin H. Williams, of San Francisco, of counsel), for appellant.

Wm. M. Abbott and Wm. M. Cannon, both of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment rendered against her upon a verdict of a jury. The action was one for damages for personal injuries claimed to have been sustained by plaintiff while attempting to alight from one of defendant's street cars at Fifteenth and Church streets in San Francisco. The complaint alleged that, while the plaintiff was attempting to alight from the defendant's car, the car started and threw her to the ground, causing serious internal injury.

The appellant argues two questions upon the appeal. The first contention is that the court erred in refusing to permit a 9 year old child to testifiy for plaintiff, on the ground that she was too young, without any examination of the proffered witness. The plaintiff testified as to the occurrence of the alleged accident, and her testimony was corroborated by that of Primo Mileti, alleged to have been with her at the time. She also offered the testimony of her 9 year old daughter, who, it is asserted by her, was present at the time of the accident and witnessed it. The preliminary questions by the court disclosed the fact that at the time of the accident the child was 8 years and 4 months old; that she was 9 years old on the 9th day of August, 1916, and the trial took place about a month later. The trial judge stated that from the appearance of the child he would think that she was between 7 and 8 years old at the time of the trial, and that she was too young at the time of the alleged accident to be permitted to testify in regard to the occurrence. Appellant argues that it was improper to exclude the testimony of the child, without an oral examination directed to whether or not she was mentally capable of receiving an impression and truthfully relating it, and that, as no such examination was made, the exclusion of the testimony was error.

[1] Section 1880, Code of Civil Procedure, enumerates the classes of persons who may not testify, and among such are included:

> "Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly."

The competency of a child under the age of 10 years to testify is a matter which is left largely to the discretion of the court. People v. Craig, 111 Cal. 460, 44 Pac. 186. The trial judge observed the child, and stated that she appeared younger even than her age. However, it becomes unnecessary for us to discuss this matter, because it appears that plaintiff acquiesced in the suggestion of the court and withdrew the witness without objection. The record does not show that objection to the competency of the witness was interposed by the defendant, but it shows that when the child was offered as a witness the court and counsel engaged in a colloquy as follows:

"Mr. Williams: Marguerite, will you take the stand? The young lady is only 9 years old.

"The Court: When did the accident occur?

"Mr. Williams: On the 27th of December last; about last Christmas; about 8 months ago.

"The Court: How old is she now?

"Mr. Williams: She is 9 years old.

"The Court: When was she 9 years old?

"Mr. Williams: The 9th of August.

"Mr. Cannon: Probably about 8 years and 4 months when the accident happened.

"The Court: Well, she is too young, being only about 8 years old at the time of the accident.

"Mr. Williams: Well, would it be proper for us to make a showing?

"The Court: I should judge from the appearance of the child she was between 7 and 8 years.

"Mr. Williams: As I understand it, she was between 8 and 9 at that time.

"Mr. Cannon: According to your figures, she was about 8 years and 3 months.

"The Court: The trouble is you cannot impress upon the child the obligation of an oath.

"Mr. Williams: The act provides that they must be under 10 and of such a condition of mind that they cannot truthfully receive an impression and truthfully relate it.

"The Court: Yes, sir; I think perhaps you had better withdraw the little girl."

[2] This portion of the record is set out in the appellant's brief, and it is then stated by appellant that the witness was withdrawn. It does not appear from the record that any objection was made. This is not one of the judicial acts enumerated in section 647, Code of Civil Procedure, which are deemed excepted to, and, as no objection was interposed by plaintiff to the action taken by the trial court, acquiescence is presumed.

[3] Appellant's next objection is in regard to the nature of the evidence offered by the defendant to establish its defense that the accident to which the plaintiff testified never in fact occurred at all. In regard to the time at which the accident occurred, the plaintiff testified that she had gone to visit her husband at the hospital, and remained there until about 8:10 p. m. and after leaving the hospital she walked about a block to Fillmore street, and boarded a street car at about 8:15 p. m., and rode to Fifteenth and Church streets, where the accident occurred. The defendant produced the crews of the various cars which, according to the company's schedule, would have passed Fillmore and Church streets at 8:07, 8:13, 8:16, 8:19, 8:22, and 8:28 p. m., and the conductor upon the car that was scheduled to pass that point at 8:10 p. m., all of whom testified that no such accident occurred upon the cars which they were operating. This evidence, although negative in character, we think was admissible. Thompson v. Los Angeles, etc., Co., 165 Cal. 750, 752, 134 Pac. 709.

Further objection is made that no showing was made by the defendant that the actual running time of the cars corresponded to the schedule time. While it is true that there is not much evidence upon this point, yet there was some evidence which would warrant the jury in concluding that the cars were running on schedule time. Mr. Donald Piercy, who testified that he was a car dispatcher at the car barn of the Turk and Fillmore division, which division was the line on which plaintiff claimed to have been injured, testified that, if the cars had been delayed, he would have known it by reports sent to his office.

[4-6] Appellant's further point with regard to this evidence is that it does not completely exclude the possibility of the accident; it is not conclusive, and it is possible that the plaintiff may have been upon yet another car; and appellant argues especially that as the crew of car No. 30, scheduled to pass Fillmore and Church streets at 8:25 p. m., was not produced, there was no evidence offered against the possibility that this particular car was the one on which the accident occurred. It is, of course, within the range of possibility that the plaintiff was upon this car No. 30 or upon yet another car passing later, about which the record offers no information, and the jury might have so concluded. The jury has, however, concluded that the probability was the other way, and has given a judgment for the defendant. The defendant offered the only kind of evidence available in the nature of the case. Its negative character affected its weight and sufficiency. Conclusive proof is never necessary to justify the verdict of a jury. The jury had the right to draw its own inferences from the evidence. It drew such an inference as conflicted with plaintiff's testimony and to their minds overcame it.

The judgment is affirmed.

We concur: HAVEN, J.; BRITTAIN, J.

41 Cal. App. 787

RUCKER v. SAN DIEGO ELECTRIC RY. CO. (Civ. 2854.)

(District Court of Appeal, Second District, Division 1, California. June 27, 1919.)

1. Appeal and Error 🔑1071(3)—Harmless Error—Findings Without Evidence—Liability in Any Event.

In an action by an intending passenger, struck by a street car, defendant cannot complain that the evidence does not sustain a finding that the car windows were so obscured by mist that the motorman could not see and that he neglected to remove such obstruction, since, if not so obscured, the motorman could have seen, so that it was negligence to suddenly start the car and run it against plaintiff, when he was immediately in front of it.

2. Carriers 🔑315(3)—Injury to Person Attempting to Board Car—Issues and Proof—Purpose of Stopping Car.

Where plaintiff was injured while crossing defendant's street car track in front of a car, which had stopped and was suddenly started, that it was not shown that the car had stopped for the purpose of permitting passengers to board the same, *held* immaterial, where the car had stopped to discharge passengers, so that plaintiff and others might approach expecting to board it.

3. Carriers 🔑347(3)—Passengers—Contributory Negligence—Question for Court or Jury.

It cannot be said as a matter of law that plaintiff, injured by a street car, was negligent when he attempted to pass in front of it while it was standing still at a street crossing; the fact of care or want of care on plaintiff's part being a matter for the court or jury to determine from surrounding circumstances.

4. Carriers 🔑322—Passengers—Personal Injuries—Negligence—Findings.

In a personal injury action against a street railway company, allegations of the complaint *held* to charge clearly that the injuries were received as a direct result of defendant's negligence in the operation of its south-bound car, and the court having so found, the result of the action could not be changed by a finding for defendant with respect to negligence in the operation of its north-bound car which struck plaintiff subsequently.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by Stella G. Rucker, as administratrix (substituted for P. R. Rucker, deceased), against the San Diego Electric Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Read G. Dilworth, of Coronado, and Titus & Davin, Horton L. Titus, and E. L. Davin, all of San Diego, for appellant.

Frank J. Macomber, Morris Binnard, C. A. A. McGee, and Henning & McGee, all of San Diego, for respondent.

CONREY, P. J. The defendant appeals from a judgment awarding to the plaintiff damages for personal injuries caused by the negligent operation of a street car of the defendant. Paragraphs IV to XVI of the court's findings are as follows:

"IV. That on February 24, 1915, at about the hour of 7 o'clock in the evening, the plaintiff, P. R. Rucker, desirous of becoming a passenger on the south-bound car of the defendant operated on Fifth street in said city of San Diego, hailed one of said cars owned by defendant as it was approaching the intersection of Fifth street and Redwood street in the said city of San Diego.

"V. That the said car, so signaled by the said P. R. Rucker, was brought to a stop on said Fifth street at the north side of Redwood street.

"VI. That while said car was at a standstill the plaintiff, in order to become a passenger thereon, started to cross the track directly in front of said car.

"VII. That said car, which was in charge of and being operated by a servant of the defendant, while the plaintiff, P. R. Rucker, was passing immediately in front thereof, without warning of any kind or character whatsoever, was suddenly started forward and run against the plaintiff and threw him upon the east parallel electric car track of defendant on said Fifth street, upon which car tracks were operated the north-bound cars of the defendant company.

"VIII. That while plaintiff was helpless, and before he had an opportunity to obtain proper control of his movements, the plaintiff, P. R. Rucker, was run against and struck by a car owned by the defendant San Diego Electric Railway Company, and operated by its servants.

"IX. That at the time the plaintiff left the curb on the east side of Fifth street for the purpose of becoming a passenger upon the south-bound car of the defendant he looked both northerly and southerly along Fifth street and observed the various obstructions and vehicles upon the street, and that the car coming northerly, at the time plaintiff stepped from the curb or was about to step from the curb, was about 300 feet away, and that the said south-bound car was at a standstill or about to come to a standstill.

"X. That at the time the plaintiff had crossed the north-bound tracks and was about to step over and cross the south-bound tracks the said south-bound car was at a standstill.

"XI. That at the time the motorman in charge of the south-bound car started his said car, after said car had been brought to a stop for the purpose of permitting passengers and the plaintiff to board the same, and for some time prior thereto, the windows in front of said car were obscured by mist to an extent that it was impossible for the motorman to see any object or person directly in front of the car by reason thereof, and that said motorman took no precaution to remove such obstruction from the glass or to open the window so that he would have a clear and unobstructed view of the street immediately before the car.

"XII. That the motorman in charge of said south-bound car started the same after the plaintiff, P. R. Rucker, had committed himself to the crossing of the south-bound car tracks, without sounding gong or giving any other notice or warning that he was about to put the car in motion.

"XIII. That the plaintiff, P. R. Rucker, had no reasonable opportunity to extricate himself from his position in front of the south-bound car after the same had been started in motion by the servants of the defendant without notice or warning, or to take any precaution to avoid being struck, crushed or mangled thereby.

"XIV. That the plaintiff, P. R. Rucker, had no reasonable opportunity to extricate himself from his position of danger, or any danger, of being struck by the north-bound car after he had been placed in this position by reason of being run against by the south-bound car, or to take any precautions so as to extricate himself from the danger of being struck, crushed or mangled by the defendant's car.

"XV. That the plaintiff used all due care and precaution in and about crossing the said Fifth street at the intersection of Redwood street on said February 24, 1915, at the hour of 7 p. m. or thereabouts, and took all due care and precaution in stepping upon the tracks whereon said cars of defendant were operated.

"XVI. That the plaintiff was not negligent or careless in any respects whatsoever."

The points relied upon by appellant are stated as follows: (1) There is no evidence to support or sustain the finding of the court that the windows in front of defendant's south-bound car were obscured by mist to an extent that it was impossible for the motorman to see any object or person directly in front of the car by reason thereof, and that said motorman took no precaution to remove such obstruction. (2) There is no evidence to support the finding that the motorman in charge of defendant's south-bound car brought it to a stop for the purpose of permitting passengers and the plaintiff to board the same. (3) The plaintiff was chargeable with contributory negligence as a matter of law. (4) The court erred in failing to find upon material issues made by the pleadings, to wit: Whether the defendant was negligent in approaching Redwood street at a rate of speed approximately 20 miles an hour; whether the motorman on the north-bound car was negligent in failing to see the plight and condition of the plaintiff before he was struck by the north-bound car; whether the defendant was negligent in the operation of the north-bound car in failing to slow down said car when approaching the intersection of Fifth street and Redwood street; whether the defendant was negligent in the operation of said north-bound car by running into, against and upon the plaintiff.

[1] In any view of the case, point 1 cannot benefit appellant, which claims that the windows in front of the car were not obscured. If they were not obscured, then there was nothing to prevent the motorman from seeing the plaintiff, who was then immediately in front of the car. That being so, and the plaintiff being plainly in view, where he easily could be seen, it was negligence on the part of the motorman to suddenly start the car and run it against the plaintiff.

[2] Under point 2 appellant admits that the car had been stopped for the purpose of discharging passengers, but contends that it was not shown to have been stopped for the purpose of permitting passengers or the plaintiff to board the same. To our minds, the important fact is that the car was standing still at a street crossing, and that under such circumstances passengers had the right to alight from the car, or to approach the car if they desired to obtain passage thereon.

[3] The third point is that plaintiff was chargeable with contributory negligence as a matter of law. The argument of appellant here seems to be directed chiefly to the relation between the plaintiff and the approaching north-bound car. But no question of negligence on the part of plaintiff or defendant, with respect to that car, is material under the facts of this case. At the moment of the accident the plaintiff had passed the north-bound track and was free of danger from the north-bound car. If there had been no south-bound car there would have been no accident and no injury to the plaintiff. It cannot be said as a matter of law that the plaintiff was negligent when he passed in front of the south-bound car at a time when it was standing still at a street crossing. Scott v. San Bernardino Valley, etc., Co., 152 Cal. 604, 611, 93 Pac. 677. The fact of care or want of care on the part of a person crossing the street in front of a standing car at such a place is generally a matter to be determined by the court or jury from the circumstances surrounding him at the time.

[4] The fourth point relates to the alleged negligence of the defendant in the operation of its north-bound car. In their argument, counsel for appellant refer to the complaint and claim that the plaintiff was attempting to base his cause of action upon a violation of the last clear chance rule; that the plaintiff nowhere alleges in his complaint that the injuries he suffered resulted from the negligent operation of the south-bound car; that, on the contrary, the plaintiff clearly relies upon injuries occasioned by the negligence of the motorman of the north-bound car. On examination of the complaint, however, we find it alleged:

> "That while plaintiff was attempting to cross the track in front of said car which was at a standstill as aforesaid for the purpose of getting on the same, and before plaintiff had passed or had reasonable opportunity to pass clear of the front of said car, the motorman on said car carelessly and negligently and without any warning whatsoever suddenly started said car

> in motion; that plaintiff observing his immediate danger and realizing that he would be unable to cross said track without being struck, crushed and mangled by said car so negligently and carelessly started as aforesaid, endeavored to extricate himself from said danger, and before he had reasonable opportunity so to do, and without any fault or omission on his (plaintiff's) part was struck and run against by said car and thrown onto, upon or near the east parallel electric car track of defendant on said Fifth street; that before plaintiff could recover himself from the impact of said car, and while he was in such helpless condition, he was run against and struck by a north-bound car operated by defendant, * * * upon said east track of said Fifth street at said intersection."

Allegations follow which charge the defendant with negligence in the operation of the north-bound car. Nevertheless, it is then alleged "that by reason of the negligent acts and conduct of the defendant as set forth herein and as a direct result therefrom" the plaintiff suffered the described injuries. These allegations taken together clearly charge that the injuries were received as a direct result of the negligence of the defendant in the operation of the south-bound car. The court having found this charge to be true, the result of the action could not be changed by a finding in favor of the defendant with respect to the charge of negligence in the operation of the north-bound car, and the failure of the court to make a finding upon this last fact alleged furnishes no ground for sustaining the appeal.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

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42 Cal. App. 266

SCHMALING v. SWAIN et al. (Civ. 2939.)

(District Court of Appeal, First District, Division 1, California. July 18, 1919. Rehearing Denied Aug. 16, 1919; Denied by Supreme Court Sept. 15, 1919.)

BROKERS 🔑94—AUTHORITY TO BIND PRINCIPAL—SALE OF LANDS.

Under authority to broker to sell lands, terms "not less than one-fifth cash down, balance in four equal annual installments," principals were not bound by a sale, $^{15}/_{26}$ of price payable at date by transfer of an equity to broker, balance in two annual installments, shortly afterwards discounted and paid to broker, and appropriated by him, all without knowledge of principals.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by F. W. Schmaling against A. B. Swain and others. Judgment for defendants, and plaintiff appeals. Affirmed.

E. B. Mering and J. R. Gilbert, both of San Francisco, for appellant.

T. J. Geary and Geary & Geary, all of Santa Rosa, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants in an action instituted by the plaintiff to recover the sum of $2,550, claimed to have been paid to an authorized agent of the defendants upon a purchase of a piece of real estate which the latter refused to consummate. The facts of the case, regarding which there is practically no dispute, are as follows:

The defendants were the owners of a certain tract of land in Sonoma county, consisting of about 80 acres, which had been subdivided into lots, each embracing 10 acres, more or less. On June 25, 1914, the said defendants entered into a written contract with Charles P. Wagner and Charles P. Rogers, real estate agents, by which they agreed to employ the latter as their exclusive agents for a period of 6 months to sell said tract of land according to the map of the subdivision thereof at $175 net per acre to the owners:

> "Terms to be not less than one-fifth cash down, and the balance in four annual equal installments, with interest on deferred payments payable semiannually, quarterly or monthly, at the rate of 6 per cent. per annum. All payments on account of principal to be divided equally between the first and second parties hereto until the parties of the second part shall have received the difference under each contract between the sale price as above stipulated. Time is of the essence of this agreement."

At some time prior to the date of the above contract the plaintiff herein had bought from Charles P. Wagner a piece of land in another tract with which the defendants herein had no connection, and had paid to said Wagner as part of the purchase price thereof the sum of $1,500. The plaintiff had become dissatisfied with that transaction, whereupon Wagner, who had in the meantime obtained from the defendants the foregoing contract, proposed to the plaintiff that he would take the land embraced in his former purchase back, and would allow the said sum of $1,500, which the plaintiff had paid thereon to be applied upon the purchase price of lot 10 of the defendants' tract of land. In so proposing Wagner did not disclose to the plaintiff the defendants' ownership of said land, or the fact that he was their agent, but, on the contrary, purported to deal with said lot 10 thereof as his own; and, the plaintiff having agreed to this exchange, Wagner made a written agreement with him in his own name, by which he agreed to sell and convey to said plaintiff said lot 10 for the sum of $2,600, in gold coin of the United States, payable and to be paid as follows:

"Fifteen hundred dollars at the date of this agreement, and the remainder in two equal installments of $550, together with interest at the rate of 6 per cent. per annum on the unpaid balance due after each payment, payable annually, on the first Monday of May, 1916 and 1917, thereafter until the whole amount of this contract and interest is fully paid."

This contract between Wagner and the plaintiff was dated April 8, 1915, and upon its execution the plaintiff handed back to Wagner his prior contract for the purchase of the former tract, paying him no money, but receiving a credit of $1,500 upon the purchase price of lot 10. A day or two after this latter transaction Wagner wrote a letter to the defendants, wherein he stated that he had received a deposit of $50 on lot 10, "to be closed about May 1st," and from time to time thereafter during the next few months wrote other letters assuring the defendants that "the deal on lot 10" was still good, but never informing them as to the actual transaction. In the meantime he procured from the plaintiff two additional payments of $500 each on the purchase price of lot 10, by agreeing to make a discount of $100 on the amount remaining due. Having thus obtained practically the whole of the purchase price of said lot 10 from the plaintiff, but having neither disclosed the facts of the transaction to the defendants nor made any remittance to them of the moneys so received, Wagner absconded, leaving for parts unknown, learning which some time later, the plaintiff demanded of the defendants a conveyance of said lot 10 of their tract under his written agreement with Wagner. The defendants repudiated the entire transaction, whereupon the plaintiff commenced this action for the recovery of the money claimed by him to have been paid to their agent, Wagner, under the plaintiff's said written agreement with him.

The foregoing facts were established by the testimony of the plaintiff himself upon the trial of the case. The court gave its judgment for the defendants, and the plaintiff appeals.

Upon this appeal the appellant urges several contentions involving the authority which the defendants conferred upon Wagner and his associate, through their written contract with them, to execute contracts for the sale of the subdivisions of their tract of land and to receive payments thereon. The respondents combat the propositions thus urged, and on their part contend that said Wagner had no authority under his said contract with them to enter into an agreement in his own name for the sale of any portion of their lands. It does not seem to us, however, that the exigencies of this case require us to decide these counter contentions of the parties, for the following reason, which seems to us decisive of this case; for, conceding that the contract between Wagner and the defendants created an agency ample enough to have empowered the former to make and enter into such an agreement as the one which is embodied in the writing between Wagner and the plaintiff herein, and conceding that had such writing expressed the actual contract between the plaintiff and Wagner, the defendants, as the latter's undisclosed principals, would have been bound thereby, the fact remains, as disclosed by the plaintiff's own testimony, that the real and only existing contract between the plaintiff and Wagner was not that which the writing expressed, but was an entirely different contract, and was one which clearly the said Wagner, under his written agency from the defendants, had no authority to make. The written contract of agency between Wagner and the defendants authorized him to sell the lots in the defendants' tract of land for $175 per acre net to them, the terms of each of such sales to be:

"Not less than one-fifth cash down, and the balance in four equal annual installments, with interest on deferred payments payable semiannually, quarterly, or monthly at the rate of 6 per cent. per annum."

Under this contract the agents might sell the lots in said tract for as much more than $175 per acre as they were able to obtain, the surplus to be their reward, but in any event the transaction was to be a cash transaction. Was the transaction between the plaintiff and Wagner a cash transaction? Not at all, in so far as the primary credit upon the purchase price of the lot in question is concerned. The plaintiff herein had an equitable interest in another tract of land which Wagner, acting entirely independently of these defendants, had contracted to convey to him. He had no longer any interest in or control over the money which he had paid to Wagner upon this first transaction, and there is no evidence that Wagner had any portion of that particular money or its equivalent in other funds on hand at the time of the second transaction out of which the present cause of action is claimed to have arisen. On the contrary, a very strong inference arises out of the proven facts of the case that Wagner had neither said money nor its equivalent on hand at the time; and, this being so, the transaction, as the plaintiff himself explains it, amounted to nothing more than an attempted exchange of the equity held by him in the property which was the subject of his former purchase for a like equity in the property of the defendants. It requires neither argument nor authority to uphold our view that Wagner, under his contract of agency with the defendants, had no authority to bind them or their property by engaging, either in his own name or in their names, in such a transaction.

This disposes of any necessity for determining just what power Wagner and his asso ciate possessed under the terms of their agency to execute contracts calling for sales of the defendants' said property according to the terms specified in the writing defining such agency, nor what authority they, or either of them, had to accept money upon such sales, since no such actual transaction is before this court. It follows that upon the plaintiff's case, as made out by his own testimony, the trial court rightly determined that the plaintiff had not made out his case. Its judgment in favor of the defendants must therefore be affirmed.

It is so ordered.

We concur: WASTE, P. J.; KERRIGAN, J.

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42 Cal. App. 238

HAY v. HOLLINGSWORTH et al.

(Civ. 2631.)

(District Court of Appeal, Second District, Division 1, California. July 16, 1919. Rehearing Denied Aug. 12, 1919; Denied by Supreme Court Sept. 11, 1919.)

1. Vendor and Purchaser ⚷334(6) — Recovery of Earnest Money Remedy When Owner Disapproves Contract.

Where defendants, owner's agents, did not act in bad faith in failing to complete the contract contemplated by the earnest money receipt they issued to plaintiff's agent, such receipt making the deal subject to the approval of the owner, and the owner's approval not being given, plaintiff's only right was to recover the earnest money deposit.

2. Pleading ⚷205(2) — Complaint Alleging Two Causes of Action Sufficient, if One Maintainable.

Where a complaint attempted to allege a cause of action for breach of contract to convey and a cause of action for the return of earnest money paid, and the only demurrer interposed was a general one, if the complaint states sufficient facts for recovery of the earnest money, disregarding the other allegations, it must be held sufficient.

3. Principal and Agent ⚷188—In Action by Undisclosed Principal, Joinder of Agent Unnecessary.

In suit by an undisclosed principal for breach of a contract to convey, it was not necessary that the agent of plaintiff be joined as a party because of some after interest which he was to have in the land, had it been secured.

4. Assignments ⚷19 — Principal and Agent ⚷143(2)—Undisclosed Principal May Recover Benefits of Transaction.

The benefits to be derived from a transaction may always be assigned, and they may likewise always be enforced by an undisclosed principal, where full consideration has been rendered by the agent.

5. Vendor and Purchaser ⚷339—On Vendor's Disapproval of Agent's Contract, Earnest Money Recoverable.

Where purchaser obtained a receipt from the vendor estate's agent for earnest money paid, which provided for sale of land upon the estate's approval, and for the payment of additional money by purchaser at a fixed date, purchaser was entitled to an approval of the sale before making the additional payment, and where approval was refused could recover the first payment, without having tendered the additional payment.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Henry Hay against W. I. Hollingsworth and others, doing business as W. I. Hollingsworth & Co. From a judgment for defendants on a directed verdict, and also from an order denying his motion for a new trial, plaintiff appeals. Judgment and order reversed.

J. O. Downing and Davis, Kemp & Post, all of Los Angeles, for appellant.

J. Wiseman Macdonald, O'Melveny, Stevens & Millikin, and Walter K. Tuller, all of Los Angeles, for respondents.

JAMES, J. Plaintiff appeals from a judgment entered for defendants on a directed verdict, and also from an order made denying his motion for a new trial.

In December, 1910, defendant Hollingsworth held an agency agreement with the Keating estate, authorizing him, under certain limitations and restrictions, to dispose of real property belonging to that estate. Defendant Marsh had made a conditional arrangement to purchase some of this property. J. O. Downing desired to purchase 50 acres of the land which Marsh was endeavoring to secure, and he negotiated with Marsh, with the result that he made a deposit of $2,500, for which a receipt was issued to him by Hollingsworth in the following words:

"Received of J. O. Downing the sum of twenty-five hundred (2,500) dollars, as a deposit and part of the purchase price, an additional fifteen hundred (1,500) dollars to be paid on or before December 14, 1910, also as a deposit and part of the purchase price, of the following described real property, situate in the county of Los Angeles, state of California: Being the southeast quarter of lot three (3) as shown on map prepared by W. I. Hollingsworth, said map being of the Keating estate property, containing fifty (50) acres, a little more or less. Full purchase price of said property to be eleven hundred (1,100) dollars per acre. Terms of sale, one-third (⅓) of the purchase price, including the above-mentioned deposits, to be paid on or before January 15, 1911; balance to be paid in three equal annual payments, bearing interest at the rate of six (6) per cent. net, payable semiannually. The Keating estate agrees to give a good and sufficient deed and certificate of title, showing the title to be free and clear of incumbrance,

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

through the Title Guarantee & Trust Company. Said company to give a declaration of trust covering the above points. The said company to reserve the discretionary power to date the transaction, and said deferred payments shall become due in one, two, and three years from said time. This deposit is taken subject to the approval of the Keating estate. If title is not good, this deposit to be returned.

"W. I. Hollingsworth & Co.,
"Per W. I. Hollingsworth, Agent."

Marsh and Downing attached their names to this receipt, under the word "Approved," below the signature of Hollingsworth. It will be noted that the deposit was taken upon the express condition that the sale should be approved by "the Keating estate." In passing, we may pause to remark that it appeared to be the evident intention, judging from the wording of the instrument, that the approval of the Keating estate should precede the requirement that more money should be paid by Downing under the terms agreed upon. There is no dispute at all under the evidence but that the Keating estate refused to approve this sale; that Downing was notified to that effect, and it was stated to him that he might have back the $2,500 first deposited. Mr. Hollingsworth, in the course of his testimony, said:

> "In the latter part of February or the first of March (1911) Mr. Downing called on me in regard to the matter, and I telephoned for Mr. Marsh to come down to my office, and he did. I told him we had tendered the balance of our first payment to the trust company and had been refused. Mr. Marsh repeated over, I think, again what I said, and told him we had made a strong effort to try and get the contract fulfilled, but had failed. Mr. Marsh told Mr. Downing he would be glad to return the $2,500. Mr. Downing said he didn't want it. He said he would not take it. I never told Mr. Downing that I had any interest in the purchase which Mr. Marsh was making. I had no interest. I told him Mr. Marsh's money entirely at the time made the purchase."

At another point in his testimony Mr. Hollingsworth said:

> "I told Mr. Downing at least two times that he could have his money back at any time he wanted it."

He said further:

> "I remember about the 15th of January (1911) we had a talk about the matter. That was the time when he should have completed the first payment, and I said to him, 'Mr. Downing, I am very much in hopes of carrying this through for you at that time. But you can have your money.' "

Without further stating the evidence, we may again repeat that there was no claim made by either of the defendants that they were ever able to fulfill their contract with Downing. They accepted his deposit of $2,500 conditionally only, and the condition never occurred which enabled them to complete the transaction; they notified Downing that they could not complete it. This action was brought in the name of Hay to recover damages for breach of contract by reason of the failure of the defendants to convey. It was alleged that in making the purchase Downing acted as the agent for Hay; Hay being an undisclosed principal. In the prayer of the complaint damages in the sum of $25,000 was first asked for, upon the theory that, as borne out by some of the allegations in the complaint, the defendants had not acted in good faith in refusing to carry out the deal, but refused because it was of greater interest to them to take that course. The second item of damage for which recovery was asked—the deposit of $2,500—which prayer was predicated upon a statement of the facts of the transaction, together with this allegation found in the complaint:

> "That the defendants in this action, since the 13th day of December, 1910, have retained the said sum of $2,500 paid by the plaintiff to the defendants, and have not at any time offered to return the said sum, or any part thereof, notwithstanding the fact that the said defendants on the 29th day of March, 1911, refused to carry out any of the terms and conditions of said contract on their part, and the said sum of $2,500, together with interest thereon from the 13th day of December, 1910, is due, owing and unpaid from the defendants to this plaintiff."

[1] Separate briefs have been filed on behalf of defendants. We think argument is unnecessary to sustain the judgment refusing general damages because of alleged breach of contract to convey the real property. In that particular we think that the evidence was sufficient to authorize the court in concluding that defendants did not act in bad faith in failing to complete the deal, and that the particular sale contemplated under the receipt issued to Downing was refused approval by the Keating estate. Such being the case, the contract necessarily failed of consummation, and Downing's only right was to recover the $2,500 deposited. We have noted that this money was in words offered back to him, and that he announced that he would refuse to accept it.

[2] Defendant Marsh, by his counsel makes the contention that the complaint was inconsistent, first, in that there was attempted to be alleged a cause of action for breach of contract, which necessarily assumed the existence of such a contract; and, secondly, a cause of action for the return of the $2,500, to sustain which the assumption must be indulged that there was no contract. No demurrer was interposed to this complaint, except the general one, that it failed to state facts sufficient to constitute a cause of action. No special ground was alleged against its form or substance. That being true, if sufficient facts can be gleaned from the complaint to show a cause of action for the recovery of the $2,500, disregarding the other

allegations, then as to that branch of the case the complaint must be held sufficient; and we think the facts are so sufficiently stated. To be sure, the terms of the receipt are not fully exhibited in the complaint, especially as to the condition that approval should be had of the Keating estate; nevertheless it is alleged that the deposit was made and that the defendants failed to complete their part of the transaction. The ultimate fact we think was sufficiently stated, although the facts as shown in evidence not only explained and justified the refusal of defendants to make conveyance, but showed that they had in good faith offered to return the $2,500 and that Downing had refused to accept the same. However, on the evidence, presented to the court, we can see no legal reason why Downing should not have recovered the $2,500 he deposited.

[3] A number of additional questions concerned in the controversy are quite elaborately argued in the brief of defendant Hollingsworth. At the outset we agree with the contention of this defendant that no recovery should have been had against him for the deposit money, because Downing's deal was made with Marsh. The evidence sufficiently shows this to be the case. Downing in his testimony stated that, when he paid the $2,500 to Hollingsworth, Hollingsworth stated to him that it was Marsh's money and that he would give it to him. As our conclusion just announced as to this defendant puts him out of the controversy, it is unnecessary to give particular attention to much of the further argument presented by his brief, although we will notice one or two of the main propositions, as they are matters which apply equally to the codefendant.

Attention has already been called to the fact that this transaction was entered into on the one part by J. O. Downing. The reason that this action was brought in the name of Hay was explained by Downing. Downing testified that, while he acted apparently in his own right in making the deal with defendants, he in truth was the attorney in fact for Hay, and that it was Hay's money which he expended and was to expend on account of the purchase of the land. He testified that he was to have had some interest in the returns from the property; but the testimony was clear to the fact that the money expended was Hay's, and that Hay was the principal party entitled to be represented in the transaction. We think there is no merit in the contention that Downing should have been joined as a party because of some after interest which he was to have in the land had it been secured.

[4] As to the question of the right of an undisclosed principal to sue in his own name in a transaction of this kind, this is made the subject of a lengthy argument in one of the briefs. It is stoutly contended that the contract attempted to be made between Downing and the defendants, or Downing and Marsh, was one in which there could be no substitution of an undisclosed principal against the wishes of the other contracting parties; this on the familiar ground that a person generally has the right to choose the party with whom he will contract, and that it will be assumed, where the real principal is totally undisclosed, that such parties looked to the individual honesty, credit, and standing of the person who afterwards claims to be only an agent, and that they have the right to insist upon the contract being carried out as to parties precisely as made. There is no disputing this rule; it is a familiar one, and applies to a variety of conditions and cases, but has no application here.

In the first place, this is not an action to compel specific performance, and there are no obligations to be performed in the future, for which Downing's credit and standing may be available to defendant Marsh. The benefits to be derived from a transaction may always be assigned, and they may likewise always be enforced by an undisclosed principal, where full consideration has been rendered by the agent. Mechem on Agency (2d Ed.) vol. 2, §§ 2062, 2063, et seq. We may add that there never was a completed contract in this case. The deposit was taken as a preliminary and the receipt issued; those things having occurred with the express condition that the approval of the Keating estate should be secured before the parties were to become bound to the further terms agreed upon. That approval was not secured, and the negotiations were closed and terminated. There was nothing more for Downing to do, but there did remain in the hands of Marsh the $2,500 belonging to Hay, which Marsh was bound to return.

[5] It is contended further that, even as to the $2,500, this money could not be recovered by the depositor until he had offered to perform the further conditions set forth in the memorandum. As we construe those terms, the depositor was entitled to have an approval of the deal made before he would be called upon to pay any more money. Conceding that he was not so entitled, nevertheless it was announced at about the time the second payment became due, and continuously thereafter, that defendants were unable to procure the approval of the Keating estate, and they offered that Marsh would return the money deposited. The case is not at all like that of Mattingly v. Pennie, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87, where a broker sought to recover a commission and he had not produced in sufficient manner a buyer who was ready, able, and willing to purchase. The court there held that he could not rely upon the statement that the vendor would refuse to sell, and in order to complete his right to a commission he must do those things which are well established to be requi-

site to the earning of brokerage. In this case the refusal of the Keating estate to approve the sale of the land had put an end to the deal between the parties, and it is an admitted fact that any tender made by Downing on his own or his principal's behalf would have been absolutely fruitless of results.

For the reasons which we have stated, we think that the court was in error in part, in that the jury should have been allowed to find for the plaintiff as against defendant Marsh in the sum of $2,500; this without interest, because Downing had refused to accept the money at the different times it was offered to him.

The judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

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42 Cal. App. 325

PEOPLE v. PARASKEVOPOLIS. (Cr. 469.)

(District Court of Appeal, Third District, California. July 22, 1919.)

1. Criminal Law ⚿1134(3)—Refusal to Set Aside Conviction on Plea of Guilty Not Reviewable.

Upon an appeal from an order denying a motion to set aside a judgment of sentence for murder entered upon defendant's plea of guilty, the decision of the superior court upon the question of accused's entering his plea upon misapprehension or in ignorance of the scope or effect of such plea or of his rights will not be reviewed.

2. Criminal Law ⚿980(2)—Court on Plea of Guilty Must Determine Degree of Crime.

Pen. Code, § 1192, providing that, "upon a plea of guilty of a crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree," is mandatory, and where the court fails to determine the degree in a murder case, in which defendant has pleaded guilty, any attempted sentence is illegal and invalid.

3. Homicide ⚿139—Indictment must Cover Both Degrees and Manslaughter.

An indictment or information for murder must cover, not only both degrees thereof, but also the crime of manslaughter.

4. Criminal Law ⚿980(2)—On Plea of Guilty of Murder Evidence Necessary to Determine Degree.

A voluntary statement or plea by one accused of murder would be sufficient to uphold a determination by the court of the degree, as required by Pen. Code, § 1192; but, in order to pronounce judgment, under Pen. Code, § 190, the court should have before it evidence both to determine the degree and to enable a sound and just exercise of the power of determining whether the punishment for first degree murder shall be death or life imprisonment.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Michael Paraskevopolis pleaded guilty to an indictment for murder and was sentenced to life imprisonment. From an order denying his motion to set aside the purported judgment of sentence, he appeals. Order reversed, with directions.

A. W. Brouillet, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant on the 31st day of October, 1917, in the superior court of Napa county, entered a plea of guilty to an indictment charging him with the crime of murder, and was thereupon sentenced to imprisonment in the state prison at San Quentin for the term of his natural life. On the 21st day of October, 1918, the defendant, through his attorney, made a motion to set aside the purported judgment of sentence on the ground, among others, that the trial court, before the pronouncement of sentence, failed to take evidence upon and find and determine the degree of murder of which the defendant was guilty. The motion was denied, and the appeal here is from the order denying said motion.

The record here shows that the defendant, upon his original arraignment under the indictment, pleaded not guilty thereto, but that subsequently he asked and was granted permission to withdraw said plea, and thereupon entered a plea of guilty to the charge. The minutes of the trial court show that the defendant entered a plea of guilty of murder of the "first degree," and that thereupon "the clerk was directed to enter the plea of guilty of murder of the first degree." The court then postponed the time for the passing of sentence until the hour of 2 p. m. of the said 31st day of October, and at that hour pronounced judgment of sentence as above shown, without previously determining of which of the two degrees of the crime of murder the defendant was guilty.

As above indicated, the motion was based upon several different and distinct grounds. Among these, in addition to the one above particularly referred to, were the following: That the defendant, being a foreigner, was ignorant of the consequences of his act in changing his plea to the indictment, and that he was induced to take that course through the erroneous advice of counsel then representing him; that before receiving his plea of guilty, and before pronouncing sentence, the court did not inform the accused of his rights, as required by the statute; that the court, having pronounced judgment of sentence on the same day on which the plea of guilty was entered, did so in violation of section 1191 of the Penal Code, which provides, inter alia, that after a plea or verdict of guilty, etc., the court must appoint a time for pronouncing judgment, "which must not be less than two nor more than five days after the verdict or plea of guilty," etc.

[1] Some points are also made as to the proceedings upon the motion which is now before us on the appeal from the order denying the same. With these, however, we shall not concern ourselves, nor will we attempt a review of the action of the court in denying the motion to set aside the judgment on the ground that the accused entered his plea of guilty under a misapprehension or in ignorance of the scope or effect of such plea or of his rights; for the decision of the court upon that proposition is conclusive upon us, notwithstanding that there was no countershowing made by the people to the showing made by the defendant in the form of an affidavit in support of those grounds of the motion. It is made to appear that the judge who received the plea of the accused and upon said plea purported to sentence him to the penitentiary presided at the hearing of the proceeding- involved in this appeal, and we think there can be no doubt that, under such circumstances, it was within the legitimate province of the court, as most likely it did, in determining whether the defendant had pleaded guilty under a misapprehension as to his rights, to consider all the facts properly attending the act of the defendant in pleading guilty and the act of the court in sentencing him. We have, however, reached the conclusion that the judgment of sentence was invalid for reasons hereinafter to be stated, and that it will therefore be necessary to rearraign the accused for sentence upon his plea of guilty. We shall assume that, upon rearraignment for sentence, the court below will observe all the statutory requirements as to the matter of the pronouncement of judgment in criminal cases.

[2] The single question, then, with which we shall here concern ourselves, is whether the court below, before pronouncing judgment of sentence upon the accused, observed the requirements of section 1192 of the Penal Code. Said section reads as follows:

> "Upon a plea of guilty of a crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree."

It is to be noted that the language of the foregoing section is upon its face peremptory and we doubt not that the Legislature so intended it. Indeed, the section has been so construed by the Supreme Court.

In the case of People v. Jefferson, 52 Cal. 452, it was held that the language of the above section was mandatory, and that, where an accused pleads guilty to an indictment charging an offense which is divided into degrees, the trial court before passing sentence, must ascertain and determine the degree.

In People v. Chew Lan Ong, 141 Cal. 550, 75 Pac. 186, 99 Am. St. Rep. 88, it was also held that, in a case where a crime divided into degrees is charged and the defendant pleads guilty, the court must first determine the degree of the crime of which the accused is guilty before pronouncing judgment of sentence. In that case the court further said that the proper way to proceed in such a case is to take evidence upon which the court may predicate its decision as to the question of the degree of the crime.

In the very recent case of People v. Bellon, 182 Pac. 420, the Supreme Court, through the Chief Justice, says:

> "Under our practice *it is essential to a proper pronouncement of judgment in the event of a plea of guilty of a crime distinguished or divided into degrees* [italics ours], such as murder or burglary, that the court first determine the degree"—citing Penal Code, section 1192, and People v. Jefferson, supra.

It is not necessary to say anything further on the question in hand than what is said in the above cases. As above stated, the language of the section is mandatory, and in the very nature of the circumstances should be, since the degree of the crime of which an accused is guilty in those cases where the crime charged is divided into degrees is essentially one of fact, to be found by the jury, of course, upon the evidence adduced before them, where there has been no plea of guilty, and necessarily by the court where there is entered by the defendant such a plea.

We do not understand, though, that the proposition that section 1192 is mandatory is disputed. The position of the Attorney General is, however, not that the plea of guilty by the defendant to murder of the first degree is equivalent to an adjudication or determination of the question as to the degree of the crime of which he is guilty, but that, as here, a plea by a defendant of guilty of murder of the first degree leaves nothing for the court to do but to accept that plea and act upon it, as it would in any other case where a simple plea of guilty would necessarily embrace within its scope every essential element or fact involved in the crime; or the contention might be that, having pleaded guilty, not only to the crime of murder, but also to the first degree thereof, the defendant thereby waived the right to have determined by the court, before passing sentence, of which of the two degrees of murder he was guilty.

We are of the opinion, however, after a careful consideration of section 1192, that it is essential in any event, in every case where the crime charged is divided into degrees, and a plea of guilty has been interposed to such charge by the accused, that the court, as a prerequisite to the pronouncement of judgment of sentence, should first determine the degree and that in the absence of such determination in such a case, any attempted sentence is illegal and invalid.

[3] An indictment or an information, under our system, in charging the crime of murder, must cover, not only both degrees thereof, but the crime of manslaughter as well. While, where the facts and circumstances justify it, an indictment or an information may charge manslaughter only, it must, when charging murder, do so without any specification of the degree thereof. The degree of the crime, whatever it may be, is necessarily included within the mere charge of murder, and it is a question of fact for the jury, where the case is tried, to find upon and determine the degree and necessarily for the court to do likewise where a plea of guilty is entered by the accused. If the jury should return a verdict of guilty of murder, without finding and specifying the degree thereof, of which the defendant was guilty, the court would be compelled to refuse to accept the verdict as being so incomplete as to make it impossible for it to pass a proper sentence, and the jury in such case would be required to return a complete or proper verdict. People v. Lee Yune Chong, 94 Cal. 379, 29 Pac. 776. So, where there is a plea of guilty in such a case, there must first be some foundation for the exercise by the court of its judgment as to the punishment which should be inflicted, the penalty for the two degrees of murder or of burglary (also divided into degrees) being different. The only legal way such foundation can be laid is, as section 1192 plainly and peremptorily points out, for the court to ascertain and determine the degree, and this can be done properly only by taking evidence addressed to that fact; and if in any case of a plea of guilty to a crime divided into degrees that has not been done—that is, that such determination has not been made in an appropriate legal way—then the judgment of sentence has not been legally pronounced.

[4] We are not, however, to be understood as holding that the voluntary admission by the defendant, whether in the form of a mere statement or in that of a plea to the charge, that he is guilty of a particular degree of a crime divided into degrees, will not constitute a sufficient evidentiary predicate for the determination by the court of the question of degree, notwithstanding that such statement may not be, or such plea is not, given under oath. To the contrary, we think a voluntary statement or plea by the accused would be sufficient to uphold the determination by the court of the degree. But, even in such case, there must nevertheless be a determination by the court of the degree. In brief, there must be such a determination regardless of the character or nature of the evidence by which the fact is ascertained.

We may, with perfect propriety, add by way of suggestion, that, in cases of murder, the proper course to pursue where an accused has pleaded guilty to a charge of murder is to take evidence upon the question of the degree of said crime of which he is guilty, and this should be done for a twofold reason, viz.: (1) To ascertain and determine the degree of the crime. (2) Where the accused pleads guilty of murder, for the just and proper exercise by the court of its judgment or discretion as to whether the penalty shall be that of death or imprisonment for life. Pen. Code, § 190. Indeed, that section makes it the duty of the court (as it is the right of the jury to determine that question where there is a trial) to determine, in cases where the accused pleads guilty to the crime of murder, whether the penalty should be death or imprisonment for life. The vesting of that power in the jury or the court was undoubtedly intended to authorize the jury or the court, as the case may be, in any case of homicide committed under circumstances which, when measured according to the strict words of the law, make it murder of the first degree, or the taking of human life deliberately and with malice aforethought, to apply to a practical or substantial purpose any mollifying circumstances connected with the commission of the homicide which might be shown to exist and which would justify the infliction of a punishment less severe than that of the extreme penalty of death. The discretion vested in the jury or the judge in that particular by section 190 is not one to be arbitrarily exercised, but must be governed, as is true in all instances of vested judicial discretion, soundly and according to the circumstances of particular cases. Hence, as above suggested, it is necessary, in the case of a plea of guilty to murder, that the court should have before it evidence not only for the purpose of determining the degree, but also, where on such plea it is found that the murder is of the first degree, for the purpose of a sound and just exercise of the power of determining whether the punishment shall be death or only life imprisonment. See People v. Welch, 49 Cal. 174, 178 et seq.

But, however that all may be or should be, it is manifest upon the record before us that the purported judgment of sentence in this case is not a legal judgment, and while the motion from which the order here appealed from arises was for the "setting aside" of the "judgment of sentence," we think the record on this appeal is nevertheless such as to warrant us in reversing the said order because of the failure of the court to determine the degree. Accordingly, the order, so far as it involves the question as to the passing of sentence without a previous determination by the trial court of the degree of the crime to which the accused pleaded guilty, is reversed, with direction to the court below to cause, by a proper proceeding and process, the defendant to be brought before it, and thereupon, and upon the arraignment of the accused upon his plea of guilty heretofore entered, and upon the said plea, to render and pronounce judgment of sentence in accordance with the views herein expressed.

We concur: CHIPMAN, P. J.; BURNETT, J.

42 Cal. App. 221

KURTZ v. DE JOHNSON et al. (Civ. 2654.)

(District Court of Appeal, Second District, Division 1, California. July 15, 1919. Rehearing Denied Aug. 12, 1919; Denied by Supreme Court Sept. 11, 1919.)

1. SPECIFIC PERFORMANCE ⚷86 — CONTRACT TO DEVISE—ENFORCEABILITY.

A contract to devise will be specifically enforced only where it is in all respects just, fair, and reasonable in its mutual compensations, and certain in its terms, and where the promise resulted in such changed conditions as to promisee that refusal to enforce promise would permit a fraud to be perpetrated against promisee.

2. SPECIFIC PERFORMANCE ⚷86 — CONTRACT TO DEVISE—ESSENTIALS.

A decedent's parol contract to devise will be strictly construed, closely scrutinized, and weighed with a careful balance, when specific performance is sought, and it must be such as, attended by all the attributes of frankness, fairness, and honesty, will appeal to the conscience of the chancellor.

3. SPECIFIC PERFORMANCE ⚷28(1) — CONTRACT TO DEVISE—CERTAINTY.

A parol contract by an aunt to devise 1,000 acres of land to her niece in consideration of an agreement by the niece that she would live with the aunt until niece's marriage, *held* too uncertain and unfair to be specifically enforced where niece was of marriageable age at time of contract, and married 3 years thereafter while aunt lived 15 years.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Ysidora Scott Kurtz against Dolores B. De Johnson and others. Judgment of dismissal, and plaintiff appeals. Affirmed.

A. W. Ashburn, W. I. Gilbert, and J. W. McKinley, Jr., all of Los Angeles, for appellant.

J. Wiseman Macdonald, O'Melveny, Stevens & Millikin, Hunsaker & Britt, Joseph L. Lewinsohn, and Henry J. Angell, all of Los Angeles, for respondents.

JAMES, J. In the superior court demurrers of respondents to the third amended complaint of the plaintiff were sustained without leave to amend. Judgment of dismissal followed, from which plaintiff has appealed.

By this action plaintiff sought, in effect, to have specifically performed an alleged oral agreement made by Arcadia B. De Baker during her lifetime. It was alleged that Mrs. De Baker agreed to devise to the plaintiff a certain tract of land embracing 1,000 acres, more or less, the return consideration being, as alleged, that the plaintiff should reside with Mrs. De Baker. The particular character of this consideration will be treated of in detail in what follows. It will be necessary to make quite a full statement of the facts as they are alleged in the amended complaint. In doing this we shall quote liberally the language of the pleader in the statement of the alleged cause of action. It appears, first, from the complaint, that in the year 1894 the plaintiff was 18 years of age and had prior thereto resided at San Diego with her parents, and that her father was a university graduate, a well-known and highly respected citizen of San Diego. The complaint proceeds with these allegations:

"That the parents of plaintiff stood high in military circles and associated with the best society and people of San Diego, where plaintiff had formed many acquaintances and close friendships. Plaintiff had three sisters and four brothers, all living with her parents in 1894 at the time of the making of the contract hereinafter referred to. That plaintiff at said time and for a long time prior thereto had been attending a private school in San Diego, where she was being educated, including instructions in music and art. That plaintiff was fond of tennis playing and horseback riding, both of which sports she indulged in at San Diego with her friends, and at the time of the contract hereinafter mentioned was a member of a tennis club composed of what was known as the younger society set, members of the best families in San Diego and close friends of plaintiff. The said Arcadia B. De Baker, at the time of making the contract hereinafter referred to, was residing in apartments in the Baker Block at Los Angeles, Cal., and was about 68 years of age, the widow of Col. R. S. Baker and one of the richest women in the state of California, worth, as plaintiff is informed and believes, many millions of dollars, and had many thousands of acres of land in the state of California, including the Laguna Ranch, which consisted of many thousands of acres. The maiden name of said Arcadia B. De Baker was Arcadia Bandini. Plaintiff was a grandniece of the said Arcadia B. De Baker. That for many years prior to the making of the contract hereinafter referred to the said Arcadia B. De Baker would upon occasions visit the parents of plaintiff at San Diego, and upon those occasions from the time that plaintiff was a little girl the said Arcadia B. De Baker would see plaintiff upon such visits, and plaintiff became very well acquainted with the said Arcadia B. De Baker, and the latter upon many occasions expressed great love and affection for plaintiff, and said upon many occasions that she would like to have plaintiff as her own daughter. These endearing expressions upon the part of the said Arcadia B. De Baker continued, and the said Arcadia B. De Baker continued to show deep and apparent lasting affection for plaintiff. That plaintiff also upon occasions would pay short visits to the said Arcadia B. De Baker in Los Angeles and upon said occasions the said Arcadia B. De Baker showed much affection for plaintiff. That plaintiff, at the time of making the contract hereinafter referred to and for a long time prior thereto, was deeply attached by ties of affection to her parents, brothers, and sisters, and also her many friends in San Diego. That in 1894 the said Arcadia B. De Baker, who was a grandaunt of plaintiff, and a widow without children, residing alone, except for a certain servant, in her apartments in the Baker Block in the said city of Los Angeles, invited the plaintiff, who at the said time resided in the city of San Diego, to visit her for a short period of time in the said Baker Block, and thereupon the said plaintiff complied with said invitation and remained with the said Arcadia B. De Baker for a period of about two months, and after which, on or about the 24th day of November, 1894, at which time the said plaintiff was 18 years of age, plaintiff much desired to return home, and informed the said Arcadia B. De Baker that she would soon return to her parents in the city of San Diego, whereupon the said Arcadia B. De Baker, *with much show of affection, informed plaintiff that she had found her company and companionship quite necessary to her in her old age, and that she would like to have plaintiff reside with her until plaintiff's marriage, and informed plaintiff that if she would do so she would leave to the said plaintiff, at the time of the death of the said Arcadia B. De Baker, a part of the said Laguna Ranch, and that she would some time thereafter point out the boundaries of the said land to the said plaintiff. Thereupon the plaintiff informed the said Arcadia B. De Baker that she would be pleased to accept her kindly offer and reside with her until her marriage.* Said plaintiff thereafter, and in compliance with said promise, resided with the said Arcadia B. De Baker until her said marriage which occurred on the 8th day of December, 1897. That during said period of time between the said 24th day of November, 1894, and the marriage of the said plaintiff, the said Arcadia B. De Baker always treated the said plaintiff as a daughter, and showed her during said period of time the greatest of affection, and the said Arcadia B. De Baker often informed the said plaintiff that her company, companionship, and affection meant a great deal to her, and that plaintiff's presence with her gave her much pleasure and happiness, and that she would not be willing to give plaintiff up to any person except her husband at the time of her marriage. That during said time plaintiff and her said grandaunt were almost constantly together, even occupying the same room and the same bed, which the said grandaunt insisted upon, because she declared her affection was so deep for plaintiff that she always wanted her with her. And the said plaintiff upon her part acted toward and treated the said Arcadia B. De Baker as her own mother and the ties and bonds of affection between them became great by reason of their close association together. That shortly after said promise was made to plaintiff the said Arcadia B. De Baker took plaintiff and the agent of the said Arcadia B. De Baker, Charles H. Forbes, to the said Laguna Ranch and pointed out to plaintiff the land that she had promised to leave the said plaintiff and the boundaries thereof, which was the land hereinafter described. That some time thereafter the said Arcadia B. De Baker had the said property surveyed and a map thereof made by one Capt. C. T. Healy, and through him gave to the said plaintiff a map of the said property and upon which map the said Arcadia B. De Baker pointed out to the said plaintiff the said land and the boundaries thereof. That the said land so promised, pointed out, and described to the said plaintiff by the said Arcadia B. De Baker, is situated in the county of Los Angeles, state of California, and more particularly described as follows, to wit: * * * That to comply with said promise the said plaintiff was required to and did give up her family life, friends, and associates in San Diego, all of which she missed deeply, and by reason of said fact it would be impossible to place the said plaintiff in statu quo, and if the said promise herein made to plaintiff on the part of the said Arcadia B. De Baker is not specifically enforced in a court of equity, it will work a fraud upon plaintiff which cannot be compensated for in any other manner except by the specific performance of said promise. * * * That after said promise was made by the said Arcadia B. De Baker to plaintiff, as plaintiff is informed and believes, the said Arcadia B. De Baker did make a will in which she left the plaintiff in said will the land above described, but the plaintiff has, since the death of said Arcadia B. De Baker hereinafter mentioned, made much inquiry and search for the said will, but has been unable to find one in existence, and has been informed during her extended inquiries and search for said will that the said will had been destroyed prior to the death of the said Arcadia B. De Baker. And the said Arcadia B. De Baker died, as plaintiff is informed and believes, without fulfilling and keeping her said promise under said agreement to this plaintiff. Plaintiff alleges that if the said promise hereinbefore referred to made by the said Arcadia B. De Baker to the said plaintiff on or about the said 24th day of November, 1894, had not been so made to the plaintiff by her said grandaunt, and made in the kindly and affectionate manner in which it was made, she the said plaintiff would not have accepted the said promise and offer upon the part of the said Arcadia B. De Baker and would not have remained and lived with the said Arcadia B. De Baker up until the marriage of the said plaintiff, but would have returned to her home and to her parents and brothers and sisters and friends in San Diego; but it was by reason of the said promise upon the part of the said Arcadia B. De Baker to this plaintiff and made in the affectionate manner in which it was made, which caused plaintiff to accept the said promise and remain with the said Arcadia B. De Baker up to plaintiff's said marriage. * * * That Col. Baker," husband of Arcadia B. De Baker, "died on the 26th day of May, 1894. That, at the time the said contract hereinbefore referred to was entered into between the plaintiff and the said Arcadia B. De Baker, the said Arcadia B. De Baker was suffering keenly from the recent death of her said husband, and that on or about the date of making said contract the said Arcadia B. De Baker informed the said plaintiff that it was her wish and desire to have plaintiff with her and near her to love, particularly at that time, as she, the said Arcadia B. De Baker, found her life very lonesome and void after the death of her said husband, and that she had no relative living with her upon whom she could bestow her affections, and that plaintiff's society and affection would in a measure atone for the loss she had suffered in her late bereavement. That during the time that said plaintiff resided with said Arcadia B. De Baker in the fulfillment of the said contract and agreement, the said Arcadia B. De Baker often told plaintiff that because of her great love for plaintiff that she had never been more happy than during the time that plaintiff was residing with her."

Upon information and belief the plaintiff alleged further that the land was, at the time of the making of the alleged promise, of the value of $25,000. It was further alleged that after the marriage of the plaintiff she and her husband took apartments in the Baker Block, being the same building occupied by Arcadia B. De Baker, and remained there for a period of about nine years, "during all of which time the affectionate relation between plaintiff and the said Arcadia B. De Baker continued."

Respondents urge a number of contentions against the validity of the alleged contract, and as showing that the same was not of such a nature as would be enforced by a court of equity. Among other grounds, it was asserted that the contract was obnoxious to the statute of frauds, and that plaintiff was barred of the remedy sought by laches. The principal contentions, however, are comprehended in a statement, made in the brief, that "the alleged contract is not founded on adequate consideration and is harsh and unjust. The alleged contract is vague and uncertain."

[1, 2] It is well settled that in order to entitle a party, claiming under a contract such as that here alleged, to the specific relief afforded in equity, it must appear that the contract is in all respects just, fair, and reasonable in its mutual compensations; that it must be certain in its terms, and a case must be presented that will show such changed conditions on the part of the plaintiff to have been worked by reason of the promise alleged as would result in a fraud being permitted to be perpetrated against the plaintiff should the relief be denied. Preliminarily it may be said that such a contract, resting in parol and sought to be enforced at a time when the voice of the opposite contracting party may not be heard in opposition thereof, will be strictly construed, closely scrutinized and weighed with a careful balance. It must be such as, attended by all the attributes of frankness, fairness, and honesty, will appeal to the conscience of the chancellor. That such is the uniform rule, has been often announced; its substance is declared in Owens v. McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369.

[3] Examining the alleged contract, as set forth in plaintiff's amended complaint, by this standard and measure, we reach the same conclusion as did the trial judge, and affirm that the plaintiff has not presented such a state of facts as should call into action the unusual power of a court of equity in determining that, as against the administrator and heirs of Arcadia B. De Baker, a trust has been impressed upon the land referred to in favor of the plaintiff. The contract appears to be uncertain and unfair in its terms. Its unfairness, in part, is illustrated by the uncertainty. It will be noted that Mrs. Baker agreed to "leave to the plaintiff," at the time of the former's death, large acreage of land, then of great value, in return for what? That the plaintiff would "reside with her until the plaintiff's marriage." Generally it may be gathered from the allegations quoted that the companionship of the plaintiff was sought by Mrs. Baker and that that companionship was mutually agreeable to both parties. But how long under the agreement made was the return consideration to be rendered by the plaintiff to continue? Plaintiff alleged that it was to continue until her (the plaintiff's) marriage. At the time of the making of the agreement the plaintiff was 18 years of age and capable of entering into the matrimonial state at the next moment thereafter. In so far as the agreement bound her to continue to render any service to Mrs. Baker, the continuance of such service was in effect optional—that is, until plaintiff received and concluded to accept an offer of marriage. As a matter of fact she did marry 3 years after the making of the alleged agreement, while Mrs. Baker continued to live for an additional term of about 15 years, during which latter time, by reason of the condition of the contract, plaintiff was not bound to live with or see or visit her benefactor.

We say that the contract was uncertain, because the termination of the period of service of the plaintiff was altogether a matter of her own option. The contract must be construed with reference to the obligations which its terms imposed, rather than any statement of fact (which the complaint gives illustration of) as having represented the actual occurrences which followed. It is immaterial that plaintiff and her husband did reside in the same building with Mrs. Baker subsequent to the plaintiff's marriage; plaintiff was under no obligation so to do, and her act in so doing was not in any wise, when legally considered, in execution of her agreement. She terminated her obligation when she married. The case is very different from some to which our attention has been called, where the party seeking to enforce a contract of this general kind agreed to and did render service up to the date of the death of the other person. It cannot be said, we think, that, where the plaintiff had the privilege of terminating her residence with Mrs. Baker at any time after the making of the agreement by selecting a husband, she contracted to render adequate consideration in return for the tract of land.

Were we to sweep aside these objections, which we deem insuperable to the enforcement of the contract, we would still have to consider as to whether the plaintiff, by reason of the making of the agreement, so changed her situation that to deny her relief would work a fraud upon her. She had reached the age of maturity and was a member of a large household, there being seven children besides herself. She was in the habit of visiting Mrs. Baker, who was a wealthy woman and from whom, we can infer from the allegations of the complaint, she received every care, attention, and consideration. In fact, it appears by express allegation that the attachment after the relations were commenced under the contract was mutual. There is nothing shown from which we can infer that plaintiff was denied the right to visit her family or to have the members thereof visit her. It is stated that she was a member of some social organizations composed of "the best" people in the city of San Diego, and that such associations were interrupted; but we are inclined to the view that the latter consideration alone would not be sufficient to justify the conclusion that the change made was to her great injury. If we were permitted to speculate at all, we might fairly infer the contrary. See Baumann v. Kusian, 164 Cal. 582, 129 Pac. 986, 44 L. R. A. (N. S.) 756, which case, together with cases cited therein, is very much in point upon the propositions hereinbefore discussed. McCabe v. Healy, 138 Cal. 81, 70 Pac. 1008, is clearly distinguishable from this case upon its facts.

The questions discussed are determinative against the right of the plaintiff to recover in this action, and it seems to us unnecessary to enter upon a discussion of any other phases of the argument as presented in the briefs.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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42 Cal. App. 290

KIRKMAN NURSERIES v. SARGENT.
(Civ. 2934.)

(District Court of Appeal, First District, Division 1, California. July 19, 1919. Rehearing Denied by Supreme Court Sept. 15, 1919.)

1. FIXTURES 🔑4—INTENT IN MAKING ANNEXATION.

Whether fig cuttings, planted on land of another under an agreement, became annexed to the real estate, so as to pass with it, depends on the parties' intention.

2. FIXTURES 🔑5—CUTTINGS PLANTED UNDER AGREEMENT.

Under agreement whereby plaintiff delivered fig cuttings to another, to be raised on the latter's land and redelivered to plaintiff, as they developed into trees of a certain size and condition, at a certain price per thousand, the cuttings remained plaintiff's personal property.

3. FIXTURES 🔑27(3)—PLANTED CUTTINGS.

A purchaser with knowledge of contract between his grantor and plaintiff, under which his grantor was raising cuttings on the land for plaintiff, had no greater rights as to the cuttings than his grantor had.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Kirkman Nurseries against J. J. Sargent. Judgment for plaintiff, and defendant appeals. Affirmed.

Everts & Ewing, M. G. Gallaher, H. A. Savage, and Savage & Lovejoy, all of Fresno, for appellant.

Short & Sutherland and Carl E. Lindsay, all of Fresno, for respondent.

KERRIGAN, J. This is an appeal by defendant from a judgment in favor of the plaintiff in an action of claim and delivery to recover the possession of a quantity of growing nursery stock.

The plaintiff and one B. F. Rose, on February 15, 1915, entered into a written contract, by the terms of which the plaintiff was to deliver to Rose 100,000 fig cuttings of assorted varieties free of charge, which Rose was to plant and raise upon his land, and during the winter of 1915–16, and again in the winter of 1916–17, deliver to plaintiff such of said cuttings as should have developed into young fig trees, three feet in height, and which were free from pests or injury of any kind, at the price of $30 per thousand f. o. b. a designated point. In the month of July following the execution of this contract, Rose, having obtained the permission of the plaintiff, transferred to the defendant his interest in the land in which the fig cuttings were planted, who, as the evidence shows, was at that time fully advised of the nature of the transaction between plaintiff and Rose, recognized the contract, and proceeded to act under it for a time, when, for some reason not disclosed by the record, he repudiated it and refused to make further deliveries of the young trees.

[1-3] The appellant contends that the transaction between the plaintiff and Rose amounted to no more than a contract by the plaintiff to purchase from Rose certain nursery stock at an agreed price, and that by his acquisition from Rose of the land upon which such stock was growing he became the owner thereof, and consequently that the plaintiff's action in claim and delivery cannot be sustained.

The question as to whether the cuttings, when planted, became annexed to the real estate, so as to pass with it, turns upon the intention of the parties. 19 Cyc. 1048; Henry v. Dinkerhoff, 57 Cal. 3, 40 Am. Rep. 107; Western U. Tel. Co. v. Modesto Irr. Co., 149 Cal. 662, 87 Pac. 190, 9 Ann. Cas. 1190. From the terms of the contract under consideration we think it must be held that title to the cuttings, and to the nursery stock into which they developed, remained in the plaintiff, and we also think that the evidence is clear that the defendant purchased the land in which they were planted with notice of the contract and of plaintiff's rights. The contract, as already mentioned, provided that the cuttings were to be delivered to Rose by the plaintiff free of expense of any kind, and were to be planted in the land described in the complaint, cultivated, and cared for, and for such of them as at specified times became merchantable nursery stock the plaintiff was to pay an agreed price per thousand. That Rose's compensation for the use of his land and for his work in caring for the cuttings and delivering them, when in suitable condition, at the price designated, should have been fixed in this manner, affords no reasonable inference that the cuttings and the young trees into which they developed were his property; and the defendant, taking a conveyance from Rose of the land in which they were growing with notice of the plaintiff's rights, stands in the shoes of Rose. That the defendant recognized that the plaintiff retained title to the cuttings after they were planted is shown by the testimony of witnesses, who related conversations with him. When thereafter he refused to make further deliveries to the plaintiff, the plaintiff was justified in regarding the trees as its property and taking action accordingly. The court in so holding correctly construed the contract herein involved.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

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42 Cal. App. 364

WATTERSON v. HILLSIDE WATER CO. et al. (Civ. 2649.)

(District Court of Appeal, Second District, Division 1, California. July 23, 1919. Rehearing Denied by Supreme Court Sept. 18, 1919.)

1. Dismissal and Nonsuit ⟹60(1) — For Want of Prosecution—Statutory Provisions.

Code Civ. Proc. § 583, providing for dismissal of action for want of prosecution on defendant's motion, when plaintiff has for two years after answer failed to bring such action to trial, and section 581a, providing that an action shall be dismissed, unless summons shall have been issued within one year, and service and return made within three years, after its commencement, merely fix a limit beyond which the court's discretion ceases, and do not prevent the court from dismissing earlier.

2. Dismissal and Nonsuit ⟹60(3)—Failure to Prosecute.

Where notices of motions to dismiss as to each defendant were made more than two years after commencement, and as to one defendant before summons had been served, and as to the other approximately one month after service, and after demurrer, but before answer, *held*, that it was not an abuse of the court's discretion to dismiss, although plaintiff's affidavits showed plaintiff had delayed because desiring advice of decision in a different case, and that one of his attorneys had died, and that he had acted under belief that Code Civ. Proc. § 581a, allowed three years from date of filing complaint within which to serve summons.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by T. G. Watterson against the Hillside Water Company and another. From a judgment dismissing the action, plaintiff appeals. Affirmed.

Richard S. Miner and P. W. Forbes, of Independence, for appellant.

John R. Dixon, of Denver, Colo., Isaac B. Potter and Newman Jones, both of Riverside, Wm. J. Clark, of Los Angeles, and L. C. Hall, of Bishop, for respondents.

JAMES, J. This action was by the superior court ordered to be dismissed. The judgment of dismissal was entered upon motions made respectively and separately by defendant Hillside Water Company and the Owens River Canal Company. The ground of the motions in each case was that the plaintiff had failed to prosecute his action with reasonable diligence. In the case of the Owens River Canal Company the motion was made before summons had been served, while in the case of the Hillside Water Company the motion was made approximately one month after the service of summons, and after demurrer had been filed by that defendant, but before answer. The action was commenced on February 10, 1913. The notice of motion to dismiss was given by the Canal Company on March 15, 1915. The notice of motion was given by the Hillside Water Company on April 24, 1915. So it will be noted that in each case more than two years had elapsed from the date of the commencement of the action before the notices to dismiss were served.

[1] Appellant first urges that the court had no discretionary power to grant the motions. He suggests that, unless such authority is found in the statute, it does not exist; but, in view of the decided cases which are to the contrary, we do not think that we are expected to take this argument seriously. The real point of the argument of appellant is that, because of provisions contained in sections 581a and 583 of the Code of Civil Procedure, the discretionary power of the court to dismiss an action for want of prosecution has been limited. Section 583 provides in part as follows:

> "The court may, in its discretion, dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after answer to bring such action to trial. * * *"

Section 581a in substance provides that, unless summons shall have been issued within one year and service and return made within three years after commencement of the action, the action shall be dismissed. In the case of the Canal Company the motion was made, as noted, before service of summons had been had. No appearance had been made on the part of that defendant. Section 583 provides that after answer filed discretion is vested in the superior court to dismiss an action within two years for failure of the plaintiff to bring his cause on for trial. It has been held that, where the motion is made under the latter section, two years must have elapsed after the filing of the answer before the court is vested with authority to dismiss. In Romero v. Snyder, 167 Cal. 216, at page 219, 138 Pac. 1002, at page 1003, the court says:

> "We think the language of section 583 supports the theory of the plaintiff that, in cases where an answer has been filed, the court should not dismiss the action for want of prosecution, unless the plaintiff has delayed for two years thereafter to bring the action on to trial. The declaration that the court, in its discretion, may dismiss the case because of such inaction for two years, implies that inaction of that kind for a shorter period will not suffice."

The court further in that decision declares that the general power of courts of general jurisdiction to dismiss for failure to prosecute an action with reasonable diligence is not to be disputed, and cites many decisions of the Supreme Court of the state to that effect, but declares that the general doctrine is inapplicable where the motion comes after answer filed under the provisions of section 583, Code of Civil Procedure. The decision reaffirms the general rule, and admits the authority of the court to so dismiss an action, where the motion is made prior to answer filed, or where it is made because of failure to serve summons prior to the lapse of time mentioned in section 581a. Under the latter head, after citing prior decisions of the court, it is said:

> "These decisions declare that the provision in question merely fixes a limit beyond which the court's discretion ceases, and a dismissal becomes mandatory upon motion of the opposite party, and further that it gives the court the additional power to dismiss an action in such a case of its own motion. No minimum time is specified in that section, or anything to indicate that a period of delay less than that which makes a dismissal mandatory would be sufficient, if the court, in its sound discretion, thinks otherwise. There is no apparent purpose therein to regulate the exercise of the court's power, except to make it imperative that in the specified contingency the action shall be dismissed."

It is further held in that decision that the court's power is unaffected by the limitation mentioned in section 583, Code of Civil Procedure, even though demurrer may have been filed. In Overaa v. Keeney, 169 Cal. 628, 147 Pac. 466, the statutory limit of time within which summons must be served and filed had not expired. Dismissal of the action upon motion made after such service was sustained. In Mori v. Mori, 171 Cal. 79, 151 Pac. 1136, the court said:

> "It is well settled that the trial court has power to dismiss for undue delay in issuing or serving summons, even though the delay has been for a shorter period than that which, under the terms of section 581a of the Code of Civil Procedure, gives the defendant an absolute right to a dismissal"—citing Witter v. Phelps, 163 Cal. 655, 126 Pac. 593.

In Bernard v. Parmelee, 6 Cal. App. 537, 92 Pac. 658, it was held, under the facts of that case, that the neglect to serve summons for a period of more than four months was good ground for the granting of a motion to dismiss. It follows that the principal law questions argued as against the judgment must be resolved adversely to the appellant.

[2] There remains only the single question as to whether the court, under the facts shown in the affidavits presented at the hearing of the motions, abused its discretion in determining the matter against the plaintiff. The principal affidavit in opposition to the motions was made by one of the attorneys for appellant. In that affidavit it was set forth that in 1909 another action had been commenced by this plaintiff against the Owens River Canal Company, that that action had been tried and a decision finally rendered on appeal, and that plaintiff had delayed serving the summons and bringing this action on for hearing, because he desired to have the advice of the decision on appeal in the other case, and—

"in order to ascertain the points of law which would be decided by said Supreme Court upon said appeals, and thus both said plaintiff and affiant would be, and also said defendants, the better prepared to try said action No. 1388, in this court."

He sets forth further that in January, 1913, which was before this action was commenced, one of the attorneys of the plaintiff in the other action had died and plaintiff had been deprived of advice and counsel by reason thereof. Further, that the plaintiff had been of the opinion that the law as expressed in section 581a, Code of Civil Procedure, allowed him three years from the date of filing his complaint within which to serve summons in the action.

We are unable to conclude that any of these matters to which reference has been made afforded any proper defense to the motions to dismiss. The defendants were entitled to have the action prosecuted with diligence, regardless of the wish of the plaintiff that he might, by reason of decision to be rendered on appeal in the other case, obtain advice upon propositions involved which would be useful to him. (The Owens River Canal Company was not even a defendant in the other action mentioned.) The fact that one of the plaintiff's attorneys had died before the commencement of this action certainly could afford no excuse for failing to serve the summons with reasonable promptness. There is no showing but that many other attorneys were accessible to the plaintiff all of the time while the action was pending, or that he was in any way prevented from securing competent and sufficient legal advice.

Plaintiff's mistake as to his rights under section 581a of the Code of Civil Procedure affords no ground whatsoever to excuse him from the effect of the delay in prosecuting his action. The case of Romero v. Snyder, supra, which is quite illuminating on the question, was decided in February, 1914, and even after that decision had been rendered plaintiff took no action to have the summons served until another year had elapsed. We can find no reason at all to conclude that the trial court was in error.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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42 Cal. App. 182

WARD v. SOUTHERN PAC. CO. (Civ. 1934.)

(District Court of Appeal, Third District, California. July 11, 1919. On Rehearing, Aug. 9, 1919. Rehearing Denied by Supreme Court Sept. 8, 1919.)

1. MASTER AND SERVANT ⚷279(4)—INJURY TO FOREMAN—NEGLIGENCE OF OTHER EMPLOYÉ—EVIDENCE.

Evidence in action for death of foreman, killed in the taking down of a railroad snowshed, *held* to show negligence of another employé in prying off one end of a timber while the other end was attached to the structure, directly contributing to the accident.

2. MASTER AND SERVANT ⚷265(14)—INJURY—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

The burden of proof as to contributory negligence is on the master, sued for death of servant.

3. MASTER AND SERVANT ⚷265(14)—INJURY—CONTRIBUTORY NEGLIGENCE—PRESUMPTION.

Relative to contributory negligence of foreman, killed by falling timber in the taking down of railroad snowsheds, the presumption is that he had a justifiable reason for changing his position, as the timber descended in an irregular manner.

4. MASTER AND SERVANT ⚷281(1)—INJURY—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Evidence in action for death of foreman from the falling of timber in taking down a railroad snowshed *held* to sustain verdict against defense of contributory negligence, based on deceased's change of position as timber descended.

5. DEATH ⚷52—COMPLAINT—AVERMENT OF PECUNIARY LOSS.

Allegation of complaint for death, that plaintiff has been damaged through negligence of defendant and by death of her husband in the sum of $50,000, is a sufficient averment that she had suffered pecuniary loss by his death in that sum.

6. APPEAL AND ERROR ⚷1039(4)—HARMLESS ERROR—COMPLAINT—CURE OF DEFECT.

That complaint for death made only an imperfect allegation that plaintiff suffered pecuniary loss therefrom, not having been objected to at the trial, but the answer having denied the suffering of any damage by the death, and evidence having been introduced on the theory of the fact being properly in issue, was not prejudicial.

On Rehearing.

7. MASTER AND SERVANT ⚷216(6)—INJURY TO FOREMAN—RISK OF OTHER EMPLOYÉ'S NEGLIGENCE.

A foreman does not assume the risk of another employé doing a thing negligently and contrary to instructions.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Ethel Julia Ward, administratrix of Joseph G. Ward, sometimes known as J. G. Ward, deceased, against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Devlin & Devlin, of Sacramento, for appellant.

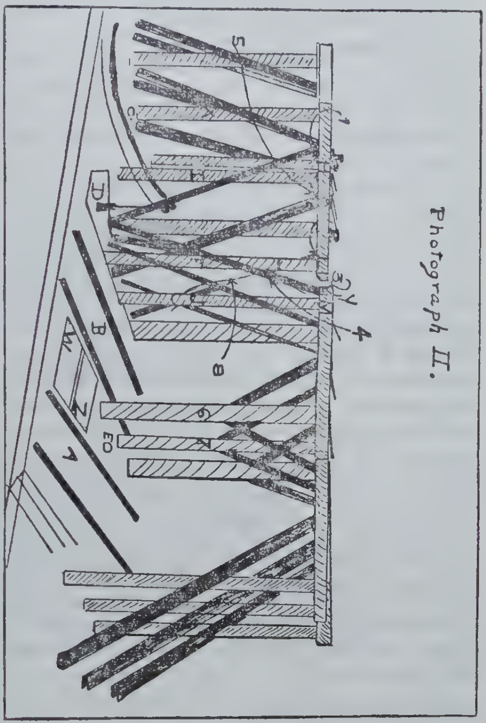
H. W. Zagoren, A. M. Seymour, and Downey, Pullen & Downey, all of Sacramento, for respondent.

BURNETT, J. The action was for damages for the death of Joseph G. Ward, the husband of plaintiff, and the jury found a verdict in her favor for the sum of $4,500. The particular acts of negligence on the part of defendant upon which the action was based are set out in the complaint as follows:

> "That on and prior to the 19th day of May, 1916, the said defendant was engaged in the business of interstate commerce as a common carrier of freight and passengers in the county of Placer, state of California; that at said time said defendant was engaged in tearing down and removing certain snowsheds along its railroad line near Immigrant Gap in said county; that on said day and immediately prior thereto said Joseph G. Ward, deceased, was employed by said defendant as foreman of certain other employés of said defendant who were engaged in said work upon said snowsheds; that on said day there were two other employés of said defendant, whose true and correct names are unknown to this plaintiff, and are therefore styled as John Doe and Richard Roe, who were engaged in throwing certain pieces of timber from the top of said snowsheds to the ground after removing them from said snowsheds; that, while engaged in throwing said timber from the snowsheds to the ground as aforesaid, the said employés, John Doe and Richard Roe, so carelessly and negligently conducted themselves as to cause said timber which they were throwing to the ground to fall in an opposite direction from that to which they had been directed to throw it, thereby causing said timber to fall against an upright post, a portion of said snowsheds, causing said upright post to be broken away and knocked loose from the supports which maintained said upright post in an upright position; that immediately prior thereto the said Joseph G. Ward, deceased, had caused a rope to be tied to the upright post last above referred to, and had caused said rope to be wound loosely around another upright post, situate about 20 feet, more or less, north of the upright post first hereinabove mentioned; that at the said time last mentioned the said Joseph G. Ward, deceased, instructed and directed another employé of said defendant, whose true and correct name is unknown to the plaintiff and who is therefore styled as Peter Smith, to manage and hold the other end of said rope in such manner as to control the falling of the upright post to a point designated by the said Joseph G. Ward, deceased; that at the time said upright post was broken away and knocked loose from its supports, through the carelessness and negligence of the said John Doe and Richard Roe, as above mentioned, the said Peter Smith so carelessly and negligently conducted himself as to cause said upright post first above mentioned to fall upon the said Joseph G. Ward, deceased, whereby the skull of the said Joseph G. Ward was fractured, and death ensued therefrom almost immediately thereafter."

The claim is thus apparent that two acts of negligence concurred in producing the unfortunate result; one being the careless removal of the timber from the top of the snowshed, and the other the improper use of the rope attached to the upright, which fell against the deceased and caused his death.

The following diagram and reference points will tend to elucidate the situation:



Reference Points on Photograph.

A—Main line track.
B—Siding track.
C—Turntable track.
D—Switch.
E—Where Ward ran to when timber started to fall.
F—Upright which fell.
G—Cross-beam which De Neef and Clark rolled off.
H—End of cross-beam where De Neef was working.
I—Upright supporting north end of cross-beam G.
J—Upright to which Marsh tied rope.
K—Joist upon which De Neef was sitting while rolling off cross-beam G.
L—End of cross-beam where Clark was working.
M—Where plate broke when upright F fell.
O—Where Ward was struck by post.
W—Point wnere Ward and Marsh were when Ward gave orders to Marsh and Smith.
X—Post around which Smith had taken turn with rope 8 attached to upright I.
Y—Plate that broke when cross-beam G was rolled off.
Z—Where Ward stood before timber fell.
1—End of plate 5 where sawed off flush with cross-beam G.
2—End of plate Y where sawed off flush with cross-beam G.
3—Joist upon which Clark was sitting while rolling off cross-beam G.
4—Brace struck by cross-beam G in falling.
5—Plate.
6—Upright.
7—Upright.
8—Rope tied by Marsh.

Of the undisputed facts, we may state that the two employés engaged in removing the timber from the top of the snowshed, named Clark and De Neef, at the time of the accident, were using crowbars to detach a beam, 16 feet in length and weighing 700 pounds, from the top of two uprights 22 feet from the ground and each upright weighing about 400 pounds. These uprights and the beam were standing on a north and south line. Clark, seated on a support near the top of the southern upright, was working at the south end of the beam, and De Neef, similarly situated, was engaged at the north end of the beam.

[1] The case of plaintiff, as to the first instance of negligence, really hinges upon the conduct of De Neef in prying off the northern end of the beam while the southern end was still attached to the southern upright. That this condition existed appears from the testimony of De Neef himself, and of one Thomas J. Smith. As to the testimony of the former the record shows the following:

> "Q. Describe to the jury how the beam was removed in this particular case—how it fell to the ground, if it did. A. My end of the beam seemed to go down a little ahead of the other end. Q. Describe what happened after that. A. I believe that—although I am not certain—that it struck the brace, started to strike the brace which is attached to the post, and in that way started the post to fall in Ward's direction, or across the track. Q. I understand you to say that your end of the beam was pried off before the other end; is that correct? A. That was evident."

Mr. Smith testified:

> "The end Mr. De Neef was working on came off at the plate before the other end had—dropped in kind of a diagonal. Here it struck on this brace, this small end of that about where the braces were fastened to the posts, somewhere in that neighborhood."

It may be added that he and other witnesses illustrated their testimony, and no doubt made it plainer to the jury by reference to a model of the snowshed, which model was used at the trial and also at the oral argument in this court.

The beam was fastened to the plates and uprights by spikes, and it is a reasonable, if not necessary, inference that De Neef pried off his end of the beam before Clark had loosened his from the plate to which it was spiked. Of course, this was a very important matter. They were engaged in a very dangerous business at best; but the danger to themselves and others would be greatly increased by casting one end of the beam from the uprights while the other was still attached. This would be manifest to the average juror, as indeed to any one familiar with the fundamental laws of physics and such a simple mechanical contrivance as the snowshed. No doubt Clark and De Neef knew that the safer course—indeed, the only proper course—was to project both ends of the beam from the uprights at practically the same time. In fact, De Neef testified that Ward told him "to roll them off to lay flatly on the ground." The direction was intended, and was so understood, to mean that the beam was to be rolled off, so as to fall in horizontal position as nearly as possible. In order to accomplish this, Clark and De Neef should have been careful to see that the spikes were removed, or at least, that they were so loosened from both ends that the beam would fall properly. These workmen were only 16 feet apart, and both could easily ascertain the conditions at the other end of the beam. It also appears from the testimony of De Neef that the beam could have been turned over upon the plates before it was thrown down. Indeed, he testified that it was so turned over; but this is manifestly inaccurate, as the evidence shows that it was still fastened at Clark's end when De Neef threw it off. We think it cannot be said to be an irrational inference from all the circumstances that said workmen were chargeable with the want of due care, either in failing to remove the spikes or in turning the beam to ascertain whether it was clear, before hurling it to the ground. We may not be able to say just why it fell as it did. Probably the jury had no decided opinion as to that, but it was and is a rational conclusion that it would have fallen without causing any injury, if the workmen had exercised the ordinary precaution which the peculiar situation demanded.

That the method pursued resulted in the fall of the upright and thereby contributed directly to the death of Ward is hardly open to controversy. The beam swung in the arc of a circle and struck the brace of said upright with such force as to break the plate at the top and to precipitate the heavy timber to the ground. If the beam had been thrown in the usual and safe manner, the probability is—and, of course, these cases must be decided upon probabilities—that it would have fallen clear of the timbers, and Ward would have suffered no injury. He expected it to fall that way and had stationed himself accordingly. However, in consequence of the unusual and dangerous direction taken by the beam, it appeared to him necessary to change his position. Indeed, it is a fair inference from the testimony of Smith and De Neef that the beam started to fall toward Ward, and his action in moving away in the easterly direction would tend to confirm this inference. It is not to be supposed that he would have taken this step, unless he had reason to believe that he would thereby promote his own safety.

[2-4] Instead of escaping the danger, the result proved, however, that Ward, by changing his place, brought himself in contact with the falling timber and consequently lost his life. But it is entirely plain that the court

cannot hold him chargeable with contributory negligence because of the change in his position. As to this it must be remembered that the burden of proof was upon defendant and that the presumption was and is that he had a justifiable reason for his conduct. This presumption was confirmed by the testimony showing how the upright started to fall. Ward was watching the process, and, seeing the timber falling toward him, what more natural thing than for him to move away from it? The fact that the upright shifted its course was a matter that he could not be supposed to anticipate. In fact, as to this circumstance, we may add, there is evidence in the record justifying the inference that this change was due to an act of one Marsh, an employé of defendant, in tying the rope—marked 8 in the diagram—to the upright directly east of the one that fell. He was given direction by Ward not to tie the rope, but to take a loop around said upright and hold it loosely. The other upright starting to fall in a southerly direction, at right angles to this rope, would, of course, be subject to its restraining power, and the resultant of the two forces would be the fall of the timber in a southeasterly direction. That seems plain enough, and it constitutes another circumstance tending to justify Ward's conduct, as he had no knowledge that the rope was so tied. Moreover, if necessary, Ward's conduct could be excused by the application of the familiar principle as to the degree of care required of a person suddenly placed in a position of grave peril; but we are entirely satisfied that as to this defense the verdict of the jury is sufficiently supported, not only by the presumptions that naturally attach to the case, but also by a strong and rational inference from all the facts and circumstances revealed by the evidence.

There is, as already suggested, another theory upon which the verdict may be affirmed, regardless of the question whether Clark, or De Neef, or both, were guilty of any negligence. We may, indeed, acquit them of any want of due care in rolling the beam from the uprights, and still there is evidence to justify the conclusion that Ward would have escaped, if it had not been for the hidden danger caused by the tying of the rope; that the latter circumstance was a proximate cause of his death, and was due to the negligence of the defendant through its servant in violating the order given by the deceased.

We deem it unnecessary to dwell longer upon the evidence. We may add, however, this reflection: That we have given it anxious attention, and, while it has caused us some difficulty, yet no more so than most of this class of cases that we are called upon to consider. Indeed, it seems to us, there is less reason for a reversal here than in a large number of damage suits wherein the judgments have been affirmed.

As to the general aspect of the case, it is not improper to suggest the significance of certain rather striking circumstances disclosed by the record. One of these is the fact that an important witness for plaintiff—and called by her probably from necessity—was under great inducement to make the circumstances appear as unfavorable as possible to her contention. In fact, one theory upon which she relied involved the charge of negligence on the part of said witness, De Neef. His natural desire for vindication was, no doubt, appreciated and properly gauged by the jury. Again, the case seems to have been tried with great care, the rulings were uniformly just, the law was given to the jury with clearness and accuracy, no complaint whatever being made by appellant of the action of the court in any of these respects, and the jury displayed great moderation in awarding only the sum of $4,500 for the death of a strong, capable man in the prime of life.

Of course, these circumstances, of themselves, are not sufficient to justify the verdict; but, believing that it is warranted by the evidence, we refer to them as confirmatory of the statement that this case is somewhat unusually free from error.

[5, 6] The only other point made by appellant was suggested for the first time at the oral argument in this court, and that is that the complaint does not state a cause of action, for the reason that there is no positive allegation of pecuniary loss on the part of plaintiff occasioned by the death of her husband. The matter is learnedly discussed by the able counsel for appellant, and several cases are cited in support of the contention; the one chiefly relied upon being Garrett v. Louisville & N. R. Co., 235 U. S. 308, 35 Sup. Ct. 32, 59 L. Ed. 242. From this decision the following quotation is made:

> "Where any fact is necessary to be proved, in order to sustain the plaintiff's right of recovery, the declaration must contain an averment substantially of such fact in order to let in the proof. Every issue must be founded upon some certain point, so that the parties may come prepared with their evidence, and not be taken by surprise, and the jury may not be misled by the introduction of various matters [citing cases]. The plaintiff's declaration contains no positive averment of pecuniary loss. * * * Nor does it set out facts or circumstances adequate to apprise the defendant with reasonable particularity that such loss in fact was suffered. * * * The rights of the defendant must be given effect."

This and other citations are reviewed by respondent, and the peculiar facts in the various decisions are pointed out and distinguished; but we do not feel called upon to report the matter more specifically. It ought to be sufficient, we think, to say that respondent alleged in her complaint:

> "That the said Ethel Julia Ward has been damaged through the negligence of said defendant and by the death of her said husband in the sum of $50,000."

If that is not equivalent to an averment that she has suffered pecuniary loss by the death of her husband in the sum of $50,000, then we must admit that the significance of the language is not apparent to us. At any rate, it is an imperfect allegation of the fact and when we consider that no such objection was made at the trial, on the contrary, appellant denied in the answer that she suffered any damage by the death of her husband, and the evidence was introduced upon the theory that the fact was properly in issue, under numerous decisions of this and other courts, the error, if any, is absolutely without prejudice. Slaughter v. Goldberg-Bowen & Co., 26 Cal. App. 318, 147 Pac. 90; Boyle v. Coast Imp. Company, 27 Cal. App. 714, 151 Pac. 25.

It appears to us that the law requires us to affirm the judgment; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

On Rehearing.

PER CURIAM. [7] In its petition for rehearing, appellant emphasizes the point that Ward assumed the risk that was incident to such negligence as caused the accident. The contention is manifestly based upon the assumption that he should have anticipated that De Neef would negligently pry off his end of the beam before the other was loosened. If that is to be held as a matter of law, it seems to us it would sweep away the right of a foreman to recover for any negligence of the workman. The danger of so treating the beam was so obvious that it would not be necessary to caution the man of ordinary intelligence against such conduct, nor do we think it should be anticipated that any one would be so reckless. We may add, however, that the instruction which was given by Ward as to how the beam should fall would clearly imply that both ends of it were to be loosened before either was projected from the upright.

Appellant thinks an inconsistency appears in the opinion by reason of the statement:

> "We may not be able to say just why it fell as it did. Probably the jury had no decided opinion as to that."

Of course, the statement in the first of these sentences must be true, regardless of the soundness of our opinion as to the merits of the appeal. This second sentence is susceptible of misunderstanding, as it has been misunderstood by the learned counsel. What we had in view was the whole situation, the entire cause of the peculiar direction taken by the beam, and what was said was really in response to various speculations of appellant as to the many circumstances that may have contributed to the result. The statement is not a full and accurate expression of what was intended, clarity being somewhat sacrificed to conciseness.

We still think the jury may not have had a decided opinion as to all these circumstances. But if they believed, as they undoubtedly did, that the negligence of defendant's servants contributed to the accident, and the evidence supports a finding to that effect, it matters not about other elements, such as rusty nails or rotten uprights, that may have affected the fall of the beam.

Of course, no opinion can be written or any conclusion announced that cannot be criticized with some show of justification by astute and censorious counsel; but we have given the cause careful consideration, and our judgment is that we should not interfere with the verdict. With that we are content.

The petition for rehearing is therefore denied.

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42 Cal. App. 271

RECLAMATION DIST. 785 v. LOVDAL BROS. CO. et al. (Civ. 1979.)

(District Court of Appeal, Third District, California. July 18, 1919. Rehearing Denied by Supreme Court Sept. 15, 1919.)

1. DRAINS ⚷85—RECLAMATION DISTRICTS—ASSESSMENTS—INSTALLMENTS.

The provisions of Pol. Code, § 3466, requiring assessments against land in reclamation districts to be collected and paid in installments, is mandatory; the only discretionary power vested thereby relating to the amounts of installments and times of their payment.

2. DRAINS ⚷90—RECLAMATION DISTRICTS—ENFORCEMENT OF ASSESSMENT LIEN—PREMATURE ACTION—COMPLAINT.

A complaint by a reclamation district to foreclose an assessment lien does not state a cause of action where it shows that the landowners were not allowed their right under Pol. Code, § 3466, to pay the assessment in installments, and any action to collect the whole prior to failure to pay such an installment is premature.

3. DRAINS ⚷90—RECLAMATION DISTRICTS—LIS PENDENS.

Although Pol. Code, § 3466, relating to reclamation district assessments, provided for filing a lis pendens with the county recorder in actions to collect delinquent installments, section 3493½ authorizing actions to validate assessments contained no such provision; and since Code Civ. Proc. § 409, requiring such notice, relates entirely to actions involving title or possession of real property, an action to validate a reclamation assessment, which became a lien on the land, under Pol. Code, § 3463, did not require filing of lis pendens.

4. DRAINS ⚷=90—ACTION TO VALIDATE RECLAMATION DISTRICT ASSESSMENT — SUFFICIENCY OF SUMMONS AND RETURN.

In an action by a reclamation district under Pol. Code, § 3493½, to validate assessments, which requires defendants to answer the complaint within 10 days when served with summons within the state, where the summons required defendant to so answer, "if served within the said county," and "within 30 days" "if served elsewhere," and the return showed service within the county, the service must be *held* to be in compliance with the statute, in view of the liberal construction required by Code Civ. Proc. § 4.

5. VENDOR AND PURCHASER ⚷=229(6, 7)—VALIDITY OF RECLAMATION ASSESSMENT LIEN—JUDGMENT VALIDATING LIEN ON NOTICE.

One purchasing land after a judgment validating a reclamation district assessment thereon is charged with notice of the lien imparted by such judgment.

6. JUDGMENT ⚷=682(1)—PERSONS CONCLUDED —RECLAMATION DISTRICT ASSESSMENT—VALIDATING JUDGMENT CONCLUDING SUBSEQUENT PURCHASER.

An action by a reclamation district to validate an assessment lien is one in rem, and is binding upon the lands assessed, and therefore concludes all subsequent purchasers.

7. JUDGMENT ⚷=746—RECLAMATION DISTRICT ASSESSMENTS — ENFORCEMENT — WAIVER OF ESTOPPEL CREATED BY FORMER JUDGMENT.

Plaintiff, in an action to foreclose a reclamation district assessment lien, does not waive the estoppel created by a judgment validating the assessment lien by introducing evidence in support of the issues raised in that action.

8. JUDGMENT ⚷=518—VALIDATING RECLAMATION DISTRICT ASSESSMENT — COLLATERAL ATTACK.

In an action by a reclamation district to foreclose assessment liens already validated by a judgment, an objection that the assessment for levees was greater than that embraced in the plans and estimates, *held* a collateral attack on the warrants issued in payment of the levies, the validity of which, having been settled by the former judgment, could not be so challenged.

9. JUDGMENT ⚷=518—COLLATERAL ATTACK—ACTION TO ENFORCE ASSESSMENT PREVIOUSLY ADJUDGED VALID.

In an action by a reclamation district to collect an assessment which had previously been judicially declared valid, objection to the legality of the action by the trustees, in purchasing for the district their own lands, constitutes a collateral attack upon the validating judgment, in which all presumptions are in favor of the judgment and proceeding leading thereto, and, there being no presumption of unfairness, illegality, or fraud, the legality of such transaction must be *held* res adjudicata.

10. DRAINS ⚷=90—RECLAMATION DISTRICT—COLLECTION OF ASSESSMENTS — MISAPPROPRIATION BY TRUSTEES.

That the trustees of a reclamation district misappropriated funds is no defense to an action to collect an assessment validated previous to such misappropriation, and a judgment against the trustees for the amount alleged to have been misappropriated, to which the district was not a party, is inadmissible in evidence.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by Reclamation District 785, by Theo. Blauth and others, trustees, against Lovdal Bros. Company and others. Judgment for plaintiff, and defendants appeal. Judgment reversed.

Chauncy H. Dunn, of Sacramento, and Arthur C. Huston, of Woodland, for appellants.

Philip S. Driver, of Sacramento, for respondent.

HART, J. The action was brought to foreclose an assessment lien. It is stated in respondent's brief:

"The respondent district is situated in the county of Yolo, state of California, and was organized as a reclamation district on the 29th day of May, 1908. On the 6th day of July, 1908, respondent levied an assessment of $132,000 over all the lands in the district. Shortly thereafter an action was brought by said respondent under section 3493½ of the Political Code of this state to validate said assessment, and on the 5th day of October, 1908, a judgment was entered in the validation suit in respondent's favor.

"At the time of the organization of the respondent district, and until after the judgment in the validation suit Lovdal Bros. Company, a corporation, one of the defendants in this action, was the owner of the lands upon which this action was brought to foreclose a lien. Thereafter said Lovdal Bros. Company, a corporation, sold said land to W. E. Lovdal. While W. E. Lovdal was the owner of said lands, and in 1914, the respondent district brought this action to foreclose the assessment lien upon said land, amounting to the sum of $17,601.07, together with interest on said sum. Thereafter said W. E. Lovdal died, and the defendants, Ovedia A. White, Emma T. L. Beardslee, and Katherine B. Fisk, executrices of the last will and testament of said W. E. Lovdal, deceased, were duly substituted by the trial court as defendants.

"The complaint in this action to foreclose the lien sets forth the statutory requirements of such a complaint. Appellants (executrices) in their answer denied that the assessment was valid, that the assessment was due or payable or that a call of the assessment had ever been made, and alleged as a separate defense that part of the moneys of said assessment was paid out for purposes other than reclamation, to wit, to pay for a judgment obtained against the trustees individually and for their individual negligence, and to pay for the purchase of the front levee owned by the trustees themselves."

The cause was tried by the court, findings and judgment were in favor of plaintiff, and the appellants, executrices, prosecute this appeal from the judgment.

[1] 1. It is first urged by appellants that the court erred in overruling their demurrer to the complaint, and in denying their motion for a nonsuit at the close of plaintiff's testimony, on the ground that the complaint showed upon its face, and that plaintiff's evidence showed, "that the trustees had never called in said assessment in separate and distinct installments, but had attempted to call in the entire assessment at one time."

Section 3466 of the Political Code, at the time of the levy of the assessment in question, read, in part, as follows:

> "At the end of thirty days, the treasurer must return the list to the board of trustees of the district, and all unpaid assessments shall bear legal interest from the date of the return of the list to said board, and shall thereafter be collected and paid in separate installments, of such amounts, and at such times, respectively, as the board, from time to time, in its discretion, may, by order entered in its minutes, direct; and a cause of action for the collection of any such installment shall accrue at the expiration of twenty days from the date of the order directing its payment: Provided, that if any such installment shall remain unpaid at the expiration of said twenty days, then the whole of the assessment against the land owned by the person failing to pay such installment shall become due and payable at once, and may, in the discretion of the board, be collected immediately, in one and the same action. The board of trustees of the district must commence actions for the collection of such delinquent installments and delinquent assessments," etc. Stats. 1891, p. 288.

The respondent contends that the provision of the said section requiring the assessments to be collected and paid in installments is merely directory, or, in other words, that it rests in the discretion of the board of trustees of reclamation districts to order the collection and payment of the assessments either as a whole or in installments. We cannot give our assent to that contention.

Prior to its amendment by the Legislature of 1891 (Stats. 1891, p. 288) the section made no provision for the collection and payment of assessments in separate installments. "This law," said the Supreme Court, in Swamp Land Dist. No. 307 v. Glide, 112 Cal. 85, 44 Pac. 451, speaking of the section as it existed before its amendment in 1891, "was found to be inconvenient, as it required the whole assessment to be paid at once, when the money could only be used from time to time," and the court proceeded to say that it was to remedy this difficulty that the Legislature of 1891 so amended the section as to require the collection and payment of assessments to be made in separate installments. Of course, it is to be understood from this language that the inconvenience following from the enforcement of the section as it formerly read was that suffered by the landowners in the reclamation districts, and not by the districts themselves or their officers; for it was undoubtedly found to be true that large bodies of land embraced within the reclamation districts of the state were, in many cases, owned by single individuals in severalty, and that it imposed upon such landowners a very onerous burden to require them to pay the whole of large assessments at one time. Indeed, it is generally known that, in many instances, assessments for reclamation purposes often call for the payment of such large sums of money that landowners often find it exceedingly inconvenient, if not impossible, to pay the whole amount of the assessments at one time. By these considerations the Legislature was unquestionably prompted in so amending the law that the work of reclamation might be facilitated in reclamation districts formed and organized under the laws of the state with as little inconvenience to the landowners upon whom the burden in such cases was thrown as possible. The theory and the purpose of the provision are the same as those at the bottom of the law authorizing the collection of county taxes in two separate installments, each at a different time of the year, viz. for the convenience of the taxpayers. It would not for a moment be contended that the board of supervisors could require the collection of county taxes, or that the tax collector could enforce their collection in whole, at one time or in one installment. That is a substantial right of which the taxpayers cannot be legally deprived against their consent, and so here. The provision requiring or authorizing the assessments to be collected and paid in separate installments involves the granting or giving to the landowners of a substantial right, and, while undoubtedly they themselves may waive it and pay the assessments levied against their lands in full at one time, they are, nevertheless, entitled to claim and invoke it. We cannot, therefore, agree with respondent that the language of the section as to the collection and payment of the assessment in separate installments is merely directory, and is justly subject to the interpretation that the trustees of the district are thereby given the discretion to determine whether the entire assessment shall be made collectable and payable at one time or in separate installments. Indeed, the language of the section in that particular is strictly mandatory. The only discretionary power vested by the section in that connection relates to the amounts of the installments and the times of their payment.

A law authorizing the assessment of land for reclamation purposes in duly formed and organized reclamation districts authorizes the exercise of the taxing power. The assessment of lands for that purpose is a species of taxation, and the rule that all laws authorizing the taxation of the property for public purposes are in invitum, and their provisions, therefore, to be strictly construed and pursued, or at least substantially so, is no less applicable to a case of an assessment of lands in reclamation districts for reclamation purposes than to laws authorizing the taxation of property for general governmental purposes. Where, therefore, the provisions of a law by authority of which districts are formed for the purpose of reclaiming lands situated therein specify the manner or the method of assessing such lands for the purpose of raising funds with which to carry out the purposes of the district, such manner or method of proceeding must be observed with substantial strictness. A substantial departure from the method specifically pointed out by the statute for raising the money for the purposes of the district will render the assessment abortive. These are elementary propositions, which apply in the construction of the powers, duties, and obligations of all public or quasi public instrumentalities or agencies established for the purpose of carrying out, within certain limited subdivisions of the state, certain designated policies of the state, or of exercising certain governmental functions.

The right of the owners of lands within reclamation districts to have the assessments levied against such lands for the purposes of such districts made collectable and payable in separate installments is, as above declared, a substantial one, expressly given to them by the Legislature for their benefit and convenience, and the courts would be guilty of resorting to the very extreme of judicial legislation under the guise of construction should they hold that the trustees of reclamation districts are at liberty to disregard that right whenever they see fit to do so, and so require the landowners to pay the entire assessments at one time.

We have carefully read and considered the briefs of respondent. We find no fault with the rules of statutory construction to which they therein refer, and which they invoke as supporting their view of the section of the Political Code in question. But, as must be manifest from the views we have already expressed respecting the language of said section, we cannot support them in their insistence upon the application to the present case of the rules of construction invoked by them or the cases they rely upon. They argue that, as there is no language in the section expressly forbidding the trustees from calling in the entire assessment at one time, therefore the Legislature must have intended that they should be vested with the discretion of collecting the entire assessment at any time if, in their judgment, the requirements of the district justify it. This proposition we have already answered. While it is true that the section does not say to the board, "You shall not call in the entire assessment at one time," it does say, as we have shown, that the collection and payment of the assessments *shall* be in separate installments, and this is tantamount to the declaration that the collection of the entire assessment shall not be compelled by the trustees at one time. The language necessarily excludes any other manner of collecting the assessments.

[2] Nor is there any force in the argument of respondent that, inasmuch as the landowners must pay the entire assessment at some time, they can suffer no prejudice because the suit, to foreclose or to enforce payment of the assessment is upon or for the entire assessment. Prejudice to the party so wronged must always follow from an act resulting in the invasion of any substantial right to which he is entitled under the law. In contracts neither party has the right to forfeit the agreement before the time for the doing of the thing thereby agreed to be done has matured. No action will lie to recover on a promissory note until the debt of which it is evidence is due. If a purchaser agrees to pay for personal property by installments payable at stated intervals of time, his rights under the agreement cannot be forfeited until he has violated the conditions of payment or some other vital covenant. The same principle applies here. The district was without authority to sue for the entire assessment until there was default in the landowner to pay one of the installments for a certain specified period; but the vital proposition involved is the landowner's right to have the assessment made payable in separate installments so that it will be the more convenient for him to pay the assessment. For aught that can be said to the contrary, the defendants here might have willingly paid the assessments had they been made payable according to law. We have no right to assume that they would not have done so if the amount had been ordered payable in installments. But be that as it may, we are fully persuaded that, for the reasons above given, the complaint fails to state a cause of action against the defendants—that is to say, that the action was premature or brought before a cause therefor could have accrued—and that the demurrer thereto should, therefore, have been sustained. From this it follows, of course, that the demurrer having been overruled and the cause tried, and the evidence at the trial showing that the trustees failed to order the assessment involved herein to be collected and paid in separate installments, the motion of defendants for a nonsuit should have been granted.

While the conclusion thus arrived at is decisive of the case, there are some other points to which attention should be given, in view of possible litigation arising in the future with respect to this assessment.

2. Appellants claim that the court erred in admitting in evidence the judgment roll in the validation suit, over the objection of defendants, that (1) no notice of the pendency of said action was offered in evidence; (2) that the court had no jurisdiction to render a judgment validating said assessment against the then owner of said lands, Lovdal Bros. Company, a corporation; (3) conceding the validating judgment to be binding upon these defendants, still the plaintiff waived the estoppel that would otherwise have been created by the judgment by introducing evidence in support of each allegation of the complaint necessary to establish the regularity and validity of the assessment.

[3] While section 3466 of the Political Code as it read at the time the assessment in question was levied provided that a lis pendens should be filed in the office of the county recorder in all actions for the collection or enforcement of the payment of delinquent installments of the assessment, there was no provision, in section 3493½ of said Code, authorizing actions to determine the validity of the assessments, which required that notice of the pendency of such actions should be filed. Nor was such a notice required to be filed in such actions by section 409 of the Code of Civil Procedure, which relates entirely to actions involving the title or the right of possession to real property. The validation action did not involve the title or the right of possession of real property, but merely the question of the validity of an assessment which, under section 3463 of the Political Code, as it then read, became a lien upon the property assessed from and after the filing with the county treasurer by the assessment commissioners of a list of the charges assessed against the land and prior to the time at which the validation suit could be brought. From these considerations it follows that it was not necessary to file a notice of the pendency of the action to establish the validity of the assessment.

[4] The objection that the court had no jurisdiction to adjudicate the validity of the assessment as against Lovedal Bros. Company, the then owner of the lands in question, is based upon the contention that the summons required by the statute is not in the form of language prescribed thereby. This objection is highly technical and without substantial merit. Section 3493½ provided that in such an action the summons shall require the defendant or defendants "to answer the complaint within ten days after the service of the summons, if served within the state." The summons served on Lovdal Bros. Company was in the usual form of such processes, and required the defendant to "answer the complaint within ten days, exclusive of the day of service, after service on you of this summons, if served within the said county—if served elsewhere, within thirty days." Thus it will be observed that the summons served did not direct or require the defendant to answer the complaint within ten days, "if served within the state," and it is upon this omission that the objection to the summons is founded. By the summons the said defendant was informed that, if served within the county in which the action was brought, it was required to answer the complaint within ten days after such service. The certificate attached to the summons by the party making service on Lovdal Bros. Company sets forth that the summons was served on said company in Yolo county. Thus the said defendant was given, substantially as the statute required, notice of the commencement of the action, and thus the only purpose that a summons is designed to achieve was as effectually and fully accomplished as if the process had contained the precise language of section 3493½. The rule of the Code is that its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice (Code Civ. Proc. § 4), and this rule obviously applies as well to the provisions as to a summons as to those relating to other proceedings and processes authorized by the Codes. See Bewick v. Muir, 83 Cal. 370, 23 Pac. 389.

[5] In this connection we should notice another point made by appellants, which is that neither W. E. Lovdal, the grantee of the corporation of the lands involved herein, nor his executrices, ever received notice of the validation suit, and that the court below, therefore, never acquired jurisdiction to enter judgment in said action as against them. The contention is without force. The deceased, Lovdal, purchased the property after judgment in the validation suit was rendered and entered, and, inasmuch as the effect of the judgment was to confirm or establish the validity of the lien which, ipso facto attached to all the lands in the district upon the filing of the list of the charges with the county treasurer, the judgment imparted notice of such lien, and all purchasers of property in the district subject to the assessment were charged with such notice. See Carpenter v. Lewis, 119 Cal. 18, 22, 50 Pac. 925.

[6] At any rate, the action in the validation suit was one in rem, and it was binding upon the lands assessed, and therefore concluded all subsequent purchasers. Peterson v. Weissbein, 80 Cal. 38, 22 Pac. 56; Riverside Land Co. v. Jensen, 108 Cal. 146, 41 Pac. 40; 39 Cyc. 1710.

[7] The claim that the plaintiff waived the estoppel created by the judgment in the validation suit by introducing evidence here in support of the issues raised in that suit requires no elaborate notice here, since, if it were true that such an objection is good as against the right to invoke an estoppel by judgment, the same would probably be obviated at the trial of any action which might be brought in the future to enforce the pay-

ment of this assessment. It may be suggested, however, that the case of Megerle v. Ashe, 33 Cal. 74, cited by the respondent as supporting the objection referred to, has been expressly overruled, so far as that proposition is concerned, by Harding v. Harding, 148 Cal. 397, 83 Pac. 434, in which it is said:

> "But whatever construction may be put upon Megerle v. Ashe, 33 Cal. 74, and the later case of Hicks v. Lovell, 64 Cal. 14, 22, 27 Pac. 942, 49 Am. Rep. 679, where something is said that might be construed as an approval of the statement quoted from the former case, we are satisfied that, under our system, a defendant does not waive his rights under a judgment pleaded in bar, by the mere act of also contesting the claim of the plaintiff upon the merits."

[8] 3. The plans and estimates of P. N. Ashley, engineer of the district, dated July 6, 1908, as reported to the trustees of the district, stated that the estimated cost of raising old front levees which were to be used as a part of the reclamation plan was six cents per cubic yard. The trustees of the district at that time were Messrs. H. J. Goethe, Theo. Blauth, and C. F. Silva, each of whom was the owner of a portion of the front levee. Defendants attempted to prove by the witness P. S. Driver, secretary and attorney for the plaintiff district, that those parties were paid ten cents per cubic yard for such levees. An objection by plaintiff that this was a collateral attack upon the warrants issued in payment for said levees was sustained, and appellants urge that the ruling was erroneous.

The ruling was proper. Before the assessment could be levied under the law it was requisite that a statement or report should have been made to the supervisors by the trustees, showing the plan of the proposed reclamation work and estimates of the costs thereof. This report or statement was a necessary prerequisite to the levying of the assessment, and the assessment was, in turn a necessary prerequisite to a validation suit. It follows, therefore, that the statement or report of the plan and estimated costs of the work to be done was necessarily one of the issues to be adjudicated in the validation suit. The judgment in that action is res adjudicata as to all matters contained in the statement. The time for the urging of any objections to the statement or any other matter connected with the assessment was at the trial of that action. The Lovdal Bros. Company, although duly notified of the action, defaulted or made no appearance therein. The attempt here to impeach the validity of the warrants in question involved an attempt to attack the judgment in that action collaterally. Of course, this cannot be done, even if it be true that the warrants called for larger amounts than the estimated price of the land, as shown by the report, justified. Indeed, the question of the price per cubic yard of the land was one of fact, and that question having been determined by the trustees of the district and the supervisors of the county by finding that ten cents, rather than six cents (the estimated price per cubic yard), was the proper price, and the warrants having been drawn for that amount, the validity or correctness of the warrants themselves cannot be collaterally challenged. Rec. Dist. v. Clark, 155 Cal. 350, 100 Pac. 1091; County of Alameda v. Evers, 136 Cal. 132, 68 Pac. 475; County of Santa Cruz v. McPherson, 133 Cal. 282, 65 Pac. 574; Victors v. Kelsey, 31 Cal. App. 801, 161 Pac. 1006; McBride v. Newlin, 129 Cal. 36, 61 Pac. 577.

[9] The appellants undertake to differentiate the above-named cases from the present case in that the question involved in those cases was one of fact, while the question presented here is one of law, the contention being that the act of the trustees in purchasing their own property for the purposes of the district was illegal. But however that may be, the question whether the act of the trustees in the matter was or was not legal was, as we have pointed out, necessarily a direct issue in the validation suit and was therein adjudicated. Indeed, the sole question to be determined in that action was whether the assessment was or was not in all respects valid.

The cases of Reclamation Dist. v. Turner, 104 Cal. 334, 37 Pac. 1038; Reclamation Dist. v. McCullah, 124 Cal. 175, 56 Pac. 887, and Reclamation Dist. v. Birks, 159 Cal. 233, 113 Pac. 170, cited by the appellants as supporting their position that the assessment was void because of the fact that the trustees, as owners thereof, sold to the district the levee banks referred to, were direct appeals from the judgments. The first named was an action to collect an assessment and the defendant appealed from the judgment entered against him. At the time that the action in that case was brought in the superior court there was no statute or law authorizing the validation of such assessments by a suit for that purpose in the superior court, section 3493½ of the Political Code not then being in existence. The attack upon the judgment in the Turner Case was therefore direct. The other two cases involved actions to validate the assessments, and the defendants therein appealed directly from the judgments declaring the assessments to be valid. The case at bar involves an action to collect an assessment which had, prior to the commencement of this action, been judicially declared to be valid upon evidence presumptively sufficient to support the judgment. If it be said that there is some evidence here showing the fact of the purchase of the land referred to by the trustees, the answer is that, since all presumptions are in a collateral attack to be indulged in favor of the judgment and the regularity of the proceedings leading thereto, it is to be presumed that in the validation suit there was evidence disclosing that the sale and transfer of the levee banks to the district was not only necessary and to the best interests of the district in its work of reclamation, but that the transaction was conducted in such manner as to remove from it any aspect of illegality. There is no presumption arising from the mere fact of the transaction itself, unexplained by the circumstances by which it was initiated and consummated, that it was unfair or illegal or characterized by fraud. Rec. Dist. v. McCullah, 124 Cal. 175, 56 Pac. 887; Morawetz on Corporations, § 527.

4. It is lastly claimed that a sum amounting to nearly fifteen thousand dollars, included in the assessment of $132,000 was misappropriated and could not possibly benefit the lands of defendants.

[10] It was alleged in the answer that the trustees of the district, in 1908, caused the front levee of the district on the bank of the Sacramento river to be cut through in order to take a dredger into the district, and that they so negligently and carelessly closed the opening made by them that, in the spring of 1909, the water of the river broke through the levee and damaged the lands of one Calvin Perkins lying adjacent to the district; that said Perkins brought suit and recovered judgment against said trustees for the sum of $9,360 and costs, which judgment and costs, together with attorney's fees, were paid out of the assessment for $132,000.

The action above referred to of Perkins v. Blauth et al. is reported in 163 Cal. 782, 127 Pac. 50. It appears by reference thereto that while the dredging company and the engineer of the district were joined as defendants (the district itself was not so joined) the judgment was against the trustees of the district individually. It is the claim of appellants, that, as the judgment in the validating action was entered October 5, 1908, and the acts of the trustees resulting in the Perkins judgment occurred thereafter, in no event could the amount of said judgment be properly paid out of the assessment under consideration.

At the trial defendants offered in evidence the judgment roll in Perkins v. Blauth et al., and also attempted to prove the above facts by the introduction of testimony. The court sustained objections to the introduction of said evidence, which ruling is specified as error.

The ruling was correct. We cannot conceive of a more obvious proposition in connection with a case of this character than that the misappropriation of the funds of the district by the trustees thereof cannot have the effect of invalidating the assessment by which such funds were raised. If the trustees have misused the funds of the district by paying them out for some purpose wholly foreign to the objects of the district, they are, of course, personally liable for the repayment of the moneys so used; but the act of those officials in the misappropriation of the moneys of the district has absolutely nothing to do with the matter of levying the assessment, and can in no way affect the proceedings involving that duty.

For the reason first hereinabove given, the judgment is reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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42 Cal. App. 262

CAMERON v. CITY OF RICHMOND et al.

(Civ. 2798.)

(District Court of Appeal, First District, Division 2, California. July 17, 1919. Rehearing Denied by Supreme Court Sept. 15, 1919.)

1. PLEADING ⚷198—JOINT DEMURRER—COMPLAINT GOOD AGAINST SOME.

A joint demurrer by all the defendants must be overruled, if the complaint is good against any of them.

2. PARTIES ⚷92(4)—DEMURRER—MISJOINDER OF DEFENDANTS.

Complaint is not subject to demurrer for misjoinder of defendants; it not appearing from the face of the complaint that any defendant is improperly joined.

3. MUNICIPAL CORPORATIONS ⚷124(6) — COUNCILMEN—ACTING AS BOARD OF EQUALIZATION — INCREASING COMPENSATION DURING TERM—CONSTITUTIONALITY.

Under the charter of Richmond, providing that no member of the council shall hold any other municipal office, that the council shall act as a board of tax equalization, and that the councilmen shall receive $5 per day while performing that duty, but no other compensation, unless provided by ordinance, they perform the duty of equalization as members of the council, so that an ordinance providing a salary for them increases their compensation, within Const. art. 11, § 9, providing that this shall not be done during their term of office.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by David Cameron against the City of Richmond and others. From an adverse judgment, plaintiff appeals. Reversed, with directions.

David Cameron and C. S. Hannum, of San Francisco, for appellant.

M. R. Jones, of San Francisco, and D. J. Hall, of Richmond, for respondents.

HAVEN, J. This is an appeal from a judgment of the superior court in and for the county of Contra Costa in favor of the defendants. The plaintiff sued as a taxpayer of the city of Richmond, a municipal corporation, to obtain a judgment for $13,950 in favor of the city against all of the defendants, except the city of Richmond, which is impleaded as a party defendant, upon an alleged cause of action for money illegally expended and paid to the members of the council of the city of Richmond in monthly payments of $50 each as salary in addition to the compensation they were entitled to receive at the time of their election. Judgment was entered upon an order sustaining a demurrer to the amended complaint after plaintiff had elected to stand upon his pleading. The mayor of Richmond, its nine councilmen, the city clerk, auditor, and treasurer, together with two ex-members of the council, were joined with the city of Richmond as defendants. In substance, it is alleged that the present city officers since July 1, 1917, have joined in issuing, auditing, and paying demands on the city treasury for salaries of hold-over councilmen, and that the former officers, prior to July 1, 1917, and subsequent to August 1, 1915, joined in similarly paying corresponding demands to those who were members of the council during that period, namely, the hold-over councilmen and the two ex-members of the council joined as defendants. The payments were made pursuant to an ordinance adopted by the council July 19, 1915, which it is claimed was invalid, or at least inapplicable to the salaries of those who were in office at the time of its adoption, as constituting an increase of compensation of municipal officers during the terms for which they were elected, in violation of section 9 of article 11 of the Constitution of California.

[1, 2] All the defendants joined in a single demurrer. It was general and special. The grounds of special demurrer were misjoinder of parties defendant, and ambiguity, uncertainty, and unintelligibility, in that it cannot be ascertained from the complaint whether or not the plaintiff claims that the compensation of $5 per day alleged to have been paid to defendants was paid to them as members of the board of equalization or as members of the council. This last matter is hereinafter discussed in considering the ruling of the trial court with reference to the general demurrer. In the matter of misjoinder, it was stated that E. J. Gerard is improperly joined as a party defendant with each and every of the other defendants in said action. In separately lettered paragraphs, the same statement was made as to each of seven other of the individual defendants, among whom were the city clerk and auditor and the two ex-councilmen. On behalf of the respondents it is argued the demurrer was properly sustained, for the reason that there is no cause of action stated against the city clerk, and he was therefore an improper party. "A joint demurrer by all the defendants must be overruled if the complaint is good against either of them." Asevado v. Orr, 100 Cal. 300, 34 Pac. 779; Rogers v. Schulenburg, 111 Cal. 281, 43 Pac. 899; Hirshfeld v. Weill, 121 Cal. 13, 53 Pac. 402. Furthermore, it does not appear on the face of the complaint that the city clerk is not a proper party, nor, indeed, that any of the defendants is improperly joined.

[3] The remaining question necessary for determination is as to whether the ordinance in question is inoperative as to the councilmen who were members of the council at the time of its passage, which is dependent upon whether or not said ordinance increased their compensation after their election and during their term of office, and this question, in turn, is dependent upon whether or not the compensation of $5 per day to the councilmen while sitting as a board of equalization was paid to them as councilmen.

Section 4, article III, of the Charter of the City of Richmond, reads as follows:

> "The councilmen shall each receive the sum of five dollars for each day while sitting as a board of equalization; but no other compensation shall be paid unless the electors, by ordinance proposed and adopted in accordance with section two of article VIII shall otherwise provide."

Section 9 of article 11 of the Constitution of this state reads as follows:

> "The compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office."

The argument presented by respondents is that the ordinance passed by the council on July 19, 1915, did not violate the above-recited constitutional provision as to the salaries of incumbent councilmen, because such councilmen were not receiving any salary at the time; that the provision for compensation was compensation to be paid them only while acting in another capacity, i. e., as a board of equalization; and that, as no salary was provided for councilmen as such, a salary could be provided without violating the constitutional provision. Reliance is placed upon the case of Gwynn v. McKinley, 30 Cal. App. 381, 158 Pac. 1059. We cannot agree that the present case comes within the rule announced in that case. The charter provides that:

> "The council shall by ordinance provide for the assessment, levy and collection of taxes, and shall act as a board of equalization in equalizing the value of property listed upon the assessment roll."

It further provides that the councilmen shall receive $5 per day while performing that duty. The councilmen perform the duties of a board of equalization as members of the council. Indeed, if this were not true, and the two offices were independent and distinct, then under section 4 of article IX of the charter, the councilmen could not perform the functions of a board of equalization, because said section of the charter provides that no member of the council shall hold any other municipal office, or hold any other office or employment, the compensation for which is paid out of the municipal money. In the case of Santa Barbara v. Rucker et al., 35 Cal. App. 676, 170 Pac. 860, the court said that the duties performed by supervisors as road commissioners were duties imposed upon them by virtue of their status as supervisors, and that an amendment allowing larger compensation for services rendered as road commissioners increased their compensation while in office. So, in the present case, we think the duties performed by the members of the council in equalizing the value of property listed on the assessment rolls are duties imposed upon them by virtue of their status as councilmen, and that the salary provided to be paid to them while acting as a board of equalization was a salary paid to them as councilmen, and, consequently, the ordinance providing a salary of $50 per month to be paid to them as councilmen increased their salaries during their terms of office, and is therefore void as to them. The complaint, therefore, was good as against the general demurrer.

There are certain other matters presented in the briefs, but our conclusions as herein expressed render a discussion of such matters unnecessary.

The judgment is reversed, with directions to the trial court to overrule the demurrer of the defendants.

We concur: LANGDON, P. J.; BRITTAIN, J.

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42 Cal. App. 285

CRANE v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

(Civ. 3064.)

(District Court of Appeal, Second District, Division 1, California. July 19, 1919.)

1. Executors and Administrators 🔑315(4)—Grounds for Vacating Settlement Insufficient.

To prevent annulling on certiorari of orders vacating orders, duly and regularly made, settling the account, decreeing distribution of dedecedent's estate and discharging administratrix, the record must show mistake, inadvertence, surprise, or excusable neglect, authorizing the vacation under Code Civ. Proc. § 473; and mere statement in the vacating orders that the vacated orders were made inadvertently is not enough.

2. Executors and Administrators 🔑315(4)—Vacating Order of Distribution for Failure of Proof Unauthorized.

Vacation of orders for distribution of estate and discharge of administratrix is not authorized under Code Civ. Proc. § 473, because the court changes its conclusion that the proof on which they were made was sufficient, or because they were based on false representations of administratrix.

3. Executors and Administrators 🔑315(4)—Grounds for Vacating Order of Distribution Stated.

The court has no power to vacate its orders, duly and regularly made, for distribution of estate and discharge of administratrix, save and except under Code Civ. Proc. § 473, authorizing relief from orders made through a party's mistake, inadvertence, surprise, or excusable neglect.

In the matter of the settlement of final account of Lida S. Crane, administratrix of James E. Crane, deceased. Orders for distribution of estate and discharge of administratrix were vacated, and Lida S. Crane brings certiorari against the Superior Court of Los Angeles County and James C. Rives, Judge thereof. Orders annulled.

Thomas K. Case, of Los Angeles for petitioner.

Robert L. Hubbard, of Los Angeles, for respondents.

SHAW, J. By this application petitioner asks that upon a writ of certiorari we set aside and annul the action of the court in vacating orders made for the distribution of the estate of a deceased person and discharge of the administratrix. The facts upon which the action of the court was based are as follows:

The petitioner, Lida S. Crane, was administratrix of the estate of James E. Crane, deceased, and up to July 8, 1918, Robert L. Hubbard and N. B. Bachtell represented her as attorneys. On said date Thomas K. Case was, subject to the right of Hubbard & Bachtell to an allowance of attorney's fees for services rendered, substituted as attorney, and as such thereafter appeared for the administratrix. On July 30, 1918, the administratrix filed her first and final account, accompanied by a petition for an order distributing the estate to herself as sole heir, the hearing of which, after due notice given, was had on August 13, 1918, at which time an order was made settling the account and the estate ordered distributed to petitioner. On August 29, 1918, Hubbard & Bachtell filed with the clerk of of the court an application to have their fees as attorneys for the administratrix fixed and allowed by the court. Thereafter, and without any receipt having been filed showing the estate had been distributed, the court on August 31st made an order discharging the administratrix. No hearing of the application to fix and allow the fees of Hubbard & Bachtell was had. Thereafter, on October 21, 1918, the court, upon motion of Hubbard & Bachtell, entered an order vacating the order discharging the administratrix; and on February 3, 1919, Hubbard & Bachtell served upon the administratrix a notice of motion for orders vacating the orders approving the final account and decree of distribution. Said motion was made no February 10, 1919, and the hearing continued from said date to February 20, 1919, at which time it was heard, and on May 6, 1919, the court made findings to the effect that said orders settling the final account and decreeing distribution of the estate were inadvertently made and under a misapprehension of the court that all claims against the estate had been paid, for which reason it was ordered that said orders and each of them be vacated, annulled, and set aside.

[1, 2] It appears from the record presented that the orders settling the account, decreeing distribution of the estate and discharging the administratrix were all duly and regularly made after due notice to all parties interested of the time fixed for the hearing of the application for the orders. The order vacating the order discharging the administratrix was in response to a motion therefor made by Hubbard & Bachtell; but the record is wholly silent as to the ground or reasons assigned in support of the motion, in the absence of which it appears that the court acted upon a mere request of these attorneys, who, appearing for respondents, now insist upon the authority of Wiggin v. Superior Court, 68 Cal. 398, 9 Pac. 646, that the court in so doing acted within its jurisdiction. Conceding the language of this case as reported justifies the contention, we are not inclined to follow it as so interpreted, for the reason that it is inconsistent with the decision of a like question decided by this court in Nason v. Superior Court, 179 Pac. 454, in which an application for a transfer was denied by the Supreme Court on March 24, 1919.

As to the orders made, vacating the order settling the account and distributing the estate, they were in response to a motion, based upon the files and records of the case, made on February 10, 1919, pursuant to notice theretofore served, the ground therefor, as stated in the notice, being that said orders were improvidently made, in that the action of the court in approving the final account was procured by false representations made by the administratrix to the effect that all obligations of the estate had been fully discharged, and that at said time a motion was pending in said court to have it fix and determine the fees of said Hubbard & Bachtell. The application was made and heard within six months from the making of the orders, and therefore was within the time fixed therefor by section 473, Code of Civil Procedure. The record shows that the order settling the final account and distributing the estate was made on August 13th, and likewise shows that the application to have the court fix attorney's fees was not filed with the clerk until the 29th of August. Hence there is no foundation for the contention that at the time of the making of the order a motion was pending to have the court fix attorney's fees. Nor is there any affidavit or showing that the orders were inadvertently made, so as to bring the case within the provisions of said section 473. That a court may, in a proper case and upon a proper showing, acting under the provisions of this section, afford relief to a party, provided the application therefor be made within six months from the action complained of, we have no doubt. But there must be some showing of mistake, inadvertence, surprise, or fraud. De Pedrorena v. Superior Court, 80 Cal. 144, 22 Pac. 71. In the Nason Case this court said:

> "In the case at bar, the fact that the decree of discharge was inadvertently made was not presented as one of the grounds of the motion to set aside that decree. No fact appeared in the record from which inadvertence of the court may be inferred. The order itself, now under review, while it states that the decree of discharge was made inadvertently and ex parte, does not indicate any particular in which the court had acted improvidently or inadvertently. Under such circumstances we cannot, from the mere assertion contained in the order, indulge in a presumption that the judge knew of some inadvertence which would justify the order."

Since the court makes a like finding, the language is applicable to the vacating orders made in this case. There is no showing whatsoever of any facts which would constitute inadvertence. All that is made to appear is that, after regularly acting upon evidence adduced which the court at the time deemed sufficient, it afterwards concluded the proof made was insufficient and thereupon vacated the orders. The law does not authorize such action. Robson v. Superior Court, 171 Cal. 588, 154 Pac. 8. There were no extrinsic matters which affected the decision of the court in making the original orders, and the fact that they were based upon false representations or testimony of the administratrix, who furnished the evidence upon which the court acted, constituted no ground for vacating the orders so regularly made. Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159.

[3] We may repeat that we adhere to what was said in the opinion in the Nason Case, the language of which we deem de-

terminative of this, viz. that the court had no power to set aside and vacate the orders, save and except under the provisions of section 473, Code of Civil Procedure, authorizing relief from orders made through a party's mistake, inadvertence, surprise, or excusable neglect, as to which there is no showing.

The orders made, vacating and setting aside the orders settling the final account, decreeing distribution, and discharging the administratrix, are annulled.

We concur: CONREY, P. J.; JAMES, J.

(181 Cal. 193)

STOCK et al. v. PLUNKETT. (Sac. 2756.)

(Supreme Court of California. Sept. 3, 1919. Rehearing Denied Oct. 2, 1919.)

1. Mines and Minerals ⚷15 — Validity of Local Regulations Recognized by Federal Laws.

Rev. St. U. S. §§ 2318–2320, 2324 (Comp. St. §§ 4613–4615, 4620), with reference to the location of mining claims, recognize the validity of local regulations and customs covering locations, and state statutes are construed to have the same force and effect as such regulations.

2. Mines and Minerals ⚷29(5)—Nonconformity of First Notice with State Statute Does Not Render Location Invalid.

Subsequent locators of a quartz mining claim, having seen and read the prior location notice of the first locator, to which his name was signed, cannot take advantage of the fact that such prior notice was undated or was not recorded as required by Civ. Code, §§ 1426, 1426b, the first locator having fully complied with the laws of the United States pertaining to the location.

Olney, J., dissenting.

In Bank.

Appeal from Superior Court, Stanislaus County; W. H. Langdon, Judge.

Action by Hugh E. Stock and another against William R. Plunkett. From judgment for defendant, plaintiffs appeal. Affirmed.

Rehearing denied; OLNEY, J., dissenting.

Edwin V. McKenzie, Harry A. McKenzie, and William F. Herron, all of San Francisco, for appellants.

A. H. Ricketts, of San Francisco, for respondent.

WILBUR, J. A transfer to this court was ordered in the above cause, after an affirmance of the judgment of the superior court by the District Court of Appeal for the Third Appellate District.

[1] The action is an ejectment, involving a contest arising between two locators of a quartz mining claim. The respondent, the first locator, posted an undated notice upon the property on November 13, 1914. The appellants, the subsequent locators, saw such notice before posting their notice of location, observed that it was undated, and based their claim to the property upon the proposition that the notice in question failed to comply with section 1426 of the Civil Code, which requires a location notice to be posted upon a quartz claim, containing, among other things, the date of location, and upon the further assertion that the prior locator did not within 30 days after the posting of his notice of location cause a true copy thereof to be recorded in the office of the county recorder of the county in which the quartz claim was situated, as required by the provisions of section 1426b of the Civil Code. It is conceded that the prior locator fully complied with the laws of the United States pertaining to such location. The only question in the case is the effect of the failure to comply with the provisions of our Civil Code requiring the posting and recording of a dated location notice. The subsequent locators were informed by the posted location notice of the prior claim of the respondent and the extent thereof. By inquiring of the respondent, whose name was signed to the notice, they could have ascertained the nature of his claim and the date of his location. Consequently appellants are charged with knowledge thereof. Civ. Code, §§ 18, 19. The laws of the United States with reference to the location of mining claims expressly recognize the validity of local mining regulations and customs governing locations, and state statutes are construed to have the same force and effect as such regulations. Daggett v. Yreka Mining Co., 149 Cal. 357, 86 Pac. 968; Rev. St. U. S. §§ 2318, 2319, 2320, 2324 (Comp. St. §§ 4613, 4614, 4615, 4620); Clason v. Matko, 223 U. S. 646, 32 Sup. Ct. 392, 56 L. Ed. 588. The question involved here is whether respondent's location, which conforms to the requirements of the United States statute, but fails to conform to the state statute, is valid as against subsequent locators who have seen and read the location notice. This is a federal question, and the principle involved has been passed upon by the United States Supreme Court (Yosemite Mining Co. v. Emerson, 208 U. S. 25, 28 Sup. Ct. 196, 52 L. Ed. 374; Butte & Superior Copper Co., Lim., v. Clark-Montana Realty Co., 249 U. S. 12, 39 Sup. Ct. 231, 63 L. Ed. 447), and by the Circuit Court of Appeals of this circuit (Butte & Superior Copper Co., Lim., v. Clark-Montana Realty Co., 248 Fed. 609, 160 C. C. A. 509). The decisions of the former are binding on this court, and those of the latter are entitled to great weight in determining such federal question.

[2] The Supreme Court of the United States, since the decision of the District Court of Appeal in this case, in Butte & Superior Copper Co., Lim., v. Clark-Montana Realty Co., supra, has held that subsequent locators, having knowledge of the previous location, could not avail themselves of defects in the prior location, and in so holding declared that it was unnecessary to determine which was correct—the decisions of the Montana Supreme Court, holding that the defect in question, a failure to comply with the state law in reference to the recordation of a certificate of location, invalidated the location, or the rule announced by the District Court (233 Fed. 547), and af-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

firmed by the Circuit Court of Appeals of the Ninth Circuit (248 Fed. 609, 160 C. C. A. 509) in the same case, declining to follow the Montana Supreme Court. The decision of the District Court and its affirmance by the Circuit Court of Appeals in the last-mentioned case were based upon the rule that, where the local statute failed to expressly declare the invalidity or forfeiture of a location which did not conform to the state law, a failure to comply therewith did not work a forfeiture. While the United States Supreme Court refrained from deciding this point, its decision in that case determines the proposition that such location, even though failing to comply with the state law, was good as against a subsequent locator having notice thereof. This is made clear by the following statement in the opinion:

> "The District Court, and the Circuit Court of Appeals, affirming it, decided both issues against appellant on the grounds: (1) That the Montana cases did not furnish the rule of decision for the federal courts, the better reasoning being (for which cases were cited) that, as the Montana statute did not impose a forfeiture, hence none resulted from defects in the declaratory statement of the Elm Orlu. (2) That the Elm Orlu people [the first locators] were in possession of their claim, working the same—of which the Black Rock people [the second locators] had knowledge—and that hence the latter could not avail themselves of the defects in the location of the Elm Orlu. Yosemite Mining Co. v. Emerson, 208 U. S. 25, 28 Sup. Ct. 196, 52 L. Ed. 374, was adduced. In the latter ground we concur, and we need not express opinion of the other, although it has impressive strength, and was conceded to have in Yosemite Mining Co. v. Emerson. * * * Yosemite Mining Co. v. Emerson was concerned with a regulation of the state of California which prescribed the manner of the location of a claim. The regulation had not been conformed to, and the validity of the location was attacked on that ground by a subsequent locator, who had had notice of the claim; he contending that there was forfeiture of it. The contention was rejected, and we said that to yield to it would work great injustice and subvert the very purpose for which the posting of notices was required, which was, we further said, 'to make known the purpose of the discoverer to claim title to the' claim 'to the extent described and to warn others of the prior appropriation.' The comment is obviously applicable to the asserted defects in the declaratory statement of appellees. It, like the California requirement, had no other purpose than 'to warn others of the prior appropriation' of the claim, and such is the principle of constructive notice. It—constructive notice—is the law's substitute for actual notice, and to say that it and actual notice are equivalents would seem to carry the self-evidence of an axiom. Besides, in this case there was an unequivocal possession of the Elm Orlu and it is elementary that such possession is notice to all the world of the possessor's rights thereunder."

The case of Yosemite Mining Co. v. Emerson, 208 U. S. 25, 28 Sup. Ct. 196, 52 L. Ed. 374, thus referred to by the Supreme Court of the United States, was a decision rendered on a writ of error from this court. The question involved was the validity of a location where the locator had posted only one notice at one end of a claim, while the local mining regulations of Tuolumne county required the posting of two notices, "one of which shall be posted in a conspicuous place at each end of the claim." This court held, upon the first appeal of that litigation (Emerson v. McWhirter, 133 Cal. 510, 65 Pac. 1036), that in the absence of an express declaration in the mining rules that such failure worked a forfeiture of the mining claim it would not have that effect. The case having been reversed, it was retried and again appealed to this court, after substitution of parties, and it was held that this decision had become the law of the case. Emerson v. Yosemite Gold Min. & Mill. Co., 149 Cal. 50, 85 Pac. 122. The Supreme Court of the United States, upon the writ of error, declined to pass upon the question of whether or not the failure to comply with the local mining regulations invalidated the location, holding that that question was immaterial in view of the knowledge of the subsequent locator of such defective location. It follows, from these decisions of the Supreme Court of the United States, that the appellants herein, having seen and read the prior location notice of the respondent, cannot take advantage of the fact that such notice was undated, or of the fact that it was not recorded.

It is claimed, however, that, whatever the view of courts of other jurisdictions, our own court has affirmatively decided in Dwinnell v. Dyer, 145 Cal. 12, 78 Pac. 247, 7 L. R. A. (N. S.) 763, that a failure to comply with a law of this state with reference to location notices invalidates such location. Even if this were true, we would be bound to follow the decisions of the Supreme Court of the United States. The case of Dwinnell v. Dyer dealt with mining locations that had been made under the statute of 1897, regulating the posting and recordation of a mining location notice (Stats. 1897, p. 214), which expressly provided that locations which did not conform thereto were void (Id. § 6). While that provision of the statute is not specifically pointed out in the decision, it is evidently the basis of the assumption by the attorneys and by the court that locations which failed to conform to the state statute were void. Previous to the enactment of this statute this court had held in Donahue v. Meister, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283, decided in 1891, and Emerson v. McWhirter, supra, decided in 1901, that a failure to conform to a local regulation with reference to the manner of making a location, in the absence of a rule declaring a forfeiture for such failure, did not render it invalid, and could not be taken advantage of by a subsequent locator having knowledge of the actual location. We had also held in Webb v. Carlon, 148 Cal. 555, 83 Pac. 998, 113 Am. St. Rep. 305, decided in 1906, involving a location made after the repeal of the statute of 1897, that a failure to comply with a mining rule which required the record of a mining location in Tuolumne county, did not invalidate the claim by reason of an erroneous date (the notice having been posted October 20th, but dated October 23d), as against one who located the claim October 22d, although under section 2324 of the Revised Statutes of the United States it was required that records of locations when made should contain the date of the location, etc. It should be noted also that the legislation of 1909 is essentially different from that of 1897, in that the law of 1909 did not, and the law of 1897 did, declare a forfeiture for a failure to comply therewith. Furthermore, in view of the fact that previous to the enactment of section 1426 et seq. of the Civil Code in 1909 this court had held that a failure to conform to mining rules governing a location did not invalidate the location when the rule did not expressly so declare (Emerson v. McWhirter, supra), and that the United States Circuit Court of Appeals of this district had, in effect, adopted the same rule of decision (see Butte & S. Copper Co. v. Clark-Montana Realty Co., 248 Fed. 612, 160 C. C. A. 509, supra, and cases cited), and that this court had held that such failure did render a location invalid where the local rule or statute did expressly declare such invalidity (Dwinnell v. Dyer, supra), and that the United States Supreme Court had concurred in that view in Butte Water Co. v. Baker, 196 U. S. 119, 25 Sup. Ct. 211, 49 L. Ed. 409, a case from Montana (see, also, Clason v. Matko, 223 U. S. 646, 32 Sup. Ct. 392, 56 L. Ed. 588, decided in 1912), the fact that the Legislature did not expressly declare that a failure to comply with its new regulations concerning mining locations would invalidate such locations is conclusive that no such result was intended.

As the point involved in this case is thus covered by our own and by authoritative decisions of the Supreme Court of the United States, it is unnecessary to discuss or consider the numerous cases cited from other states or federal courts. It follows that the location notice of the respondent, even though undated, was sufficient to establish his rights against the appellants—subsequent locators having notice of the prior location.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; LAWLOR, J.; MELVIN, J.

OLNEY, J. I dissent. The main opinion in its discussion is beside the mark, and touches upon the real point involved only in the most casual fashion. Its conclusion is rested primarily upon the authority of Butte, etc., Co. v. Clark, etc., Co., 249 U. S. 12, 39 Sup. Ct. 231, 63 L. Ed. 447, very recently decided by the Supreme Court of the United States. The essential facts in that case were that, while the first locators were in actual—not merely constructive—exclusive and notorious possession of the claim and working it, the second locators attempted to locate it, relying upon the fact that the notice of location by the first locators was defective in some particular required by the statutes of Montana, in which state the claim was situate. The court held that under these circumstances the second location was inferior to the first, putting its decision in express terms solely on the ground:

> "That the Elm Orlu people [the first locators] were in possession of their claim, working the same—of which the Black Rock people [the second locators] had knowledge—and that hence the latter could not avail themselves of the defects in the location of the Elm Orlu."

Without exception every decision cited in the main opinion here to support its conclusion upon this point involves similar facts. These decisions are to the point alone that, where a would-be locator has notice or knowledge of a subsisting and genuine prior location, and particularly when the first locator is in actual possession of and working the claim, which fact is notice to all the world, the would-be locator cannot take advantage of defects in the posted or recorded notice of the first locator, that he has in fact the notice or knowledge which it was the purpose of the statute should be given by the posted or recorded notice required, and that having such notice or knowledge it is enough.

But the present case is not of that character. The first locator made his location on November 13, 1914. He posted a location notice, but it was undated. The location would expire at the end of the following year, unless the necessary assessment work was done. It was impossible for any one reading the notice to know, when it would so expire, or in the absence of assessment work that there was a subsisting location there claimed. Nor did the first locator record his notice, so that any information could be derived from that source. He did not do the assessment work or remain in possession of the property. Some 10 months later, in September, 1915, the second locator came upon the ground, which was wholly unoccupied. So far as appears, he had no notice or knowledge of the first location, except such as he received from the undated notice of the first locator, which he found and read. But this did not, as has been indicated, inform him as to the essential point for which a posted and recorded notice is required by the statute, namely, that there was a then subsisting location.

So far as he could tell, the ground might at that time have been wholly unclaimed and open to location. The second locator, by an employé, remained in actual possession of the property, doing work thereon, until the following month, October, when the first locator came upon the scene, rifle in hand, to do his assessment work, and ejected the employé of the second. It is plain that such facts are not within either the actual decision or the principle of such cases as Butte, etc., Co. v. Clark, etc., Co., supra.

On the other hand, the facts do bring the case within the principle of Butte City Water Co. v. Baker, 196 U. S. 119, 25 Sup. Ct. 211, 49 L. Ed. 409, where it was held that the first location was inferior to the second, when the notice of the first location did not contain certain matter required by the Montana statutes. The main opinion here cites the last-mentioned decision as one "where the local rule or statute did expressly declare such invalidity." The decision is not put on that ground, and the statute did not in fact so provide. Butte, etc., Co. v. Clark, etc., Co., 248 Fed. 609, 612, 160 C. C. A. 509.

The true doctrine of the cases may, I believe, be stated with fair accuracy as follows: (a) If the requirements of the statute are observed, the location is valid, and is protected against subsequent locators, regardless of whether they have notice or knowledge of the first location or not. (b) Conversely, if the requirements of the statute are not complied with, as, for instance, if the location notice is defective in a material particular, and a second location is made in good faith by a party who has neither knowledge nor notice, actual or constructive, of the first location, the first location, being defective, will not be protected, but is inferior to the second. If this is not the case, the whole state statute might just as well have never been enacted. (c) If the first location be defective, but the second location be made by a party who had knowledge or notice of the prior location, and particularly where there is such notice because the first locator is in actual possession working the claim, the first location, although defective, is nevertheless superior to the second location so made.

If the foregoing is a correct statement, the first location here was defective, and the real question in the case is whether or not the reading by the second locator of the undated notice posted by the first is sufficient to charge him with notice of the first location. Practically all that is said in the main opinion on this point is that the second locator, by inquiring of the first, could have ascertained the date of the location, and therefore he should be charged with knowledge of it. But could the second locator inquire of the first? He may not know who he is, or where he is to be found. If the first locator is a wandering prospector, who has apparently gone his way, and the notice is old, as it was in this case, finding him would be a most uncertain task. Locations are frequently, if not usually, made in remote and almost inaccessible places, and the legislation should be reasonable as to locations so made. It seems to me wholly unreasonable to require of a locator, prospecting ground on which there is an old and undated location notice, either to spend days, weeks, or maybe months, hunting the first locator, or else to spend his time, labor, and possibly money in making a discovery at his peril. It is easy to imagine, also, just how much information the first locator would probably give when inquiry was made of him, and just how much reliance could be placed in any statement he might make. In the majority of cases the only result of an inquiry of the first locator would be a hasty and immediate trip on his part to the claim, to see what was there, with a consequent probability of litigation, and a fair chance of more violent methods of settling the almost certain dispute. I do not believe the second locator can properly be charged with the duty of inquiring of the first under such circumstances.

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SMITH v. ROYER et al. (L. A. 4943.)

(Supreme Court of California. Aug. 29, 1919. Rehearing Denied Sept. 25, 1919.)

1. ANIMALS ⟹72 — HARBORER OF VICIOUS DOG LIABLE FOR INJURIES CAUSED.

The harborer and keeper of a dog known by him to be vicious is responsible for injury caused by it, regardless of ownership.

2. ANIMALS ⟹72—WHEN EVIDENCE ESTABLISHES OWNERSHIP OF VICIOUS DOG.

Where defendant was the head of a family having possession and control of a house and premises, and suffered or permitted to be kept thereon the dog which attacked and personally injured plaintiff, the fact that plaintiff's son, who was away at school at the time of the injury, testified to his own ownership of the dog, did not present a conflict with other testimony showing that defendant kept and harbored the dog.

3. ANIMALS ⟹74(5)—WHEN EVIDENCE SUFFICIENT TO IDENTIFY VICIOUS DOG.

In a personal injury action, where evidence showed that plaintiff was attacked by certain dogs answering description of those defendants had harbored on the ranch for two or three years prior to such injury, it cannot be urged that there was no evidence showing that the dogs harbored by defendants were the dogs which attacked plaintiff.

4. ANIMALS 🔑70—KNOWLEDGE OF WIFE HAVING CUSTODY OF VICIOUS DOG IS KNOWLEDGE OF HUSBAND.

Actual notice to the owner or keeper that a dog is vicious is not necessary; notice to or knowledge of his wife while she was with his knowledge in custody or control of the dogs, or to his agent in such control, being sufficient.

5. ANIMALS 🔑74(5)—WHEN EVIDENCE ESTABLISHES KNOWLEDGE OF VICIOUSNESS OF DOG.

In an action for personal injury resulting from the attack by defendant's dogs, evidence *held* to show that defendant's wife was in charge of the premises and had control of the dogs, that defendant was the head of the household, with authority over the premises superior to that of his wife and foreman, and that they had knowledge of the dogs' viciousness, which must be imputed to defendant.

6. NEW TRIAL 🔑71 — MAY BE GRANTED THOUGH VERDICT BASED ON CONFLICTING EVIDENCE.

In a jury trial, a party is entitled to two decisions on the evidence, one by the jury and one by the trial court, and the latter is not bound by a conflict in the evidence.

7. ANIMALS 🔑74(5)—SUFFICIENCY OF EVIDENCE TO SUSTAIN VERDICT FOR PLAINTIFF.

In an action for personal injuries resulting from an attack by defendants' vicious dogs, evidence *held* to present no substantial conflict on the question of defendants' liability, based on knowledge of the dogs' viciousness.

8. DAMAGES 🔑131(2)—WHEN DAMAGES FOR WOUND BY DOG NOT EXCESSIVE.

Where plaintiff, 70 years of age, was attacked while riding a bicycle by two vicious dogs, receiving a wound in his leg which had to be dressed twice a day by a trained nurse for three weeks, during which he was confined to his home, and daily for three weeks thereafter, and it was more than three months before he could walk without experiencing pain, and he sustained a severe nervous shock, which continued until time of trial, a verdict of $700 is not excessive.

9. APPEAL AND ERROR 🔑1078(6)—GRANT OF NEW TRIAL REVERSED AS WITHOUT SUPPORT.

On appeal from an order granting a new trial, notwithstanding appellants limited their contention on appeal to two grounds, the entire record must be reviewed, and where it fails to disclose any ground supporting such order, it must be reversed.

Department 1. Appeal from Superior Court, Orange County; William H. Thomas, Judge.

Action by C. H. Smith against J. O. Royer and Mrs. L. Royer. Judgment for plaintiff, and from an order vacating and setting aside the judgment, and granting a new trial, the plaintiff appeals. Order reversed.

Tipton & Cailor, of Los Angeles, for appellant.

Williams & Rutan, of Santa Ana, for respondents.

LAWLOR, J. This is an appeal by the plaintiff from an order vacating and setting aside the judgment and granting a new trial.

Action was brought by the plaintiff in the superior court of Orange county against the defendants to recover damages for personal injuries sustained as a result of an attack by two vicious dogs, alleged to have been harbored and kept by the defendants, who, it is further alleged, knew of the vicious characteristics of the dogs and that they were accustomed to bite people. The complaint prayed for damages in the sum of $2,550. The case was tried by jury, and a verdict in favor of the plaintiff was rendered in the sum of $700. Judgment was entered on the verdict, with costs to the plaintiff, amounting to $36.65.

On January 20, 1914, the plaintiff, a man 70 years of age, while riding his bicycle along the sidewalk in front of the "Royer place" in the city of Anaheim, was attacked by two dogs, a St. Bernard and a bull terrier, which rushed out from the Royer place. The St. Bernard sprang upon the plaintiff and barked at him in a threatening manner, while the smaller dog, the bull terrier, seized the plaintiff by the calf of his right leg, tearing his clothes, and inflicting a painful wound. Following the attack the plaintiff was confined to his home for a period of 3 weeks, suffering from the wound in his leg and from a severe nervous shock. The plaintiff was not able to walk without experiencing pain from the bite for more than 3 months, and he testified at the trial, more than 2 years after the injury, that he was still suffering somewhat from the nervous shock.

No reason was assigned for ordering a new trial, but it was stated that it was "not on the ground that the jury violated the instructions of the court." However, in their notice of motion to vacate and set aside the judgment and for a new trial, the defendants set out the following statutory grounds: (1) Newly discovered evidence material to the defendants, which they could not with reasonable diligence have discovered and produced at the trial. (2) Excessive damages appearing to have been given under the influence of passion or prejudice. (3) Insufficiency of the evidence to justify the verdict. (4) That such verdict is against law. (5) Misconduct of the jury. (6) Errors in law occurring at the trial and excepted to by the defendants.

The record discloses that the defendants, in arguing the motion, urged but two points: (1) Excessive damages; and (2) insufficiency of the evidence. The arguments of the defendants in their brief on appeal are also confined to these two points.

[1] 1. The defendants contend that the "evidence was either conflicting upon material issues, or there was no evidence to support certain material issues necessary for the plaintiff to prove." In this connection the defendants point out that the evidence shows that there were two St. Bernard dogs on the place—one belonging to the defendant J. O. Royer; the other to his son-in-law, Walter Olmstead; so that the St. Bernard which attacked the plaintiff may or may not have belonged to the defendant J. O. Royer, while the other, the bull terrier, was owned by Max Royer, the adult son of the defendants. Hence they argue that, since it was admitted by the plaintiff that it was the bull terrier alone which did the biting, they are not responsible for the damage done by this dog, because he did not belong to them. In other words, the position of the defendants is that, before liability can be established in such a case, one of the things which must be proved is that the defendant is the owner of the dog. The contention ignores the element of damage which may have been caused by the St. Bernard; but, even assuming that the legal injury is to be limited to the damage caused by the bull terrier, and that the ownership of the bull terrier was in the son of the defendants, the fact of ownership would be immaterial, and we must presume, in the absence of such a specification in the order, that the new trial was not granted upon that ground. This would also be true as to the ownership of the St. Bernard, which by its barking and threatening manner, it was alleged, contributed to the injury. The rule of decision in this and other jurisdictions is against the contention of the defendants. It has been held in similar cases that in order to recover damages it is necessary to prove: (1) That the dog bit the plaintiff. (2) That the dog was vicious and accustomed to bite people. (3) That this fact was known to the defendant. (4) That the dog was harbored or kept by the defendant. The question of ownership is not an issue in such cases. Wilkinson v. Parrott, 32 Cal. 102; Strouse v. Leipf, 101 Ala. 433, 14 South. 667, 23 L. R. A. 622, 46 Am. St. Rep. 122, and cases there cited. Hence, any insufficiency in the evidence to establish the ownership of the dogs was not material, and could not properly have been made the basis of an order granting the new trial.

[2] But the defendants go a step further and cite the record that Max Royer testified that he owned the property where these dogs were kept—that it was his home. From this it is argued that he alone would be responsible for the injury, since it was his dog, kept on his premises, which did the biting. Max Royer did testify that he owned the place where the dogs were kept, and that it was his home, but he also testified that it was the home of his mother and father; that his father had deeded to him, in 1910, the part of the property upon which the house stood, and that the title had been in his name since that time; that his brother-in-law, Walter Olmstead, was the manager or foreman of the ranch known as the Royer place, 20 acres of which belonged to the Anaheim Investment Company; that he himself did not run the ranch, or in any way exercise control over it, but that Mr. Olmstead took his orders from J. O. Royer, defendant herein; and that at the time the plaintiff was attacked by the dogs he (Max Royer) was away at school. Therefore the contention of the defendants that there was a conflict or an insufficiency in the evidence to establish the fact that the defendants kept and harbored the dogs is without foundation. It has been held that if the head of a family, having possession and control of a house or premises, suffers or permits an animal to be kept on the premises, he may be regarded as the keeper. 3 Corpus Juris, 106.

[3] The defendants further urge that there is no evidence establishing or tending to establish the fact that the dogs which attacked the plaintiff on January 20, 1914, were the same dogs which other witnesses had testified were kept on the Royer place, and which dogs were of a vicious nature. There is no merit in this contention. It was established by the testimony of witnesses Max Royer, J. L. Thompson, and the plaintiff that certain dogs answering to the description of the ones which caused the injury to the plaintiff had been on the ranch for 2 or 3 years prior to January 20, 1914. This evidence stands uncontradicted.

[4] The defendants further contend that there is no evidence that the defendant J. O. Royer ever had any knowledge of the vicious character of any of the dogs. It is true that there is no direct evidence that the defendant J. O. Royer was ever personally notified that the dogs on his place were accustomed to run out and bark at and attack people. But it seems to us idle to assume, in view of the fact of his residence on the place and the other evidence, that J. O. Royer did not have personal knowledge of the vicious propensities of the dogs. Moreover, actual notice to the owner or keeper of a vicious dog is not necessary; notice to or knowledge of his wife, while she was with his knowledge in custody or control of the dogs, or to his agent in such control, is sufficient. 2 Cyc. 378.

[5] There is a partial conflict in the evidence as to whether Mrs. L. Royer had personal knowledge or was notified of the vicious nature of the dogs. What we have said touching the personal knowledge of J. O. Royer applies with increased force to his wife, who, according to the testimony of the plaintiff and the witness Thompson, was

notified of previous attacks by the animals. Plaintiff testified that on one occasion, a few months before he was injured, while he was riding by the Royer place on his bicycle, these same dogs "dived" out at him, and that Mrs. Royer was standing on the sidewalk and prevented them from doing him any harm at that time by calling them off, and that he had then told Mrs. Royer that the dogs were dangerous, and that they should be tied up or otherwise taken care of. Mrs. Royer denied that such an incident had ever occurred. She testified that to her knowledge she had never seen the plaintiff in her life until he was pointed out to her in the courtroom. Plaintiff attempted further to show that the defendant J. O. Royer had constructive notice through his agent, Mr. Olmstead, the foreman of the ranch. In this behalf, John Kellenberger, the city marshal of Anaheim, testified that he had visited the Royer place, as deputy assessor, more than two years before January 20, 1914, and that at that time he had seen two dogs there; that they had rushed upon him in a threatening manner, and that Mr. Olmstead had called them off. One of these dogs was a St. Bernard; the other, a small white Spitz. There is no direct evidence of identity between the dogs which attacked Mr. Kellenberger and those which inflicted the injury on the plaintiff, unless such identity may be inferred from the fact that two St. Bernards were kept on the place, and that on each of the two occasions the attacking dog was accompanied by a St. Bernard. The testimony of Mr. Thompson that he called at the Royer place in August, 1913, and while there was attacked by dogs answering the description of those that injured the plaintiff, stands uncontradicted. The witness testified that he had been employed as a driver for the Standard Oil Company; that in this capacity he had often visited the Royer place to deliver oil; that on such an occasion in August, 1913, he was attacked by three dogs—two large St. Bernards and a white bulldog; that the three dogs set upon him, and that the bulldog bit his hand, while one of the St. Bernards bit his leg, the other St. Bernard tearing his clothes, but doing no damage otherwise; that after he had kicked himself free from the dogs Mrs. Royer came out and took him into the house and administered first aid to his injuries; that as a result of this attack he was laid up for three weeks. Mr. Thompson further testified that he had occasion to pass the Royer place several times after that during the year 1913, and that on each of these occasions he saw the same dogs about the place; that the last time he had been by the place was in December, 1913, and that he had seen the same dogs there at that time. This would seem to be sufficient to establish the fact, through the knowledge of his wife, that defendant J. O. Royer knew the vicious character of the dogs kept on the place, and, from the description, that these were the same dogs which attacked the plaintiff, inflicting the injury complained of.

The evidence shows, without conflict, that Mrs. Royer was in charge of the premises and had control of the dogs, and that J. O. Royer was the head of the household, with authority over the premises superior to that of his wife or of the foreman, Olmstead. If either the wife or the foreman, in the exercise of their functions as custodians, obtained knowledge of the vicious character of the dogs, it was their duty, respectively, to inform their superior, J. O. Royer, of the fact. Their knowledge, so obtained of that fact, is imputed to him and he is chargeable therewith. The fact that they both had knowledge of the vicious nature of the dogs, as has been shown already, was established by uncontradicted evidence. There was, therefore, no cause for granting a new trial to J. O. Royer on the ground that the evidence was insufficient to charge him with that knowledge; and, of course, there was no such cause respecting Mrs. Royer, who was also a defendant.

[6, 7] We have reached the conclusion that the contention of the defendants that the order granting a new trial was made upon the ground of the insufficiency of the evidence cannot be supported. In a jury trial a party is entitled to two decisions on the evidence—one by the jury and one by the trial court, and the trial court is not bound by a conflict in the evidence. Dickey v. Davis, 39 Cal. 565; Curtiss v. Starr, 85 Cal. 376, 24 Pac. 806; Bates v. Howard, 105 Cal. 173, 38 Pac. 715; Condee v. Gyger, 126 Cal. 546, 59 Pac. 26; Green v. Soule, 145 Cal. 96, 78 Pac. 337. In passing upon the question before us, we are not to weigh the evidence, but only to consider its legal sufficiency, as distinguished from its probative force, and accept a substantial conflict as conclusive upon us. After examining the evidence, we find that there is no substantial conflict on the question of the liability of the defendants. It has not been questioned that the plaintiff was injured by dogs kept and harbored by the defendants on the premises where they resided. The defendants offered no evidence that the dogs were not vicious. Indeed, with the exception of the denial of Mrs. Royer that plaintiff was once pounced on by the dogs in her presence, the evidence that the animals were vicious and had previously attacked persons stands uncontradicted. The only dispute in the evidence is whether the defendants had knowledge that the dogs were accustomed to attack and bite people. On this question we do not think it can be maintained that there was a substantial conflict. From the evidence it is inconceivable to us that either the jury or the trial court believed that the defendants did not have knowledge within the meaning of

the decisions, that the dogs had vicious propensities and were accustomed to attack people. Here, according to the evidence, we have the case of a man and his wife living together on a place where, for several years, they kept and harbored vicious dogs, and yet it is insisted that the evidence does not show that they knew of the dangerous propensities of the animals. In our view, the proof of scienter is so complete that it would involve a waste of effort to discuss the argument on behalf of the defendants on the subject. As already pointed out, there are some discrepancies in the testimony as to identity between the dogs that figured in previous attacks and those that injured the plaintiff, but the absence of complete harmony in the testimony on this point, in view of the fact that it is not every individual who can distinguish the different species of dogs, cannot, any more than the contradiction of Mrs. Royer of the testimony of the plaintiff as to the action of the dogs in her presence on a previous occasion, be held to constitute a substantial conflict in the face of the inherent probabilities arising from the evidence bringing liability home to the defendants for the injury. And the contention that the trial court disagreed with the jury as to the facts is, in our opinion, equivalent to a declaration that the former disregarded the evidence.

[8] An examination of the evidence precludes the suggestion that the new trial was granted upon the ground of excessive damages, the second point urged by the defendants. Assuming that the trial court believed that the plaintiff was entitled to recover, we find no warrant for the conclusion that it deemed a verdict for $700 disproportionate to the injury suffered. As we have stated, the plaintiff was an old man 70 years of age at the time of the injury; he was confined to his home for a period of 3 weeks, during which time his wound was dressed twice a day by a trained nurse, and daily for 3 weeks thereafter, and it was more than 3 months before he could walk without experiencing pain, and he sustained a severe shock, produced partly by his dread of hydrophobia, from which shock he was still suffering at the time of the trial. It was said in Harrison v. Sutter Street Ry. Co., 116 Cal. 156, 47 Pac. 1019, approved in Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 Pac. 513:

> "It is only where the verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts, as to shock the sense of justice, and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment, that the judge is at liberty to interpose his judgment as against that of the jury."

We must hold, therefore, that the trial court did not view the verdict of $700 as "grossly disproportionate to any reasonable limit of compensation warranted by the facts," nor "based on prejudice or passion rather than sober judgment."

[9] The granting of a new trial rests very largely in the trial court, and such an order will not be disturbed if it can be upheld upon any ground shown by the records. Hitchcock v. Rooney, 171 Cal. 285, 152 Pac. 913, and cases there cited. Hence, notwithstanding the defendants limited their contention on appeal to the two grounds herein discussed, we have examined the entire record, in order to determine whether the order can be supported upon any ground, and, none appearing to us, the order must be reversed.

Order reversed.

We concur: SHAW, J.; OLNEY, J.

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SIEGEL v. HECHLER et al. (L. A. 4935.)

(Supreme Court of California. Sept. 3, 1919.)

1. PRINCIPAL AND SURETY 🔑115(1)—PREMATURE PAYMENT OF SUBCONTRACTOR'S DEFAULT WILL NOT RELEASE SUBCONTRACTOR'S SURETY.

In an action by a contractor upon a bond of a subcontractor guarantying performance of the contract, the effect of contractor's premature payment of subcontractor's defaults would not be to release the surety from the whole bond, but only from the amount so paid.

2. PRINCIPAL AND SURETY 🔑115(1)—CONTRACTOR'S IMMEDIATE PAYMENT OF CLAIMS AGAINST SUBCONTRACTOR NOT PREMATURE.

Where a subcontract provided that subcontractor should save contractor free and harmless from any liability that might accrue from the former's default, and subcontractor's bond bound the surety company to the performance of such covenant, upon breach by subcontractor, the contractor's immediate payment of parties performing work and furnishing material, who were entitled to a lien under Code Civ. Proc. §§ 1184, 1187, was not premature, and did not violate the contract or affect the bond's validity.

Department 1.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Fred W. Siegel against G. A. Hechler and the Southwestern Surety Insurance Company. From a judgment for plaintiff upon the bond of defendant Hechler, the Surety Company appeals. Affirmed.

Hickcox & Crenshaw, of Los Angeles, for appellant.

Overton, Lyman & Plumb, of Los Angeles, for respondent.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

SHAW, J. The Southwestern Surety Insurance Company appeals from a judgment against it in favor of plaintiff upon a bond executed by it as surety for G. A. Hechler for the performance of a subcontract between Hechler and the plaintiff for the doing of a part of the work upon a building under erection by Siegel.

The Marlborough School for Girls, a corporation engaged in the business of conducting a girls' school, made a contract with Siegel for the erection of a school building on its premises at the contract price of $70,000. The contract, with elaborate plans and specifications, was duly filed in the recorder's office on July 12, 1915. Siegel and Hechler entered into a subcontract, whereby Hechler agreed to do the excavation and concrete work on the building as required by said plans and specifications, for the sum of $7,000. Hechler began work on the subcontract about September 7, 1915, and continued at the work until November 7, 1915, at which time he absconded, leaving the work unfinished. Siegel completed the subcontract work at his own expense. Hechler was made a defendant, but he was not served with process. The case proceeded to judgment against the surety company alone.

The complaint alleges that while Hechler was engaged in the work Siegel paid him, in accordance with the terms of the contract, $4,537.87; that after Hechler abandoned the work Siegel paid for labor performed upon, and materials and supplies used in, the subcontract work by Hechler and left unpaid by him, sums amounting to $3,925.33; and that in completing the building after the abandonment by Hechler plaintiff expended $2,139.43, which was the reasonable cost of such completion. He asked judgment for the difference between the aggregate of these sums and $7,000, the subcontract price.

The denials and affirmative allegations of the answer set up the defense that the sums, amounting to $4,537.85, alleged to have been paid to Hechler while the work was going on, were not paid "in accordance with the terms of said contract," and that Siegel violated his agreement with Hechler, for the performance of which the bond was given, by paying money to Hechler in excess of the amount due on the subcontract at the time of such payment, whereby, it is claimed, the surety was released.

The court found that while Hechler was engaged in the work Siegel paid him "in accordance with the terms of said subcontract" $4,526.90; that after the abandonment Siegel paid $3,925.33 on bills due from Hechler for materials and labor used in the subcontract work; and that Siegel completed the work on the subcontract at the reasonable expense of $2,139.43. This made an excess of $3,591.66 paid out by Siegel over the subcontract price, for which excess judgment was given in favor of the plaintiff.

The terms of the subcontract regarding payments by Siegel to Hechler, and which it is claimed Siegel violated by premature payments, were as follows:

> "Second. That the said general contractor will, in consideration of the said covenants and agreements being strictly performed and kept by the said subcontractor, as hereinabove mentioned, well and truly pay or cause to be paid unto the said subcontractor the said sum of money above mentioned as the subcontract price, in the manner following: Such amounts as Hechler may need for pay roll on or before 12 o'clock noon of each and every Saturday following beginning of work and balance 35 days after completion of this contract; but in the event that the general contractor should deem himself insecure by reason of a possibility that the laborers or the materialmen of the subcontractor may file claims of liens upon said property, or may give to the owner notices to withhold money from the general contractor, then the general contractor may at his option withhold further payments until furnished with receipts or releases from all such materialmen and laborers."

[1] It is the contention of the plaintiff that the phrase "such amounts as Hechler may need for pay roll on or before 12 o'clock noon of each and every Saturday following beginning of work" covers only payments of the weekly wages of the men employed by Hechler, or other regular weekly sums contracted to be paid by him for the doing of work on the subcontract. It appears from the evidence that in the course of the work Hechler incurred bills in the performance thereof upon which Siegel paid the sums following, to wit: On September 23, 1915, to Butterfield & Scaer, $350, for steam shovel work; October 1, 1915, to E. E. Scott, for hauling and excavating, $450; and on October 21, 1915, to L. A. Rock & Gravel Company, $759, for materials used in the work—a total of $1,559. The point made by the appellant is that these sums could not have been included in any pay roll, within the meaning of the subcontract, and that under its terms they did not become due to Hechler, or payable on his account, until 35 days after the completion of his subcontract. The argument is that by this departure from the terms of the contract the surety was prejudiced, and thereby it was released from its obligation. If the words "pay roll" have the meaning this argument assumes, the abovementioned payments were premature, so far as the terms of the subcontract just quoted are concerned.

It is not an accurate statement of the law to say that the surety would be released from the entire obligation by reason of premature payments. They would not be an alteration of the contract for the performance of which the defendant had become surety. They would be a departure therefrom, or a violation thereof, effected by the parties during its performance, without the consent of the surety. The legal result of such departure would not be to release the surety from the entire obligation. The effect would be that Siegel would have no cause of action on the bond to recover from the surety that part of Hechler's defalcation that was made up of these premature payments. The authorities cited by appellant, concerning the effect of a material alteration in the contract after the surety has become bound thereon and without its consent, are not strictly applicable.

There are persuasive reasons, growing out of the nature of the subcontract and the work to be done thereunder, in connection with the law as to the liens of mechanics, for giving the above-quoted phrase "pay rolls" a broader meaning. But we take a view of the case which renders it unnecessary to determine whether the narrower or broader interpretation is correct, and we therefore leave the question undetermined. There are other terms of the subcontract and there were other circumstances, both of law and fact, which must be taken into consideration, and which show that Siegel had the right to pay these bills at the time they were paid.

[2] The subcontract provides that Hechler shall save Siegel "free and harmless" from any and all liability which might accrue against or upon Siegel as the result of any default of Hechler in the performance of the subcontract. By the bond executed by the surety company it became bound to the effect that Hechler should perform all the covenants and agreements on his part in said subcontract, including, of course, the one just mentioned, and should indemnify and save harmless the said Siegel against all loss which he might sustain by reason of any claim or claims of lien filed with the county recorder, or any notice given to the owner to withhold money from Siegel for any labor performed or material furnished in the work, "or by reason of any demands or claims which shall be made against said owner or Fred W. Siegel for such labor or materials." Under the law as it stood at the time these contracts were made and the work done, every person furnishing materials or doing work upon the building, whether for a subcontractor or for the general contractor, was entitled to file a lien upon the owner's property and upon the building therefor, at any time within 30 days after he had ceased to labor or had ceased to furnish materials (Code Civ. Proc. § 1187), and such person could also at any time give a stop notice to the owner, and thereby authorize the owner to withhold payments from the general contractor upon the principal contract (Code Civ. Proc. § 1184). It appears from the evidence that the bills aforesaid were presented to Siegel, and that the money was then due from Hechler to the respective claimants for work done or material furnished and used in the building. The answer does not allege, and it is not claimed, that the demands thus made upon Siegel were not then lienable under the law. A stop notice could have been given therefor immediately. Siegel, therefore, immediately incurred a liability, through this default, to have liens filed on the premises for these bills, and stop notices given therefor to the owner to withhold money due to Siegel on the main contract. He was liable to be greatly embarrassed by these consequences of such failure on the part of Hechler. Such failure was a violation of Hechler's covenant to save the general contractor "free and harmless" from any and all liability which might accrue against or upon Siegel as the result of any default of Hechler. It was also a violation of the terms of the bond, whereby the surety undertook that Hechler should perform all the covenants of the subcontract and save Siegel harmless against loss by reason of any demands or claims which might be made against him or the owner for labor or materials upon the subcontract work, and against loss which he might be put to by reason of liens filed or stop notices given to the owner. Hechler having failed, the only way by which Siegel could save himself harmless from such failure and free himself from the liability thus imposed was by paying the bills at once. It was his right, if not his duty, to prevent as much of the damage that might flow from Hechler's nonpayment as he could with reasonable effort, under the circumstances. If he had not been able to pay these bills at the time, and additional damage to himself had followed therefrom, the surety would have had so much the more to pay on the bond.

The mere fact, therefore, that the bills were paid prior to the time specifically fixed by the payment clause of the subcontract for the payment of anything other than the sums necessary for pay rolls, even if it were true, does not determine the question of the surety's release. Siegel had the right to rely upon the other covenants of the contract and bond, whereby the surety became bound for Hechler's failure to save Siegel free from the liability that stop notices and liens should be filed. His payment of these bills for that purpose was therefore not a violation of the contract, but was in accordance with his rights thereunder. The fault was that of Hechler in leaving his bills unpaid, thus to become a demand against Siegel, or a potential lien upon the building being erected by Siegel, and the surety's obligation was that Hechler would not commit such default.

For these reasons we are of the opinion

that the finding of the court, of which appellant complains, to the effect that all sums of money paid by plaintiff to defendant Hechler were paid in accordance with said subcontract and for pay rolls, was immaterial, and not prejudicial to the appellant, even if it were based on an erroneous construction of the contract. The evidence shows that these payments were not made to Hechler personally, but were paid to the respective claimants by Siegel at Hechler's request. As Siegel had a right to pay them, it is immaterial whether they were technically to be included in the pay rolls or not.

There is a general finding that while Hechler was engaged in the work Siegel paid to him, in accordance with the terms of the subcontract, the sum of $4,526.90. This sum includes the above-mentioned payments claimed to be premature. We have shown that these payments were paid in accordance with the terms of the subcontract. This finding is supported by the evidence, and it is sufficient to support the judgment.

The judgment is affirmed.

We concur: **LAWLOR, J.**; **OLNEY, J.**

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42 Cal. App. 497

SEELYE v. SOUTHERN CALIFORNIA CANNING CO. (Civ. 2952.)

(District Court of Appeal, First District, Division 1, California. July 29, 1919.)

APPEAL AND ERROR ⟹1011(1)—FINDING OF FACT ON CONFLICTING EVIDENCE NOT REVIEWABLE.

Findings of fact on substantial conflict in the evidence will not be disturbed on appeal.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by O. L. Seelye against the Southern California Canning Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Goodcell & Goodcell, of San Bernardino, for appellant.

E. H. Jolliffe and Archie D. Mitchell, both of Ontario, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff in an action brought by him against the defendant to recover damages for breach of a contract between the parties for the sale and delivery of the plaintiff's crops of fruit covering a series of years. The said contract was entered into in April, 1914, and by its terms the plaintiff sold and the defendant bought all of the peaches of specified kinds and grades that should be raised upon the plaintiff's orchard during the ensuing five years. The contract contained various conditions as to the care and delivery of the fruit by the plaintiff, and as to the acceptance and payment therefor by the defendant. The plaintiff's crop of fruit for the year 1914 was delivered and paid for pursuant to the terms of the contract but as to the crop for the year 1915 disputes arose between the parties, during which some portions of the fruit tendered by the plaintiff were rejected by the defendant as being below standard as fixed by the contract. Other portions of said fruit were accepted, but, as claimed by the defendant, subject to certain discounts from the contract prices, on account of the fruit being inferior to the grade called for by the terms of the agreement. The parties having disagreed as to these matters, and hence as to the amount due to the plaintiff at the close of the cropping season, the plaintiff instituted this action, wherein he sought to recover for the fruit delivered and tendered by him according to the full contract prices therefor provided in said contract. The trial of the cause was held before the court without a jury, and findings and judgment were thereupon entered in favor of the plaintiff for the amount prayed for in his complaint, whereupon the defendant prosecuted this appeal.

Examination of the briefs of counsel will disclose that the entire discussion of the merits of the case upon appeal is a discussion of matters of fact, and that as to each and every one of said matters, the evidence is in substantial conflict. This being so, the decision of the trial court upon all of such contested matters will not be disturbed upon appeal. The sole contention of the appellant deserving even a passing consideration is the contention that, under the terms of the contract between the parties the appellant, as the purchaser of the fruit in question, was entitled to exercise an unbridled judgment as to whether any portion of said fruit was not in quality up to the specifications of the contract, and was entitled thereupon to elect to accept or refuse to receive said fruit, and that the seller thereof was, under the terms of said contract, bound to abide by the conclusion of the purchaser in this regard, and was not thereafter entitled to insist upon the delivery of such fruit so rejected, and hence that the judgment of the court in respect to so much of the said fruit as the purchaser had thus rejected was erroneous and excessive. We do not so interpret the contract between the parties, but on, the contrary, we are of the opinion shared by the trial court, that if the plaintiff's fruit was of the quality required by the terms of the agreement between the parties, he was entitled to deliver it, and the defendant was bound to receive it or, in the event of his refusal, to pay such damages as were the rightful penalty imposed upon his wrongful rejection of the fruit. The judgment of the trial court imposed this penalty, and in our opinion imposed no more.

There being no merit in this appeal, the judgment is affirmed.

We concur: WASTE, P. J.; BARDIN, Judge pro tem.

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42 Cal. App. 409

KELSEY v. TRACY. (Civ. 2989.)

(District Court of Appeal, First District, Division 1, California. July 28, 1919.)

LIMITATION OF ACTIONS 🔑31—ACTION FOR MALPRACTICE LIMITED TO ONE YEAR.

An action against a physician and surgeon for injuries resulting from want of knowledge and unskillfulness is within Code Civ. Proc. § 340, subd. 3, requiring the action to be begun within a year.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Kenneth G. Kelsey against Coyle J. Tracy. From a judgment for defendant, plaintiff appeals. Affirmed.

Flint & Jutten, of Los Angeles, for appellant.

W. H. Dehm and Burton R. Fitts, both of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from a judgment in the defendant's favor after an order sustaining the latter's demurrer to the plaintiff's second amended complaint.

The action is one in which the plaintiff seeks to recover damages from the defendant for alleged losses of time and wages and for expenses incurred and pain in body and mind suffered by reason of the alleged want of knowledge and unskillfulness of the defendant as a physician and surgeon in the treatment of the plaintiff for certain bodily injuries under an agreement engaging the defendant to treat plaintiff professionally for such injuries. The action was commenced one year and six months after said treatment had ceased. The defendant's demurrer upon the ground that the action was barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure was sustained, and judgment in his favor followed, from which judgment this appeal has been taken.

We are unable to distinguish this case, either as to its substantial facts or as to the issue of law involved, from the case of Harding et al. v. Liberty Hospital Corp., decided by this court in 24 California Appellate Decisions, 1021, which decision was upon rehearing affirmed by the Supreme Court in 177 Cal. 520, 171 Pac. 98. On the authority of that case, and of the cases cited therein, the judgment is affirmed.

We concur: WASTE, P. J.; BARDIN, Judge pro tem.

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42 Cal. App. 353

PEOPLE v. TRIGAROS. (Cr. 667.)

(District Court of Appeal, Second District, Division 2, California. July 23, 1919.)

1. HOMICIDE 🔑244(1)—WHEN EVIDENCE INSUFFICIENT TO SHOW SELF-DEFENSE.

Evidence in homicide case *held* to justify jury's finding against self-defense.

2. HOMICIDE 🔑300(9)—INSTRUCTIONS WITHOUT EVIDENCE TO SUSTAIN SAME PROPERLY REFUSED.

There being no evidence that deceased was known as a dangerous character, there was no occasion for giving the requested instruction, in homicide, as to apprehension of danger from one of rash and violent disposition.

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Rito Trigaros was convicted of manslaughter, and appeals. Affirmed.

Robert J. Adcock, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

SLOANE, J. The defendant was convicted of manslaughter on an information charging him with the murder of Ascension Ramirez. The defendant admitted the killing, but claimed that Ramirez came to his house, insulted and threatened him, and then threw a beer bottle at him, and attempted to assault him with an iron of some description in his hand, and that he shot him in self-defense.

[1] We find no sufficient ground for disturbing the verdict of the jury. The defendant was found guilty of manslaughter. That he shot and killed Ascension Ramirez is not disputed. The only question as to the justness of the verdict arises under the plea of self-defense. The facts testified to on behalf of the defendant, if true, would justify the homicide. The jury evidently did not accept the evidence as true.

According to the testimony on behalf of the people, neither the defendant nor his relatives and friends who witnessed the shooting, in giving an account of what took place to the officer and those accompanying him on their visit to the place of the tragedy soon after it occurred, while they told of the insulting remarks and threats of Ramirez, made any reference to any attempt on his part to attack defendant with a bottle or piece of iron, or any other weapon, although they were questioned as to the nature of the provocation for the shooting. This omission tends to discredit their subsequent story as being fabricated.

The interpreter, Dominguez, who was present at the place of the shooting with the officer, soon after it occurred, testifies:

> "I asked Trigaros if he shot Ascension Ramirez, and he said, 'Yes.' I asked him what was the trouble, and he said: 'He came here and insulted me, and I shot him.' I said: 'Did he threaten you? Draw anything against you?' He said: 'No.' I said: 'That is a poor way to do, to kill a man just because he called you a bad name.'"

The constable, Freeman, who interrogated the defendant at the same time, testifies that in answer to the query as to why he shot Trigaros, he answered that he shot him for "disturbing his peace." The witnesses Freeman and Borden also testify that on the night of the shooting they carefully looked over the ground in the vicinity with their searchlights, and found no evidence of the beer bottle or the iron alleged to have been seen in the hands of the man who was shot, and which defendant's sister-in-law claimed to have found there two or three days later. The evidence as to the size and nature of this piece of iron is very vague and indefinite.

We cannot say that the jury was not justified in rejecting the evidence tending to show a justifiable homicide. "It requires a clear case—one in which there is an absence of evidence against the prisoner, or a decided preponderance of evidence in his favor—to justify an interference with the verdict of the jury." People v. Ah Loy, 10 Cal. 301.

[2] The instructions were ample, and as favorable to the defendant as they properly could be, on the question of self-defense, and fully covered the ground to which the refused instructions were directed. There was no occasion for the instruction as to apprehension of danger from one of rash and violent disposition, as there was no evidence that the deceased was known as a dangerous character. The law of the other instructions, the refusal of which is complained of, was fully covered by instructions given.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

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42 Cal. App. 382

WILLIAMS, Superintendent of Banks, v. CARVER et al. (Civ. 2950.)

(District Court of Appeal, First District, Division 1, California. July 24, 1919.)

JUDGMENT 🔑674—WHEN DECISION ON APPEAL LAW OF CASE IN ANOTHER ACTION.

Decision on appeal that authority attempted to be given by statute to superintendent of banks to maintain action to enforce liability of bank's stockholders to creditors was not within the title of the act is the law of the case in second action by him against the same defendants, with the bank, an unnecessary party, added, brought pending appeal in the first case, but after an amendment of statute merely defining more specifically his powers.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by W. C. Williams, as Superintendent of Banks, against L. J. Carver and others. Judgment for defendants, and plaintiff appeals. Affirmed.

A. A. De Ligne and Hiram W. Johnson, Jr., both of San Francisco, for appellant.

Corbet & Selby, of San Francisco, for respondent Carver.

Thos. Scott, of Bakersfield, for respondent White.

E. L. Foster and C. A. Barnhart, both of Bakersfield, for respondent McDonald and others.

Matthew S. Platz, of Bakersfield, for respondent Cohn.

Rowen Irwin, of Bakersfield, for respondent Jastro.

C. C. Cowgill, of Sonoma, for respondent Conner.

J. W. Wiley, of Bakersfield, and Hunsaker & Britt, of Los Angeles, for respondent Stevens.

RICHARDS, J. This is an appeal on the part of the plaintiff from a judgment in favor of the defendants upon the pleadings. The following is a history of the case:

Prior to the institution of this action, the plaintiff herein, in his official capacity of superintendent of banks of the state of California had commenced an action against all of the defendants herein, with the exception of the Kern Valley Bank, having for its purpose the collection from each of said defendants of an amount alleged to be due upon their individual liability as stockholders of the said Kern Valley Bank, arising under the terms of the state Constitution and of section 322 of the Civil Code. That former action was in due course tried, and thereafter appealed by the plaintiff therein to the Supreme Court. Upon said trial and appeal the defendants in that action successfully assailed the constitutionality of that portion of the banking act which purported to authorize the plaintiff therein, in his said official capacity, to institute and prosecute said action. During the time when said cause was still pending upon appeal, the said Legislature undertook to amend the banking act under which said action had been begun, the said amendment consisting of a more express declaration of the power of the superintendent of banks to institute and prosecute actions of that character; the said amendment being evidently intended to eliminate the ground of objection which had been urged in said action to the effect that the superintendent of banks under the terms of the act prior to said amendment possessed no such power. See Stats. 1913, pp. 136–192. After the taking effect of said amendment to the banking act (St. 1909, p. 87), but before the decision of the Supreme Court in the former suit, the plaintiff instituted the present action against the same defendants with the addition of the Kern Valley Bank. Thereafter the Supreme Court handed down its decision in the said former action, which is reported in 171 Cal. 658, 154 Pac. 472, to which reference is made for a more particular statement of the facts, set forth in the identical language in the complaints in each of said actions. Upon the handing down of said decision by the Supreme Court, the defendants herein moved the trial court in which this action was pending for a judgment in their favor upon the pleadings, upon the ground that the said decision constituted the law of the case, and that by the terms thereof the objection which was therein successfully urged to the banking act as it existed before the said amendment thereof applied equally to its amendment; the said objection being that the title, both of said act and of the amendment thereof, did not sufficiently embrace such powers as the superintendent of banks was attempting to exercise in each of said actions. The trial court sustained the contention of the defendants, as urged in said motion, and rendered judgment in their favor upon the pleadings from which judgment the plaintiff has prosecuted this appeal.

We do not deem it necessary to further review the history and identity of these two cases, nor to go further into this discussion than to quote the closing language of the decision of the Supreme Court in the case of Williams v. Carver, supra, wherein the learned justice writing the opinion uses the following words:

> "Moreover, if the provision be construed as authorizing the superintendent of banks to enforce the constitutional liability of stockholders to the creditors, then it is void as being obnoxious to the provisions of section 24, art. 4, of the Constitution, which provides that every act shall embrace but one subject, which shall be expressed in its title. As stated, the subject of the legislation, as shown by its title, is to 'define and regulate the business of banking.' The constitutional liability of the stockholders of a corporation to its creditors and the enforcement of such liability is no part of the business of banking. Hence the subject of the legislation, if its purpose be to deprive the creditor of the right to enforce such liability and confer upon the superintendent of banks the power to act for and on behalf of the creditor in the collection thereof, is not embraced in the title."

We are of the opinion that the foregoing language of the Supreme Court in the former actions constitutes the law of the case, and, as such, is binding both upon the trial court and upon this tribunal. The mere fact that the Kern Valley Bank has been added to the list of defendants in this action does not militate against this conclusion, since the Kern Valley Bank cannot be said to be a necessary party to the determination of the issues involved in either case.

The judgment is therefore affirmed.

We concur: WASTE, P. J.; BARDIN, Judge pro tem.

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42 Cal. App. 332

WANGENHEIM v. GARNER et al.

(Civ. 1995.)

(District Court of Appeal, Third District, California. July 22, 1919. Rehearing Denied by Supreme Court Sept. 18, 1919.)

1. FRAUDULENT CONVEYANCES 🔑230 — QUIETING TITLE 🔑10(2)—WHEN CREDITOR PURCHASING AT EXECUTION SALE ACQUIRES LEGAL TITLE.

Under Code Civ. Proc. § 700, as to execution sale of real property, where land fraudulently conveyed was sold under execution in favor of a creditor and bid in by him, he acquired, by virtue of the sheriff's certificate and the sale, the legal title, and not merely an equitable interest in the land, and could therefore maintain action, by cross-complaint in partition suit, against debtor's vendee.

2. QUIETING TITLE 🔑43—WHEN PURCHASER UNDER EXECUTION AGAINST PLAINTIFFS' VENDOR CAN SHOW FRAUD OF VENDOR.

Where land fraudulently conveyed was sold under execution in favor of a creditor, and bid in by him, and in partition suit involving such land the creditor cross-complained against the vendee of the debtor, the creditor might, as against such vendee, introduce evidence to show that the vendee's deed was in fraud of creditors, although fraud was not pleaded in the cross-complaint; such fraud being matter in avoidance of the vendee's answer, setting up title based on such deed.

3. FRAUDULENT CONVEYANCES 🔑172(1), 206(1)—ONLY CREDITOR AT TIME OF DEED CAN ATTACK IT.

Only one who was a creditor at the time a conveyance was made can attack it as being fraudulent as to creditors; the conveyance being good between the parties.

4. FRAUDULENT CONVEYANCES 🔑296—SUBSTANTIAL EVIDENCE OF FRAUD IN CONVEYANCE IS SUFFICIENT.

A finding of invalidity of a deed as being in fraud of creditors will not be reversed, as not supported by sufficient evidence, because respondent's proof that the attacking creditor was a creditor at the time of the conveyance is not "clear and satisfactory," but substantial evidence of the fact is sufficient.

5. Appeal and Error ⚷823—When Reversal Unnecessary for Insufficient Evidence Because of Admissions of Counsel.

It is not necessary to reverse a case because the record does not contain sufficient evidence of a fact of which there is no possible doubt; respondent's counsel asserting that it would have been proven by abundant evidence, if questioned in the lower court, which statement appellant must be deemed to have admitted by failure of his counsel to deny.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by E. S. Wangenheim against Mary Garner and others, in which the defendant Otto Olsen filed a cross-complaint against defendants Josephine Parten and others. From a judgment holding a deed invalid, the defendant Augustus Knight appeals. Affirmed.

Ostrander, Tuttle, Griffin & Shaffer and H. K. Landram, all of Merced, for appellant.

Edward Bickmore, of Merced, and Harry W. Hanson, of Los Angeles, for respondent.

BURNETT, J. The action was for partition of certain real property in Merced county. As to defendant Otto Olsen, the complaint alleges that he claims an interest in the property by virtue of the levy upon it of a writ of attachment issued in the case of Otto Olsen v. Josephine Parten, pending in the superior court of Los Angeles county. In his answer Olsen alleges that subsequent to the levy of said writ he obtained judgment in said case, and thereupon a writ of execution was issued and levied upon the interest of said Josephine Parten in the property, and on the 11th day of September, 1916, he purchased said interest at a sheriff's sale and received the certificate of the sheriff therefor. He also filed a cross-complaint against Josephine Parten, her husband, and Augustus Knight, in which it is alleged that said Josephine Parten was the owner of an undivided one-sixth of said land until he acquired her interest by virtue of said judgment and sale under said writ of execution. It is further averred that said Parten and Knight claimed some interest adverse to Olsen, and the prayer is for a decree determining that their claims are subordinate to his ownership. The cross-complaint was served only on Knight, who answered by averring that he is the owner of said undivided one-sixth by virtue of a deed, for a valuable consideration, from said Josephine Parten, executed on January 28, 1916.

The controversy in the court below, as herein, was between said Knight and Olsen; the said writ of attachment having been levied subsequent to the alleged purchase by Knight. As to this issue the court found:

"That the alleged and purported sale and conveyance by Josephine M. Parten to Augustus Knight of her interest in said real estate was not in good faith, and was for a consideration much less than the value of the property, and was made for the purpose of preventing the defendant and cross-complainant, Otto Olsen, from recovering the amount owed to him by the said Josephine Parten; that the said purported conveyance to the said defendant Knight is therefore void and of no effect, and the recorder of the county of Merced is hereby ordered to cancel and the said conveyance is hereby canceled upon the records of the office of the county recorder of Merced county; that the defendant Augustus Knight acquired no interest in the said real estate under and by virtue of said alleged and purported deed."

The appeal is by Knight from the determination of the court that the said deed is invalid, and he makes three points: First, that respondent had only an equitable interest in the land by virtue of said certificate and sale, and therefore could not maintain the action as against the holder of the legal title; second, that the issue of fraud was not raised by said cross-complaint, and is not, therefore, within the issues; and, third, that the evidence is insufficient to support the finding that the conveyance to Augustus Knight was fraudulent and void.

[1] The first point is answered by section 700 of the Code of Civil Procedure and the decisions of the Supreme Court in Judson v. Lyford, 84 Cal. 505, 24 Pac. 286, and Pollard v. Harlow, 138 Cal. 390, 71 Pac. 454, 648. In the former it is said:

"A deed in fraud of creditors is absolutely void as against them, and an execution sale of the debtor's interest carries the legal title, and not an equitable interest only."

In the Pollard Case the holding is that under said section 700—

"the purchaser under execution sale acquires the legal title of the judgment debtor, defeasible upon condition subsequent, and that the effect of the sheriff's deed is not to create a new title, but is merely evidence that the title of the purchaser has become absolute."

[2] The second contention is fully covered by the case of Jose Realty Co. v. Pavlicevich, 164 Cal. 613, 130 Pac. 15, wherein it is held that—

"In an action to quiet title to land, in which the defendant by his answer sets up title through a sale by a trustee under a deed of trust, executed by the plaintiff's predecessor in interest, the plaintiff, in avoidance of such defense, may offer evidence to show that the trustee's sale and deed made in pursuance thereof were invalid by reason of fraud, without pleading the fraud in his complaint."

The reason is, as stated, that it is a matter of avoidance of the defense set up in the answer.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[3] It is due to the learned counsel for appellant to say that in their closing brief, they do not insist upon either of these positions, and they limit the third contention to the specification that the evidence is insufficient to show that, at the time of the conveyance to Knight, Olsen was a creditor of Josephine Parten. It is not disputed that it is only as a creditor that he can question the validity of said deed to appellant; the conveyance being good as between the parties. First National Bank v. Eastman, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95, 1 Ann. Cas. 626. The finding that the deed was fraudulent as to creditors, in other words, must fall if it was not shown that there was a creditor. It is admitted by respondent that—

> "The most serious contention raised by appellant is that there is no evidence in the record showing that the respondent, Otto Olsen, was the creditor of Mrs. Parten at the time of the conveyance to the appellant, Knight."

It is claimed, however, that it is sufficient, and, moreover, it is asserted that—

> "This fact was not even questioned by the appellant during the course of the trial, and he raises the point for the first time on appeal, and the failure of appellant to even question the fact that this indebtedness existed at the time of the conveyance no doubt explains any lack of evidence of the existence of this indebtedness, which could have been clearly established, and which is conceded throughout the whole deposition of Mrs. Parten."

[4] The answer to this by appellant is:

> "That Mrs. Parten was indebted to Olsen is not disputed, but there is absolutely no evidence in the record as to the time such indebtedness arose. Counsel complained that appellant did not instruct them as to how to prove their case or as to the facts that were necessary to establish their contention. We submit, however, that the duty of proving his case devolved upon respondent, and if Mrs. Parten were in fact indebted to Olsen prior to the conveyance from Mrs. Parten to Knight, respondent should have supplied such evidence in a clear and unequivocal manner. Such evidence was a condition precedent to his right to attack the conveyance from Mrs. Parten to Knight, and without a clear and satisfactory showing on the point the case for respondent must naturally fall."

Respondent probably deserves the criticism for his carelessness, and the importance of the point is quite apparent. It is not, however, for us to require that the showing be "clear and satisfactory." It is sufficient if there be substantial evidence of the fact. We feel some doubt as to that—the evidence being meager—but we are satisfied that under the circumstances the cause should not be reversed for that reason.

[5] Respondent has virtually said in this court that the fact was never questioned in the court below, that appellant made no such claim therein, and that if there had been any controversy about it, abundant evidence could and would have been furnished to prove it. These statements are not denied by appellant, and they must be deemed admitted. The counsel are honorable officers of this court, and we attach the same weight and significance to their statements and admissions as though they were testifying as witnesses.

The status of the matter may be thus presented: Appellant admits that respondent was actually a creditor; that he never questioned it in the court below; that, if he had, it would have been amply proven; but, since the record does not contain sufficient evidence of the fact, the cause should be reversed, and additional cost incurred in proving a fact that never has been really disputed, and concerning which there is no possible doubt.

We do not think the practical administration of justice would be subserved by such a course. The rules of pleading and practice are designed primarily to promote the righteous determination of a judicial proceeding, and in their application we must not lose sight of that purpose. If appellant had stipulated in this court that Olsen was a creditor, it would not be seriously contended that the cause should be reversed, in order that the fact might be proven in the court below. His acquiescence in the statement of respondent is equivalent to such stipulation.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

42 Cal. App. 456

KLEIN v. SAN PEDRO, L. A. & S. L. R. CO. (Civ. 2145.)

(District Court of Appeal, Second District, Division 2, California. July 29, 1919.)

WATERS AND WATER COURSES ⚷179(4) — CONSTRUCTION OF BRIDGE — DAMAGE TO REALTY—SUFFICIENCY OF EVIDENCE.

In an action for damages to land abutting on a stream by reason of defendant railroad's wrongful acts in constructing its trestle bridge and a rock bulkhead across and within the stream, so as to obstruct the same causing overflow in time of flood, evidence that the construction did not conform to good engineering practice *held* to support verdict for plaintiff.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Eugene L. Klein against the San Pedro, Los Angeles & Salt Lake Railroad Company. From judgment for plaintiff, and an order denying defendant's motion for new trial, defendant appeals. Appeal from order dismissed, and judgment affirmed.

James E. Kelby, of Los Angeles (A. S. Halsted, of Los Angeles, of counsel), for appellant.

Oliver O. Clark, of Los Angeles, for respondent.

THOMAS, J. In his complaint plaintiff alleged that he had sustained certain damages to his real property adjacent to and abutting upon the Arroyo Seco, in the city of Los Angeles, by reason of the wrongful acts of defendant in so constructing (1) its railroad trestle bridge, and (2) a certain rock bulkhead across and within said Arroyo Seco, as to obstruct the same in time of flood, and to cause the water therein to be dammed up and diverted from its regular course and channel over and across the real property of plaintiff, cutting and washing it away. There was a verdict for plaintiff for $1,000, and judgment was accordingly entered in his favor. Defendant filed a motion for a new trial, which was denied. From the order denying said motion, and the judgment so entered, defendant appeals.

Defendant urges that the order and judgment should be reversed upon several grounds, which, for convenience here, may be grouped under two heads, viz.: (1) Errors of law occurring during the trial, including errors in giving certain instructions to the jury; and (2) insufficiency of the evidence to justify the verdict.

Much space is devoted by appellant in support of this appeal to the argument of the point that the lower court erred in denying its motion for a directed verdict, and which argument is indeed very persuasive. After quoting at length from the evidence, appellant, in its opening brief, says:

> "It results, therefore, that the witness Jessup's testimony to the effect (1) that the bridge was constructed with due care and engineering skill; (2) that the bents thereof were practically parallel to the stream; (3) that the bridge was of approved construction and standard; (4) that the available waterway provided by it was infinitely more than was necessary for any flood which happened in the arroyo; (5) that it was constructed in such a manner as to afford security for life and property; (6) that the arroyo crossed by the bridge was restored to its former state of usefulness; and (7) that the usefulness of the arroyo on the property adjoining it was not impaired, is absolutely uncontradicted by any witness, and stands unimpeached and is unimpeachable."

If this comprehensive and far-reaching statement is supported by the record here, it would seem that no other point need be considered. We shall see.

Plaintiff, respondent here, seeks to support his contention that the evidence does not support the statement quoted above by arguing that—

> "Counsel reviews the evidence presented by defendant, and concludes that the only conclusion which can be drawn is that the bridge 'conformed to good engineering practice,' thus entirely ignoring the statement of their own expert, Mr. Olmstead, that '*it was not good engineering practice then or ever.*'"

The fact is defendant did not ignore such testimony, but used the very words which we have last italicized in referring to the testimony of the said witness. The conflict is not in the evidence, but in the construction which counsel places thereon. The fact is, also, that appellant's statement of the evidence now under consideration is the one which agrees with the recorded testimony itself. Mr. Olmstead did testify that "the bridge as constructed conformed to the practice of building bridges at that time"; but he added that "it was not good engineering practice then or ever." From the standpoint of bridge construction, it was all right. From a civil engineer's view, it was not good engineering. We have not only read that portion to which our attention has been called, but have read the whole of the testimony of the witness Olmstead, and we think it is not susceptible to any other construction. But, even so, this places the first claim of appellant, referred to above, viz. "That the bridge was constructed with due care and engineering skill," beyond the scope of appellant's general statement in regard to Mr. Jessup's testimony; i. e., that the same was "uncontradicted," etc. On this first point alone there seems to be such a conflict in the testimony as to overcome the assignment that it was error not to grant defendant's motion for a directed verdict.

The instructions given by the court, to which appellant objects, were, we think, ample, and as favorable to appellant as they properly could be on the questions presented. Especially is this so when the instructions objected to are considered in connection with, and in the light of, the other instructions given.

The evidence, we think, amply supports the verdict upon which the judgment was entered.

Finding no error in the record which would justify a reversal of the judgment entered herein, it is ordered that the appeal from the order denying defendant's motion for a new trial be and the same is hereby dismissed, and the judgment appealed from is affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

42 Cal. App. 369

PEOPLE v. LOPEZ. (Cr. 665.)

(District Court of Appeal, Second District, Division 2, California. July 23, 1919.)

1. CRIMINAL LAW ⚷1170(2)—EXCLUSION OF EVIDENCE HARMLESS WHEN SHOWN BY TRANSCRIPT OF PRELIMINARY EXAMINATION.

In a prosecution for rape, any error in sustaining the district attorney's objection to testimony of prosecutrix admitting that on preliminary examination she had testified to certain facts contrary to her testimony on trial was harmless to defendant, where the evidence was in the record through reading of a portion of the transcript on preliminary examination.

2. CRIMINAL LAW ⚷673(5) — EVIDENCE OF SIMILAR CRIMES ADMISSIBLE TO SHOW DISPOSITION.

In a prosecution for rape, where defendant's counsel elicited from prosecutrix on cross-examination that defendant had had relations with her for two years before the date of the crime charged, the court properly instructed that such evidence was received and admitted to prove the adulterous disposition of defendant, etc.

3. CRIMINAL LAW ⚷815(13) — INSTRUCTION NOT ERRONEOUS AS EXCLUDING CONSIDERATION OF PROSECUTRIX'S AGE.

In a prosecution for rape, an instruction that the jury under the information could find a verdict of guilty of rape as charged, of assault with intent to commit rape, of assault, and of not guilty, *held* not erroneous as taking from the jury the right to consider whether or not prosecutrix was over 16 and under 18; the only evidence being that she was 13.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Joe Lopez was convicted of rape, and, from the judgment and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

Frank E. Dominguez and Paul Schenck, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

THOMAS, J. This is an appeal from a judgment on conviction for the crime of rape committed upon one Clorinda Manriguez, a female person under the age of 18 years, not being the wife of defendant.

Defendant was sentenced to imprisonment in the state's prison. There was a motion for new trial, which was denied. From the order denying said motion, and the judgment, defendant appeals, and for reversal relies upon the following grounds:

"(1) Error occurring at the trial in the admission and rejection of evidence; (2) error in instructions to the jury; and (3) the improbability of the truth of the testimony of the complaining witness, Clorinda Manriguez."

[1] On cross-examination the defendant sought to show, by the testimony of the prosecuting witness given at the preliminary examination of defendant, that she there testified to certain facts contrary to her testimony on the trial in the superior court in this action; and after the portion of the transcript of the evidence taken at the preliminary examination, which defendant desired to have read, was actually read into the record, and the witness had answered the question, admitting that she had so testified, the district attorney objected on the ground that it did not tend in any way to impeach the witness. This objection was sustained by the court. As already stated, however, the evidence was in. There was no motion to strike. The evidence is still a part of this record. If the ruling was error, it was without prejudice, because the defendant, so far as this point is concerned, had full opportunity to use the transcript. It was resorted to, too, on other occasions, as disclosed by the record, and for the same purposes. The ultimate question is not, "Is there conflict between the testimony given by the prosecuting witness at the preliminary hearing and that given by her at the trial in the superior court?" but rather, "Do the jury believe the testimony given at the trial, notwithstanding said conflict?" In this case the jury apparently believed the testimony of the little girl.

[2] It is urged that the court erred in giving the following instruction:

> "You are further instructed that the evidence of other acts of sexual intercourse between the defendant and the prosecutrix, and of the improper familiarity on the part of the defendant towards and with the prosecutrix, shown before and after the time charged in the information, is received and admitted in evidence to prove the adulterous disposition of the defendant, and as having a tendency to render it more probable that the act of sexual intercourse charged and relied on in the information was committed at the time and place as charged in the information, and for no other purpose"—because it assumes that there was evidence introduced at the trial tending to show that defendant had had acts of sexual intercourse with the prosecuting witness prior to the date charged in the information.

The record discloses that this assumption was based upon the evidence, and that this evidence was elicited from the prosecuting witness by defendant's counsel on cross-examination—testimony showing that defendant had had sexual intercourse with the prosecutrix for a period of two years prior to the date of the crime charged in the information. The instruction given, therefore, was a proper one.

[3] It is also urged that the court erred in giving the following instruction:

"It is competent for you, under this information, to find either one of four verdicts: Rape, as charged in the information; assault with intent to commit rape; assault, and not guilty—as you may be convinced from the evidence in the case," on the ground that this instruction took away from the jury the right to consider whether or not the prosecutrix was over the age of 16 and under the age of 18 years.

The answer to this contention is that the court was not called upon to submit to the jury any question predicated on the assumption that the prosecutrix may have been between the ages of 16 and 18 years; and the only evidence in the case touching her age was to the effect that she was 13 years old at the time of the commission of the crime.

The third point urged, namely, the improbability of the truth of the testimony of the complaining witness, is not well taken. It will not be discussed here, because both this court and the Supreme Court have said so much about this phase of the law that it is useless to take further space with such discussion. We cite the case of People v. Vickroy, 182 Pac. 764, in support of our present conclusion, and rest the matter there.

There is no merit to the points urged.

The judgment and order are affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

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42 Cal. App. 426

HAMILTON v. KLINKE et al. (Civ. 2005.)

(District Court of Appeal, Third District, California. July 28, 1919. Rehearing Denied Aug. 27, 1919; Denied by Supreme Court Sept. 25, 1919.)

1. SALES 🔑12 — UNPLANTED CROPS SUBJECT TO SALE.

In view of Civ. Code, §§ 1039, 1721, defining sales and transfers, and section 1722, declaring what property may be subject to sale, and section 1730, providing that any property which, if in existence, might be the subject of sale, may be the subject of an agreement for sale, whether in existence or not, a future crop of beans, not yet planted, was subject to sale contract.

2. SALES 🔑197 — CONTRACT FOR SALE OF UNPLANTED CROPS PASSED TITLE.

A contract for sale of an unplanted crop of beans, providing that, until the bill of lading or warehouse receipt covering them was received by the vendee, the vendor agreed to assume "all risks of loss or damage to said beans," construed as passing title.

3. SALES 🔑201(1), 202(1) — MAY BE COMPLETED WITHOUT DELIVERY OR PAYMENT OF CONSIDERATION.

Under Civ. Code, § 1721, defining a sale, as between the parties a sale may be completed without either delivery or payment of consideration.

4. TENANCY IN COMMON 🔑43 — SALE TO THIRD PERSON OF COTENANT'S CROP.

Where defendant sold plaintiff beans, to be grown on a certain piece of land, and the evidence showed that certain beans were grown on the land by defendant as a cotenant with defendant's wife, and were subject to a lien as a mortgage on the interest of both, in adjusting the right of the parties, it must be held that plaintiff succeeded to the interest of the defendant.

Appeal from Superior Court, Stanislaus County; W. H. Langdon, Judge.

Action by Roth Hamilton, surviving partner of the copartnership of Hamilton & Menderson, against W. A. Klinke and another, in which Geneva R. L. Klinke intervened. Judgment for defendants, and plaintiff appeals. Reversed.

Hawkins & Hawkins, of Modesto, for appellant.

Hatton & Scott, of Modesto, for respondents.

CHIPMAN, P. J. The action is in claim and delivery, arising out of the contract of purchase and sale set forth in the complaint as follows:

"Ceres, Cal., R. D. A. Box 393, 3/3, 1917.

"Hamilton & Menderson, Los Angeles, California—Gentlemen: This contract confirms sale to you this day of our/my entire 1917 crop of choice recleaned black eye beans from 30 acres on own ranch in Stanislaus county, about 5 miles So. of Ceres, less none of the crop which is reserved for rental, and less —— sacks reserved for seed, at five cents per pound net weight, f. o. b. cars or warehouse Ceres. We/I estimate the quantity hereby sold to be 600 sacks (at 80 lbs. each), and agree to deliver all of said beans in good marketable condition and free from damage, on or before October 30, 1917, in good new bean sacks, you to pay us/me cash for said beans on receipt of shipping documents. If not delivered within the specified time you may accept or reject the beans at your option. We/I hereby guarantee that the said crop of beans is our/my sole and absolute property and free from all incumbrance except as specified herein. Should the above estimate be exceeded by more than 10 per cent. of same, you may accept or reject at your option all in excess of the original estimate plus 10 per cent. thereof. If we/I fail to deliver the beans as herein provided, unless nondelivery results from crop failure or other cause beyond our/my control, we/I will pay you the difference between the price herein fixed and the market price of such beans on th—/ last day specified for delivery.

"It is mutually understood that this contract, which is signed in duplicate by both parties hereto, constitutes an absolute sale, but until you receive bill of lading or negotiable warehouse receipt covering the beans, we/I agree to and to assume all risks of loss or damage to said beans.

"Yours truly, W. A. Klinke,
"of ——— Post Office.

"W. A. Klinke, Ceres:
"We confirm purchase of beans in accordance with the foregoing contract.
"Hamilton & Menderson,
"By R. L. Brown."

It is alleged that defendant W. A. Klinke grew on the premises mentioned in said contract in 1917 certain 400 sacks of black eye beans, weighing 31,000 pounds, being the same beans mentioned in said contract; that on October 31, 1917, said beans were of the value of 8 cents per pound; that said Klinke did not deliver said beans on said date, or at all, although plaintiff demanded delivery, and "said defendants do still fail and refuse to deliver such beans or any part thereof"; that defendant Hatton claims an interest in said beans by virtue of a certain chattel mortgage; that by the terms of said contract plaintiff is entitled to the possession, and was so entitled at the commencement of the action, but that defendants, "both of whom have possession of said beans, refused and still refuse to deliver possession of said beans to plaintiff"; that on November 3, 1917, plaintiff demanded of defendants, and each of them, possession of said property, but defendants, and each of them, refused to deliver the same to plaintiff, and still refuse to deliver said beans.

The complaint was filed on November 3, 1917. The defendants answered and filed a counterclaim. They denied that the defendant Klinke sold to the copartnership of Hamilton & Menderson said Klinke's crop of beans, but do not deny the execution of the before-mentioned contract, and allege there was no consideration for the said alleged written contract; deny that said Klinke grew on any ranch belonging to him in the year 1917 any beans whatever. They deny that the said beans were of the quantity and value alleged, but do not allege any value; deny that plaintiff demanded delivery of said beans as alleged in the complaint; "deny that both of said defendants have possession of said beans belonging to plaintiff, and to the possession of which plaintiff is entitled"; deny that on November 3, or at any other time, plaintiff demanded of defendants "delivery to plaintiff of any beans belonging to plaintiff"; and deny that they, or either of them, refused to deliver to plaintiff any beans belonging to him.

Further answering said complaint, it is alleged "that on March 3, 1917, defendant Klinke and his wife were, and ever since have been, the owners as tenants in common of a certain 40-acre tract of land (describing the same)"; that about June 1, they planted "beans on about 39 acres of said above-described land," prior to which date no beans had been planted thereon; that they thereafter jointly cared for, cultivated, and harvested the same, and each of said parties is the owner of an undivided one-half interest in said crop of beans. It is then alleged that on October 18, 1917, the said Klinke and his wife executed and delivered to defendant Hatton their promissory note for $750, secured by a chattel mortgage on said beans; that about November 2, 1917, a part of said beans, to wit, 294 sacks, were stored in a certain designated warehouse in the town of Modesto, and were so stored in the name of defendant Hatton, as mortgagee. The commencement of the present action is then alleged, and that on the affidavit filed therein were written instructions to the sheriff to take possession of certain beans, being the same beans referred to in said warehouse; that in pursuance of said order the sheriff took possession of 294 sacks; that the papers in the said action were served upon the defendants on or about November 7, 1917; that on November 12, 1917, defendants Klinke and Hatton executed and delivered to the sheriff an undertaking for the delivery to defendants of said 294 sacks of said beans, together with a written demand for a return to defendants of the same; that said sheriff "has failed and refused to deliver to said defendants, or either of them, said 294 sacks of beans, or any part thereof"; that at the time of the taking of said beans they were in the rightful and lawful possession of the defendants. They allege the value of said beans to be the market price of said beans, being 8¾ cents per pound, and they pray for judgment for the recovery of the possession of said beans or the value thereof. For further defense, defendants set up substantially the foregoing facts by way of counterclaim.

Plaintiff answered the counterclaim by denials and admissions which we do not deem it necessary to set forth. Geneva R. L. Klinke filed a complaint by way of intervention by leave of the court, in which she set forth her interest in the beans, substantially as set forth in the answer of defendants. The pleadings are verified.

The action was tried by the court without a jury, and findings of fact and judgment were in favor of the defendants. The judgment directed that the defendants and intervener recover the said beans and the possession thereof, and in case delivery cannot be had that they have judgment for the sum of $2,129.40, the value of said beans, and costs of the action. The appeal is on the judgment roll alone.

Appellant makes three points: I. The judgment is not supported by the findings. II. The court failed to find on a material fact. III. The findings are inconsistent.

By finding II the court found that with the said copartnership W. A. Klinke made the contract set forth in the complaint. Finding III is "that said defendant W. A.

Klinke did not sell any beans whatever to said Hamilton & Menderson by the written contract set forth in finding II herein." Finding IV is "that there never was any consideration whatever for the execution by said defendant W. A. Klinke of said written contract set forth in finding II," and "that neither of the defendants received any consideration in connection with the execution of said contract." Finding VI is that prior to the commencement of the action said Klinke did not at any time sell to said copartnership any beans for any purchase price whatever. Finding XI is that the beans were planted in June, and afterwards harvested; and Finding XIII is that they were stored in the warehouse on November 2, 1917.

[1] Concededly these findings were made and are now defended by respondents upon the assumption that, inasmuch as the contract was made March 3, 1917, and no beans were planted by defendant Klinke until June 1, 1917, as found by the court, the subject of the sale (the beans) had no existence when the contract was entered into, and there was therefore no sale. The argument of respondents is based upon the Code provisions as follows:

> "Sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property." Civ. Code, § 1721.

Says the brief:

> "The definition of sale above given uses the word 'transfers' and does not use the words 'agrees to transfer.'"

Again quoting from the Code:

> "Transfer is an act of the parties, or of the law, by which the title to property is conveyed from one living person to another." Civ. Code, § 1039.

The brief proceeds:

> "We submit that, if property does not exist, title to said property does not exist, and therefore that there cannot be a transfer of title to nonexistent property."

Again resorting to the Code:

> "The subject of sale must be property, the title to which can be immediately transferred from the seller to the buyer." Civ. Code, § 1722.

Says the brief:

> "Title to property which has no existence cannot be immediately transferred."

Respondents quote section 1730, which reads:

> "Any property which, if in existence, might be the subject of sale, may be the subject of an agreement for sale, whether in existence or not"

—as to which the brief says:

> "Above section needs no comment."

It seems to us that this section should not be thus summarily disposed of. In note to this section, Kerr's Cyclopedic Civil Code, under the heading "Crops to be Grown may be Subject of Sale," we find cited: Argues v. Wasson, 51 Cal. 620, 21 Am. Rep. 718; Callender v. McLeod, 74 Cal. 376, 379, 16 Pac. 194; Brown v. Anderson, 77 Cal. 236, 19 Pac 487; Shoemaker v. Acker, 116 Cal. 239, 48 Pac. 62; Lemon v. Wolf, 121 Cal. 272, 53 Pac. 801. Said the court in Lemon v. Wolf, supra:

> "Whether a chattel mortgage upon a crop yet to be planted is valid is a question which has not received a uniform decision. See Pingree on Chattel Mortgages, § 217 et seq. Whatever may be the law in other states, the right to make a chattel mortgage upon a crop to be raised before the same has been planted was affirmed in Argues v. Wasson, 51 Cal. 620, 21 Am. Rep. 718, and has become an established rule of property in this state."

In Shoemaker v. Acker, 116 Cal. 239, 245, 48 Pac. 62, 64, the court said:

> "Contracts for the purchase and sale of future crops running through a series of years have been recognized as valid (Civ. Code, 1768; Blackwood v. Cutting Co., 76 Cal. 212 [18 Pac. 248] 9 Am. St. Rep. 199; Brown v. Anderson, 77 Cal. 236 [19 Pac. 487]); and actions have frequently been maintained for damages for the destruction of growing crops, although, of course, there was no absolute certainty that they would have matured (Sutherland on Damages, § 120, and cases there cited)."

Section 1768 of the Civil Code seems to contemplate the sale of merchandise not in existence. And in Blackwood v. Cutting Co., supra, the court said:

> "Future crops of fruit come under the head of merchandise not then in existence."

So also, we think, would beans.

[2] Respondents contend that the contract was an agreement to sell, and does not import a sale, and hence title did not pass. Relying, we assume, upon the fundamental difference between a sale, properly so-called, and an agreement to sell, which is that in the former the title passes, while in the latter case it does not, respondents cite Blackwood v. Cutting Packing Company, quoting from Benjamin on Sales, as follows:

> "Where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state into which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property."

In considering the contract in that case the court said:

> "It seems well settled that the question as to whether the title has passed is one as to the intention of the parties. And such intention is,

as a matter of course, to be gathered from the language of the parties, considered in the light of all the circumstances."

The court found that there were certain enumerated things to be done connected with the contract which had a controlling force indicating that it was not intended to mean a sale.

In the present case we cannot discover that Klinke was to do anything which he would not naturally or ordinarily be required to do in case of a sale. Besides, to make his intention unmistakable, the following was made part of the contract:

> "It is mutually understood that this contract * * * constitutes an absolute sale."

And until a bill of lading or warehouse receipt "covering the beans" is received by the vendee, Klinke, the vendor, agrees to assume "all risks of loss or damage to said beans." As to this latter provision, as bearing upon the question, appellant says in his brief:

> "In the Elgee Cotton Cases, 22 Wall. 180, 22 L. Ed. 863, the courts say, in discussing the case of Martineau v. Kitching, L. R. 7 Q. B. 436: 'There it was stipulated that the goods should remain at the risk of the sellers, and Lord Cockburn asked: "If the property in the goods had not passed to the buyers, why was it said the goods should remain at the risk of the seller?" Adding further: "What would be the necessity, what would be the object and purpose, of such a stipulation, if the property still remained in them. Of course it would be at their risk."'"

So here we may ask: Why did Klinke "assume all risks of loss or damage to said beans," if it was not intended that the title passed to the vendee?

[3] In the case of Dickey v. Waldo, 97 Mich. 255, 56 N. W. 608, 23 L. R. A. 449, the question was whether or not a crop not in being was the subject of a sale. In the course of an exhaustive opinion the case of Argues v. Wasson, 51 Cal. 620, 21 Am. Rep. 718, was cited and the court said:

> "In the legal sense things are said to have a potential existence when they are the natural product or expected increase of something already belonging to the vendor. When one possesses a thing from which a certain product, in the very nature of things, may be expected, such product, we think, has a potential existence. The following rule appears to be well established both by reason and authority, viz. that, when one owns property from which such product naturally arises, such product may be the subject of sale and mortgage."

As between the parties a sale may be completed without either delivery or payment of the consideration. That a sale may be consummated without delivery was decided in Johnson v. Dixon Farms Co., 29 Cal. App. 52, 155 Pac. 134, 136. Section 1721, Civil Code, provides:

> "Sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property."

It was said in Borland v. Nevada Bank, 99 Cal. 89, 93, 33 Pac. 737, 738 (37 Am. St. Rep. 32):

> "It is, however, the agreement to pay a price, rather than the actual payment of the price, which is the essential element of a sale."

[4] Some other questions are presented, but it seems to us that the foregoing is the basic question involved, and on its correct solution the judgment must stand or fall. If as we think is true, a sale was intended, plaintiff succeeded to Klinke's interest as cotenant with the latter's wife, subject to Hatton's lien as mortgagee of the interest of both Klinke and wife. In the adjustment of the property rights of the parties, plaintiff's interest should have been considered; whereas, by the findings and judgment of the court, it was determined that plaintiff has no interest whatever in the property.

The court found that the beans in question were grown upon a tract of land owned by Klinke and wife as tenants in common, and that the beans were the result of their joint effort, and were owned by them jointly, each one-half thereof, and that the beans were grown "on about 39 acres" of a certain 40-acre tract of land of which, as we understand, it is not disputed, the 30 acres referred to in said contract as Klinke's "own ranch" was a part; that the beans grown on this land were stored in the name of mortgagee Hatton, and when taken by plaintiff were in the possession of Hatton and Klinke and wife. Whether or not the call in the contract for 30 acres would limit plaintiff's right to the beans grown on that proportion of the 39 acres, the fact that the 294 sacks included beans harvested from the entire tract, including this 30 acres, should not, it seems to us, deprive plaintiff of the right, at least, to the possession of Klinke's interest in the beans grown on 30 acres of the land, as tenant in common with mortgagee Hatton and Klinke.

The point that the findings are inconsistent must be held well taken, if, as we hold, there was a sale. Finding II is that the contract sued upon was entered into, and finding III is that defendant Klinke did not sell any beans to Hamilton & Menderson by that contract, and finding VI is to like effect, while finding IV is that there was no consideration for the execution of the contract. Findings II and III are not only inconsistent, but repugnant. Findings II and IV are inconsistent, as we have seen there was a consideration, and the contract shows that the consideration for the promise was a "good consideration," under the definition given in section 1605 of the Civil Code.

It is not necessary to consider appellant's second point, that the court failed to find upon material facts.

Because of what we deem to have been an erroneous meaning given to the contract in question by the court, the judgment must be reversed; and it is so ordered.

We concur: HART, J.; BURNETT, J.

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42 Cal. App. 490

PEOPLE v. DIAMONDSTEIN. (Cr. 662.)

(District Court of Appeal, Second District, Division 1, California. July 29, 1919.)

1. LARCENY 🔑7—OWNERSHIP OF PROPERTY—COUNTIES.

Pen. Code, § 484, defining "larceny" as stealing the personal property of another, applies to stealing such property from any ownership, as that of a county, though a county is not strictly a corporation, which by provision of section 7 is included in the word "person."

2. LARCENY 🔑32(1)—INFORMATION—OWNERSHIP OF PROPERTY.

Alleging in information for larceny ownership in the county, even if it should be laid in the taxpayers, is within Pen. Code, § 956, providing that when an offense involves commission of private injury, and is otherwise described with sufficient certainty to identify the act, an erroneous allegation as to person injured is immaterial.

3. LARCENY 🔑60—OWNERSHIP OF PROPERTY—EVIDENCE.

Evidence in larceny *held* sufficient to show that ownership of the electric motor stolen was in a certain county, as alleged in information.

4. LARCENY 🔑64(7)—PARTICIPATION—SUFFICIENCY OF EVIDENCE.

Evidence of defendant's presence in the neighborhood the night of the theft, his possession of the property the day after, employment of his truck in moving it, his active participation in selling it, and his interest in the proceeds, *held* sufficient to connect him as a participant in the theft.

5. LARCENY 🔑79—INSTRUCTIONS—DEFINING GRAND LARCENY.

Defendant convicted of grand larceny was not harmed by failure of instructions to give Code definition of it, the portion of the section showing the difference between it and petit larceny being given, and there being no dispute but that the property was stolen or but that its value was such as to make the crime grand larceny.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Meyer Diamondstein was convicted of grand larceny, and from the judgment and an order denying motion for new trial he appeals. Affirmed.

Frank Dominguez and Paul W. Schenck, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

JAMES, J. Appellant was convicted of the crime of grand larceny, the charge being particularly that he feloniously took and carried away one electric motor, the property of the county of Ventura, of the value of $75. He appeals from the judgment and from an order denying his motion for a new trial.

[1, 2] It is first contended that the information was insufficient in its allegation as to the ownership of the property alleged to have been stolen. The language of the information was that the property was the property of "Ventura county, a political corporation in the state of California." The contention of appellant under this head is that, as the Penal Code, § 484, defines larceny as "the felonious stealing, taking, carrying, leading or driving away the personal property of another," it is not sufficient to show ownership in a county. As defined by section 7, Penal Code, the word "person" includes a corporation as well as a natural person. While the political subdivision of the state denominated "county" is not in strictness a corporation, at the same time it requires no stretching of the plain intent of the criminal statute to say that it was designed to make punishable the stealing of personal property from any ownership whatsoever, regardless of the kind. Appellant's counsel argue that the ownership should have been alleged to be in the taxpayers of the county. If, indeed, it may be said that the taxpayers in their collective capacity do hold the ownership of property used in the conduct of the county government, then we may at once answer that the charging of such ownership as being in the county itself is no different from charging it in the manner suggested, for the term would then mean the same thing. We are only conceding for the sake of the argument that the taxpayers collectively may be said to own the county's property, but think that this is not true as a legal proposition—we think it is not more true that the ultimate ownership resides in the taxpayers than that it may reside in the electorate. Furthermore, unless there is a material variance between the ownership charged and that proved, the manner in which such ownership is alleged is not important, further than to show that the property taken was not the property of a defendant charged with larceny. Section 956, Penal Code, provides that—

> "When an offense involves the commission of, or an attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous al-

legation as to the person injured, or intended to be injured, is not material."

Respondent cites a case which is directly in point and in which this subject is given extended discussion, that being the case of People v. Prather, 120 Cal. 660, 53 Pac. 259.

[3] The second point made by appellant is that, conceding the allegation of ownership of the property to have been sufficiently made in the information, the evidence is insufficient to show that the ownership was so held; in other words, the claim of appellant is that there was not evidence tending to show that the property taken was the property of the county of Ventura. While the testimony of none of the witnesses in words was of the direct import that the motor charged to have been stolen belonged to the county of Ventura, there was testimony from which the jury was authorized to conclude, and naturally conclude, that the ownership was as charged. The motor alleged to have been stolen was a small electric machine which was installed at a crossroads in the county of Ventura, near the town of Oxnard, for the purpose of raising or handling water used for the sprinkling of the public roads. One Roussey, a supervisor of Ventura county, testified that he was supervisor of a certain district, which included a certain road district. He was asked what was the nature of the sprinkling system just north of the city of Oxnard during the month of September, 1918, and he replied:

> "Well, we had a sprinkling system there, some electric motors, some windmills, and also one gas engine in my district. * * * We had one motor located just, I guess it is, 30 feet off the Saviers Road on the Gonzales Road, three-quarters of a mile north of the city limits of Oxnard. * * * Underneath the tank there was a little motor house, a wooden house, and the motor was inside of that motor house. * * * In the early part of September, I was notified it was gone, and I went there to see and it was gone. The wires had been cut and the bolts unscrewed and the motor was removed."

The witness Peckstein testified that in the month of September he was employed by the county of Ventura to sprinkle roads under Supervisor Roussey, and that a sprinkling system was in use, and that electric motors were used; that one of these was located at what is known as the "Carr" corner; that he visited the motor house nearly every day; that on the 11th day of September, 1918, he found that the motor was gone. We point to this testimony as being sufficient to show that the motor which was removed from the motor house at the place mentioned by the supervisor and the witness Peckstein was the property of the county of Ventura. It was not necessary that any witness should in words have declared the ownership to be in the county; the inevitable inference from the statements made by the witnesses referred to would lead to that conclusion.

[4] The next contention urged on behalf of appellant is that, admitting that the larceny was committed by some one, the evidence is insufficient to prove that the appellant was a participant in the commission of that crime. Under this contention it is, of course, our duty to consider the testimony introduced by the prosecution in its strongest light, disregarding the evidence offered in defense; for if there was any substantial showing which tended to connect the defendant with the commission of the alleged crime the jury's verdict would not be disturbed. The facts, in substance as illustrated by such testimony, were these: On the 11th day of September, 1918, the appellant, in company with a man named Silverstein, who was his brother-in-law, appeared at an electrical merchandising place in the city of Los Angeles. They had a motor truck which was being driven by the appellant. On this motor truck there were two electric motors, one of which admittedly was that described in the information as having been stolen from the county of Ventura. These motors were offered for sale, Silverstein doing most of the negotiating. One of the merchants to whom they applied offered $35 for the motors, and this appellant stated that they could get more for them at "Broils' Place," and the two men left. They later appeared at the store of one Falck, to whom they sold the two motors for $50. At this place Silverstein again did the bargaining with the proprietor until the deal was concluded. A check was given in payment for the motors and the proprietor inquired as to whether he should O. K. the check, or the indorsement; Silverstein stating that it was not necessary. At this juncture this appellant intervened and stated that it was advisable to have the check O. K.'d, as he (the appellant) needed some money. Up to this point, then, we have a case presented where the appellant was found in possession of stolen property; that he was driving the truck upon which the same was loaded; and that he participated in negotiating the sale of the motors to the extent we have described. Other testimony showed that on the night previous appellant and his truck were seen in the city of Ventura, and that late in the evening he was seen to drive away through the streets of the city in company with Silverstein. A brief reference may be made to the testimony offered in defense. It was, in effect, that Silverstein, finding his brother-in-law in the city of Ventura on other business—that of collecting or transporting some junk—impressed him and his truck into service to convey the two motors to the city of Los Angeles to be sold. Silverstein, who had previously pleaded guilty to the charge, testified that he alone had stolen the motors, and that he had told appellant that he had obtained them from a sugar company at Oxnard. While it is true under our law that a defendant charged with larceny

may not be convicted upon proof of possession of the stolen property alone, the jury had before it here other circumstances noted, that of appellant having taken an active part in the sale of the motors and giving evidence that he was interested in the proceeds. His presence in the city of Ventura and employment of his truck in the business of transporting stolen goods were all proper to be considered with all the attendant circumstances. And we think such facts and circumstances were sufficient to establish a good case for the prosecution. It is the unusual case, indeed, in which evidence is at hand to show that a thief found in possession of stolen property was also seen to actually abstract it. The prosecution necessarily in such cases must rely upon circumstances of an incriminating nature, large or small, to support the main incriminating incident.

[5] Some complaint is made as to the instructions given by the court being improper and unfair to the defendant. It is first urged that the court failed to define the crime of grand larceny, and that the jury, therefore, had no standard by which to weigh the alleged case of appellant. The court did not give the Code definition of "larceny," but did give that portion of the Code section showing the difference between grand and petit larceny. In so far as the particular property alleged in the information to have been stolen is concerned, there was no dispute, either that that property was actually stolen, or that its value was such as to make the crime grand larceny. This was proved by the defendant's witness Silverstein, who admitted that he had taken the motor from the place where it was installed, and that he was at the time of the trial under commitment to the Preston School of Industry after plea of guilty to a like charge. This witness endeavored to exculpate the appellant here by taking all blame in the matter upon himself. Pursuing the argument further along the same line, appellant's counsel contend that the court, in effect, advised the jury that, if the defendant was shown to have been in possession of the stolen property after the commission of the alleged crime, he should be convicted. The instruction carefully considered did not bear that import. The court's instruction was, referring to the taking, that if the jury found that appellant "feloniously" took the property described in the information, or aided or abetted in the taking of the property, the jury should find him guilty. The instruction upon the question of the possession of stolen property as an incriminating fact was full and fair. The instructions upon reasonable doubt were complete, as were also those referring to proof of circumstances relied upon by the prosecution. In fact, the entire charge, to our minds, was as complete and fair as the defendant was entitled to have given. No claim is made that in any of the instructions offered by the defendant and refused any essential advice was contained which was not included within the instructions as given.

We find no error entitling appellant to a judgment of reversal.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; SHAW, J.

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42 Cal. App. 448

PEOPLE v. LUTTRELL. (Cr. 668.)

(District Court of Appeal, Second District, Division 1, California. July 29, 1919.)

1. Homicide 🔑300(3) — Instructions on Self-Defense Sufficient.

In a prosecution for murder, wherein defendant set up self-defense, instructions on such issue, fully advising the jury that, if defendant as a reasonable man believed he was about to suffer great bodily injury at the hands of decedent, he was justified in using his deadly weapon, and killing decedent, *held* sufficient.

2. Homicide 🔑282—Whether Offense Was Murder or Manslaughter Question for Jury.

In a prosecution for homicide, it was for the jury to determine the degree or character of the crime, if any, whether murder or manslaughter, which had been committed.

3. Homicide 🔑254—Evidence Sufficient to Show Murder in Second Degree.

In a prosecution for murder, defendant setting up self-defense, evidence held to justify verdict of guilty of murder in the second degree, in that decedent was in retreat and was going away and had abandoned his quarrel with defendant when he was shot and killed.

4. Homicide 🔑45 — Killing on Sudden Passion Authorizes Conviction of Manslaughter.

If defendant shot decedent upon a sudden and unpremeditated impulse of passion caused by decedent's vilification, abuse, and threats, a verdict of guilty of manslaughter might have been rendered against defendant.

5. Criminal Law 🔑829(1) — Refusal of Repetition of Instructions Given, Proper.

The refusal of instructions containing matter sufficiently covered by the charge given by the court was not erroneous.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Thomas F. Luttrell was convicted of murder in the second degree, and, from the judgment and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

Farnsworth, McClure & Burke, of Visalia, for appellant.

U. S. Webb, Atty Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of the crime of murder in the second degree. The appeal is taken from the judgment of imprisonment which followed the conviction, and also from an order denying defendant's motion for a new trial.

On the 10th day of December, 1918, at the town of Lemon Cove, county of Tulare, an altercation occurred between defendant and Vernon French, a young man about the age of 21 years. French was killed by being shot by appellant. At least three bullets were fired into the body of French. French at the time was unarmed. From this brief preliminary statement it might be inferred that the shooting of French by appellant was an act of wanton and deliberate murder. But from what will be stated immediately hereinafter it will appear that the appellant only acted after he had been annoyed, abused, and cursed upon his own premises; that he had sought to avoid a physical encounter with French, who was there with the evident purpose of provoking and engaging in a fist fight with appellant; that the deceased not only abused and vilified the appellant, but, after challenging him to a fist fight, called him a coward and dared him to shoot. To this further statement we may here add, after carefully examining the testimony introduced at the trial, that had this court the duty to try the question anew upon the evidence we would be most apt to conclude that defendant's crime, considering the extreme provocation under which he acted, was not greater than that of manslaughter. However, we have no function to perform in the way of re-examining the facts, except in so far as it may be necessary to consider them in determining the matters of law which are the only subjects entitled to be reviewed on this appeal.

The main points urged on the part of the appellant are that the refusal of the court to give certain offered instructions was error. It will be appropriate to make a further statement more fully showing the facts affecting the circumstances of the shooting: The appellant at the time of the alleged homicide resided at the town mentioned with his family; he was engaged in operating stages from that point to the Sequoia National Park. In the operation of this business he used automobiles and carried passengers and mail. The deceased, French, had been employed by him, but on the day preceding that of his death had refused, during the absence of appellant, to convey three passengers who desired transportation to a grading camp. For that reason appellant had discharged him the following morning, through the mouth of another person to whom he gave the wages due to French and which were apparently delivered by the messenger. Some days prior, while making change with a customer, appellant had borrowed 50 cents from French. On the morning of the tragedy appellant brought a truck into the barn or garage used and owned by him, for the purpose of having a mechanic make some small repairs thereon. This mechanic operated a garage near by and had just returned to appellant's place with another machine upon which he had been working. Up to this point there appears to be no dispute in the facts—there is little dispute made at all in the case, except as to the final actions of French immediately before he was shot. To that matter we will advert later. The main story, as told by an eyewitness, was that, after appellant came in with the truck and dismounted therefrom, French appeared inside the door of the building; that appellant approached him; and that French said to appellant, "When are you going to pay me that four bits"; that appellant asked, "What four bits?" and was then reminded of the 50 cents which French had loaned to him; that appellant immediately replied he had forgotten that, that he would pay it; without more ado French, after the introductory question, "You know what I think of you?" began to curse appellant and to apply to him the vilest epithets which his vocabulary afforded, and it appeared that his command of language was not at all restricted in that direction; French advanced toward appellant, whereupon appellant drew a revolver and pointed it at French and retreated from him; French took off his coat, laid it down, and dared appellant to come outside and fight; the challenge to fight was repeated, and he followed after appellant, who retreated toward the rear of the building, pistol in hand, until he reached the wall; he went through a rear door, which was a swinging contrivance, and disappeared from the sight of the eyewitness within the building; French hesitated a moment and followed after him, but nothing more was heard outside. By appellant's testimony it appears that he went home and procured from his wife the 50 cents owing to French and returned with it; at any rate, the eyewitness soon saw French reappear at the front door and shortly thereafter appellant came in and offered him the fifty cents; again French entered upon his tirade of cursing the appellant, calling him again vile and unmentionable names, and again appellant drew his pistol, which he pointed at French. This time, it can be gathered that appellant moved toward French and that French moved toward and through the front door of the building. While these actions were being performed appellant was telling French that he wanted him to go, away, that he wanted nothing to do with him and wanted him to leave his premises. It may be here said, too, that appellant had, before retreating through the rear door, requested French to leave; also that, when being cursed by the deceased, he had returned the compliment by calling him names of similar character to those first used by French. As the eyewitness observed, after French had retreated through the door, his general action was to move away from appellant; that after he got through the door he dared appellant to shoot, telling him that he was afraid to shoot, that he had "a streak of yellow" in him. Thereupon the appellant, standing at the door, declared that he was not afraid to shoot and that he would shoot, and thereupon he fired several shots, at least three, all of which apparently took effect in the body of French, as a result of which wounds he died in a hospital not long after. The only substantial difference in the testimony as between the witnesses for the prosecution and the defendant was that the defendant testified that after French had retreated through the front door he again advanced upon him (appellant) in a threatening manner and that he (appellant) believed that French was again about to attack him; that, so believing, he fired the fatal shots.

[1-5] The appellant relied for his exoneration upon the claim that he acted in necessary self-defense. This claim was given very full presentation to the jury by instructions as read by the court. We have made a particularly close examination of those instructions, and we think that they were not only fair, but exceedingly full, and prepared with a view to thoroughly cover the case. As we read them, they present a full exposition of the law touching the manner of self-defense. Instructions were not wanting in the advice to the jury that, if the defendant believed as a reasonable man that he was about to suffer great bodily injury at the hands of French, he would be justified in using his deadly weapon and killing his antagonist. The crime of murder and its degrees were carefully analyzed by the court, as was the offense of manslaughter included therein. To say that the jury would have been altogether justified under the evidence in returning a verdict of guilty of manslaughter, instead of murder of the second degree, does not help the case of appellant on this appeal at all. It was for the jury to determine the degree or character of crime, if any, which had been committed. Evidently it concluded, as it had a right to do under the evidence, that French was in retreat and was going away and had abandoned the quarrel when he was shot and killed. There was evidence, as we have noted, to fully sustain such a verdict. On the other hand, had the jury concluded, as appellant insisted, that French was advancing upon him, threatening him with an assault, and that he feared great bodily harm at the hands of deceased, then a verdict of acquittal would have no doubt been rendered. If it had concluded that there was no deliberate intent involved in the act, but that appellant shot upon a sudden and unpremeditated impulse of passion, a verdict of manslaughter might have been rendered. We think it unnecessary to here repeat the text of the instructions given by the court in the lengthy charge delivered. It will suffice to state again that that charge seems to us to completely cover the case and to present fully all of the propositions important to the appellant's defense. The instructions refused and for which error is claimed either contained matter sufficiently covered by the charge given by the court, or contained matter not clearly material to a sufficient exposition of the law as applied to the case.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

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42 Cal. App. 355

TITLE INS. & TRUST CO. v. LOS ANGELES COUNTY et al. (Civ. 2893.)

(District Court of Appeal, Second District, Division 2, California. July 23, 1919.)

HIGHWAYS ⟹68 — WHERE DESCRIPTION IN JUDGMENT FOLLOWS NEITHER COMPLAINT NOR ANSWER, VARIANCE FATAL.

In an action by a bank to enjoin a county from constructing a roadway on its land, in view of the descriptions of the land as found in the pleadings, a resolution of the board of supervisors of the county declaring a certain road a public highway *held* inadmissible as constituting a material variance.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by the Title Insurance & Trust Company, a corporation, against the County of Los Angeles, a municipal corporation, and others. From judgment for defendants, and an order denying motion for new trial, plaintiff appeals. Judgment and order reversed.

Chas. H. Brock and J. N. Hastings, both of Los Angeles, for appellant.

Robert B. Murphy, A. J. Hill, County Counsel, Charles E. Haas, and Lucretia H. Norman, all of Los Angeles, for respondents.

THOMAS, J. This is an action for injunction. From the complaint it appears that plaintiff claims that on the 25th of April, 1915, it "was and is the owner and possessed of" certain lands described therein; that, while so possessed, the defendants, "on or about said date," and on divers other days between said date and the commencement of said action, acting by and through their agents, etc., "wrongfully, unlawfully, and without right, permission, or authority, broke into and entered upon said tract of land, and began and continued, from a day on or about the 23d day of April, 1915, to the date of the commencement of this suit, the construction of a roadway on, over, and across said tract of land, and in and about the construction of said roadway defaced the said land by cuts and fills and displacement of rocks and the soil thereof, and destroyed valuable growing timber thereon, and obstructed and filled up a stream of water flowing thereon, and thereby and otherwise committed great damage, waste, and injury to said tract of land, all without the knowledge or consent of plaintiff, and to the great and irreparable damage and injury of plaintiff." After describing the natural beauty and the peculiarly inviting characteristics of the land which tend, in the mind of the pleader, to enhance the value of the same, it is further alleged:

> That defendants, as hereinbefore set forth, "broke into and entered upon said tract of land with a large force of laborers, to the number of 50 or upwards, with tools, machinery, and teams; that the said laborers are now encamped and congregated in the immediate vicinity of said tract of land, with a large number of work teams and with a large quantity of tools and machinery; that large quantities of tools and machinery are now in said canyon on said land; that, in the construction of said roadway as aforesaid, said laborers, acting under the direction of defendants herein, removed the fence and gate constructed across the mouth of said canyon, and said laborers, under the direction of the defendants herein, have already proceeded and carried their work of construction of said roadway to a distance of approximately one-eighth of a mile up said canyon; that the said defendants are about to, and will, unless restrained by this court, commit further injury and damage to said land of plaintiff in this: that they will continue the construction of said roadway up and through the said canyon, and in such work of construction will cut down valuable growing timber, displace rocks and soil, fill up or divert the stream of water flowing in said canyon, and deface and mar said lands and the natural beauty of said canyon with cuts and fills, and will otherwise damage and injure said lands by such construction work, all to the great and irreparable injury and damage of plaintiff."

The answer of defendants, except for the formal parts, denies all the material allegations of the complaint; and, while admitting the ownership and possession of the land in plaintiff, they insist that—

> The ownership and possession "is now and was at all times mentioned in plaintiff's complaint subject to a certain roadway known as the Tuna or Tunis Canyon Road, * * * and which was at all times stated in said complaint, and is now, a duly existing, recognized, used, and accepted public highway."

Defendants admit:

> That they "entered upon that certain public roadway known as Tuna or Tunis Canyon; * * * that laborers in the employ of said defendant [the county of Los Angeles] were, at the time mentioned in plaintiff's complaint, encamped and congregated in the immediate vicinity of said tract; * * * and that said laborers, * * * under direction of the defendants herein, have proceeded and carried their work of construction of said roadway to a distance of approximately one-eighth of a mile up said canyon."

It is further alleged, and set forth by proper allegation in the answer:

> That during all the time mentioned in the complaint, and for more than ten years prior to the commencement of this action, the alleged road "was a duly used and recognized public highway, and has been used and recognized as a public highway for many years last past, to wit, for over ten years continuously; that on Tuesday, February 14, 1911, the board of supervisors of the county of Los Angeles, in and by a proper resolution duly passed, accepted and laid out said Tuna Canyon Road as a public highway, and so declared it to be, which said resolution is duly recorded" (then following the resolution, in extenso, purporting to contain a description of the road); and "that said Tuna Canyon Road has never been discontinued or ceased to be a public highway by order of the board of supervisors of Los Angeles county, or otherwise; that said Tuna Canyon Road was and is the same in extent, width, and direction at all times mentioned in plaintiff's complaint herein as dedicated and declared in the said order."

The strip of land involved in this action extends about six miles north of the city of Santa Monica, and begins at the southern entrance of what is known as Tuna, or Cactus, canyon, which entrance is upon the shore of the Pacific Ocean. From this place of beginning it runs for some distance along the side of the canyon, which is very narrow, and thence meandering up into the Santa Monica mountains to a settlement in the highlands. Along the bed of the canyon, during the rainy season of each year, a stream of water flows. The "road" in question here practically parallels that stream for quite a distance, and then crosses the bed of the canyon in a northwesterly direction. In some form or another this "trail," "road", "public highway," or whatever designation may suit the person interested, has been used since the year 1883, at first by "a few settlers" and those visiting, working for, or having business with them; and, with the advance of years and the increase of population, the numbers who have so used it have increased until it has become, as contended by defendants, "a splendid automobile highway," this latter condition being brought about by the defendant county following the decision of the trial court herein, that court having found for the defendant and having denied the injunction prayed for.

It is conceded that, so far as the present action is concerned, in its final analysis there is but one question involved, and that question is whether or not there was a dedication of the alleged road. As already intimated, the trial court has answered this question in the affirmative. There was a motion for a new trial, which was denied. The appeal here is from the judgment and from the order denying said motion.

Appellant urges consideration by this court of eight assignments of error, by the second of which it is urged "that the evidence is insufficient to support said findings of fact and conclusions of law." Assignment No. 5 is as follows:

> "The court erred in making its order denying plaintiff's motion for a new trial because of error on the part of the trial court in admitting in evidence the resolution of the board of supervisors of Los Angeles county adopted three days before the trial of this action, as no supplemental answer had been filed alleging the adoption of said resolution."

If these two assignments of error are not well taken, then there is nothing in this record that needs our consideration.

On the trial of the case, the court permitted the defendants, over plaintiff's objection, to introduce defendant's Exhibit C which is a resolution by the board of supervisors of Los Angeles county declaring "Tuna Canyon Road, also known as Cactus Canyon Road, a public highway," which resolution was adopted on July 12, 1915—a long time after the commencement of this action and the joining of issues herein, and only three days before the trial. Exhibit C is a very lengthy resolution, purporting to describe in detail, by metes and courses, a strip of land, which respondents claim is the road here involved. This description was adopted by the court and is incorporated in the judgment. Appellant argues very vigorously that the ruling of the court here was error; that said resolution was inadmissible as evidence; and in this contention we think it correct. We find nothing in the language of the pleadings, the franchise of September 28, 1891, the resolution of February 14, 1911, or in defendant's Exhibit C, which ties the latter up to the "road" described in the former. We have no hesitation in saying that it is a physical impossibility to reconcile the description contained in the judgment with either the description as alleged in the complaint or with that alleged in the answer. Nor does the record contain any evidence—and we have read the entire voluminous record—which would even tend to prove that the "road" described in the judgment is the land referred to in either the complaint or the answer. There is nothing from which this fact, if it be a fact, may be inferred. On the contrary, the record here shows affirmatively, we think, that such is not the case. In this respect the evidence does not justify the finding, which the court found as a fact, that the road referred to in plaintiff's complaint and defendants' answer, the franchise granted by the board of supervisors of Los Angeles county on September 28, 1891, to operate a wagon road or steam road to the Ocean Shore and Calabasas Toll Road and Steam Railroad Company, and in the resolutions of the board of supervisors of Los Angeles county dated February 14, 1911, and July 12, 1915 (defendant's Exhibit C) was, and is, the said Tuna Canyon Road. No useful purpose can be served by a lengthy discussion of this point. We think the conclusion that there is a material variance between the allegation and the proof must now be obvious. Certainly no stranger, taking this record and comparing the descriptions of the land involved here, as found in the pleadings, with that found in the judgment—and the judgment follows exactly the description found in said Exhibit C—could say it described the same strip of land.

In view of the fact that there was no supplemental pleading which would justify the reception of the proffered evidence, we think it was error to overrule plaintiff's objection and to permit said resolution to be received in evidence. But notwithstanding this, were it not for the variance referred to above, and which we think fatal to the judgment here, the judgment might have been sustained.

The judgment and order appealed from are reversed.

We concur: FINLAYSON, P. J.; SLOANE, J.

42 Cal. App. 230

Ex parte RANKIN. (Cr. 860.)

(District Court of Appeal, First District, Division 1, California. July 15, 1919.)

1. INDICTMENT AND INFORMATION ⟹71—CERTAINTY.

If the facts stated are not capable of two constructions, and are such as to plainly show to a person of common understanding a crime has been committed, the information or indictment will be held sufficient.

2. INDICTMENT AND INFORMATION ⟹110(3)—WORDS OF STATUTE.

Indictment or information is sufficient, where crime is substantially alleged in the words of the statute, or their equivalent.

3. INDICTMENT AND INFORMATION ⟹110(25)—WORDS OF STATUTE—SODOMY.

Information charging attempt to commit the infamous crime against nature in the words of the statute (Pen. Code, § 286) denouncing such crime *held* sufficient, as against objection that the terms of the statute are unintelligible, uncertain, ambiguous, and general, since every person of ordinary intelligence understands what the crime against nature with a human being is.

In the matter of the application of Nathan Rankin for a writ of habeas corpus. Denied.

Nathan Rankin, in pro. per.

WASTE, P. J. From the petition filed in the above-entitled matter, it appears that the petitioner is confined in the state prison of the state of California at San Quentin, after conviction upon a charge of attempt to commit the infamous crime against nature, under section 286 of the Penal Code. While the document is denominated "A Petition for a Writ of Habeas Corpus and Certiorari," it mounts to nothing more than a petition for a writ of habeas corpus.

While the petition does not contain allegations of fact sufficient to warrant the issuance of such a writ, we are able to ascertain from its averments, and from the petitioner's brief, filed herein, that the gravamen of the petitioner's complaint is that the terms of said section 286 of the Penal Code are unintelligible, uncertain, ambiguous, and general, and that an information charging the commission of the crime in the words of the statute, or their equivalent, fails to state an indictable public offense, or any offense, in legally sufficient terms.

Defendant was prosecuted under section 286 of the Penal Code, which reads as follows:

> "Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than five years."

[1, 2] "The section does not define the crime, nor state in what it consists, but denominates it 'the infamous crime against nature.' At common law, the crime attempted to be charged was called sodomy. * * * The crime is now, and has been since the days of Blackstone, designated by law writers and judges as 'the infamous crime against nature' [citing cases], and it is so designated in the Penal Code. * * * If the facts stated are not capable of two constructions, and are such as to plainly show to a person of common understanding that a crime has been committed, the information or indictment will be held sufficient. It will also be held sufficient where the crime is substantially alleged in the words of the statute or their equivalent." People v. Carroll, 1 Cal. App. 3, 81 Pac. 681.

[3] "Every person of ordinary intelligence understands what the crime against nature with a human being is." People v. Williams, 59 Cal. 397, 398.

The writ is denied.

We concur: RICHARDS, J.; BARDIN, Judge pro tem.

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42 Cal. App. 404

TRULSSON v. SOUTHERN PAC. CO. (Civ. 2853.)

(District Court of Appeal, First District, Division 1, California. July 26, 1919. Rehearing Denied by Supreme Court Sept. 22, 1919.)

1. APPEAL AND ERROR ⟹843(2) — WHERE CONTRIBUTORY NEGLIGENCE DEFEATS RECOVERY, WHETHER PLAINTIFF WAS PASSENGER IMMATERIAL.

On an appeal in personal injury action, it is not necessary to determine whether plaintiff was still a passenger of defendant carrier, when injured while on its tracks, where plaintiff was guilty of such negligence proximately causing his injuries as must prevent his recovery.

2. CARRIERS ⟹333(1) — PASSENGER MUST USE ORDINARY CARE IN LEAVING TRAIN.

The fact that a carrier may owe its passengers the highest degree of care in safeguarding their exit from the carrier's premises after leaving its trains does not absolve the passenger from the duty of using ordinary care.

3. CARRIERS ⟹333(10)—PASSENGER GUILTY OF CONTRIBUTORY NEGLIGENCE BARRING RECOVERY.

Where plaintiff, alighting from defendant's train at an unusual place stepped upon another track after looking down it only a short distance in the direction from which trains would come, because of his view being obstructed by the departing train, walked with his back toward the approaching train without noticing the same until too late to step from such track, his negligence precluded recovery.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Pehr Trulsson against the Southern Pacific Company. From a judgment for defendant after granting a motion for nonsuit at the close of plaintiff's case, plaintiff appeals. Affirmed.

John D. Willard and E. A. Douthitt, both of San Francisco, for appellant.

Louis Oneal and James P. Sex, both of San Jose, and Roy G. Hillebrand, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in the defendant's favor after the granting of a motion for nonsuit at the close of the plaintiff's case.

The action was one to recover damages for injuries sustained by the plaintiff through the alleged negligence of the defendant. The facts of the case are these: The plaintiff, who at the time of the injuries complained of was, and for a period of between two and three years prior thereto had been, a resident of Palo Alto, had, on the 13th day of March, 1917, purchased a commutation ticket book, which entitled him to a first-class daily passage upon the trains of the defendant to San Francisco and return. Thereafter, and up to the 21st of March, 1917, the plaintiff had made six trips between said points upon his commutation book. On the last-named date, at about 4 o'clock p. m., the plaintiff presented himself as a passenger at the San Francisco depot of the defendant, and exhibited his book to the gatekeeper at one of the then open gateways which were there maintained leading to outgoing trains. The gatekeeper admitted him, and the plaintiff boarded a train then loading with passengers, and apparently about to start on the way to his desired destination. The train presently started, the conductor began his round collecting tickets, the plaintiff presented to him his book, from which the conductor took one of the tickets representing that day's trip without comment, and returned the book. The plaintiff presently noticed that the train was not stopping at stations to take on or discharge passengers, and inquired of a brakeman the reason thereof, by whom he was then informed that the first stop of that particular train was at San Jose, which was about 20 miles beyond Palo Alto. Plaintiff thereupon demanded that the train be stopped at the Palo Alto Station, and that he be let off there. The brakeman referred him to the conductor, upon whom he made the same demand. The conductor refused to stop the train at the passenger depot at Palo Alto for the reason that the train, being a through train, was not scheduled to stop at Palo Alto. The plaintiff's commutation book of tickets contained the following provision:

> "It is hereby understood that if this book is used on a train that does not stop at destination of coupons the holder will detrain at some point short of destination of coupons, or, if he elects to travel beyond such destination, he will pay conductor ticket fare from such destination to point at which he detrains."

The plaintiff, however, still insisting upon being let off at the Palo Alto Station, the conductor finally consented to stop the train in the switch and freightyards, about 1,200 feet beyond the regular station at Palo Alto, and allow the passenger to alight there. This he did; and the plaintiff, going at the conductor's request to the rear platform of the train, alighted on the west side of the train, which immediately moved off. The place where the plaintiff thus left the train was about 50 yards south of Forest avenue at the point where it crosses the defendant's tracks. There was a smooth and traveled pathway leading along the side of the track from the point where the plaintiff alighted back to the Palo Alto Station, but otherwise the ground within the switch yards was graveled and rough, and the rails stood their width above the ties so as to render walking across the tracks difficult. There is some question as to whether the plaintiff noticed the traveled walk leading back to the station, but whether or not he did so he did not wish to go that way, but rather to cross obliquely to the east side of the several tracks of the defendant in order to reach Forest avenue at that point on his way to his home, which was to the eastward of the point where he had alighted from the train. While so proceeding obliquely across the rough ground and raised rails of the defendant's switchyards he was struck by a north-bound train of the defendant coming swiftly upon an adjacent track to that on which the former train was departing, without giving warning of its approach. For the injuries thus inflicted he brought this action.

[1] The plaintiff's first contention upon this appeal is that he was a passenger of the defendant while upon its train, and that he continued to be such passenger after he alighted from the defendant's train under the circumstances above set forth and up to such time as he would have made his egress from the defendant's premises had he not been struck by its train; and that, being such passenger, the defendant owed him the highest degree of care, and was bound to give him warning of its approaching train, and that, not having done so, it is responsible for his injuries. Conceding, though not deciding, that the relation of carrier and passenger continued to exist between the plaintiff and the defendant after he had passed the station to which his ticket entitled him to ride, and after he had insisted upon being let off at said station notwithstanding the terms of his commutation contract above quoted, and after he had consented to leave and had left the defendant's train at the

place and under the circumstances above detailed, we are still of the opinion that the plaintiff's own undisputed evidence shows him to have been guilty of such negligence proximately causing his injuries as must have prevented his recovery in this action.

[2] The fact that a carrier may owe to its passengers the highest degree of care in safeguarding their exit from the carrier's premises after leaving its trains does not absolve the passenger from the duty of himself using ordinary care under the circumstances attending his departure from the carrier's train and grounds. Holmes v. S. P. Ry. Co., 97 Cal. 161, 31 Pac. 834.

[3] The undisputed evidence, as presented by the plaintiff himself, discloses that, however much or little the defendant's agents may have been at fault in permitting the plaintiff to gain access to and to take passage upon a train which was not scheduled to stop at his station, he did in fact, and without inquiry on his own part, board such a train, and, being so on board and evidently not desiring to be carried to its first regular place of stoppage at San Jose, conformably to the stipulation of his ticket book, he demanded that the officials of the defendant in charge of said train should depart from its schedule and violate their instructions by stopping the train at the Palo Alto Station; and when the conductor, declining to comply with this demand, finally agreed to halt the train momentarily in the freightyards of the defendant, some 1,200 feet or more beyond said station, the plaintiff consented to alight at said place, and did so; and, having done so, found himself standing by the west side of one of the defendant's several tracks about 50 yards from a street crossing to which, along the rails by which he stood, ran a smooth pathway to said street, and beyond it back to the station. He either did not see or did not choose to take said pathway, but started obliquely across the rough grounds and raised tracks, where no pathway or crossing was, on his way to the east side of the several tracks of the defendant at their point of intersection with said street. The plaintiff had lived in Palo Alto for several years, and must have known that trains of the defendant passed frequently through that city. Being upon its tracks at a point other than the regular station or stopping place of such trains, and at a place where persons, whether or not they held the relation of passengers of the carrier, were not expected to be, and where trains were not accustomed to stop, and, being minded to cross said tracks where no pathway was, it was plainly the duty of the plaintiff to walk circumspectly and to watch for approaching trains before essaying to cross the tracks of the defendant in the manner and direction which he chose to go. Had he done this he could not have failed to observe the rapidly approaching train coming from the southward along a straight track and visible for at least half a mile. If his view in that direction was obstructed by the departing train from which he had just alighted, it was all the more his duty to proceed cautiously, but, instead of doing so, according to his own testimony, he started, as soon as he was clear of the rear end of said departing train, and with only a glance in its direction, which gave him a view of but 40 or 50 feet of the adjacent north-bound track, to walk diagonally to the northward, with his back partially at least in the direction from which the north-bound train was coming, and without another look in that direction until said train was so close upon him that, although he was not yet upon the track on which it was approaching, he could not, by stepping backward, avoid being struck by it as it went by.

Under the circumstances of this case as thus summarized from the plaintiff's own testimony, we think that he was clearly guilty of such negligence as a matter of law as must have prevented his recovery in this action. The language of the case of Holmes v. S. P. Ry. Co., supra, is particularly applicable to the case at bar because of the similarity of its facts, and also because the plaintiff in that case, as it is claimed in the instant one, occupied the relation of a passenger to the defendant. The court said:

> "A railroad track upon which trains are constantly run is itself a warning to any person who has reached years of discretion and who is possessed of ordinary intelligence that it is not safe to walk upon it, or near enough to it to be struck by a passing train, without the exercise of constant vigilance in order to be made aware of the approach of a locomotive, and thus be enabled to avoid receiving injury; and the failure of such a person so situated with reference to the railroad track to exercise such care and watchfulness, and to make use of all his senses, in order to avoid the danger incident to such situation, is negligence per se."

It may be said, in conclusion, that the doctrine of "last clear chance," invoked for the first time by the appellant at the oral argument and in the briefs filed subsequent thereto, has no application to the facts of the case at bar.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

(42 Cal. App. 441)

ETIENNE v. ETIENNE. (Civ. 2806.)

(District Court of Appeal, First District, Division 2, California. July 28, 1919. Rehearing Denied by Supreme Court Sept. 25, 1919.)

1. Contracts 🔑172—Agreement to Deliver Bonds—Breach—Maturity of Cause of Action.

Where a man breached his contract with his wife to deliver bonds which he was to redeem for a specified sum within five years, failure to make such deposit of the bonds converted the agreement into an absolute promise for the payment of the money, and a right of action for recovery thereof matured upon such breach; demands for such delivery having been previously made.

2. Contracts 🔑314—Rendering Performance Impossible.

Where defendant made a contract before divorce for a property settlement, agreeing to deliver certain bonds to his wife to be redeemed by him at a fixed price within five years, and delayed delivery until performance became impossible, his conduct was equivalent to a breach of contract, although the time for redeeming the bonds had not arrived, and the plaintiff could then maintain an action for the breach.

3. Contracts 🔑172—Breach by Failure to Deliver Bonds.

In an action for breach of contract by failure to deliver corporate bonds, which were to be later redeemed, the objection that damages must be based on the value of the bonds at time of breach, and that no proof thereon is contained in the record, is not well taken, where it is shown that defendant appellant construed the contract as requiring immediate deposit of the bonds, and the contract provides that the "bonds are taken" "as being the equivalent of $60,000."

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by Annie T. Etienne against Victor Etienne, Jr. Judgment for plaintiff, and defendant appeals. Affirmed.

John T. Williams and Leo R. Friedman, both of San Francisco, for appellant.

F. B. Clarke and J. J. Dunne, both of San Francisco, for respondent.

HAVEN, J. Defendant appeals from a judgment rendered against him in the sum of $60,000, with interest, found to be due to plaintiff under the terms of a written contract between the parties. Plaintiff and defendant were husband and wife. On October 22, 1913, while an action for divorce filed by plaintiff was pending, a property settlement was made between them, evidenced by a written contract, upon which this action is based. For a proper understanding of the facts involved in the appeal it is necessary to set forth in full two paragraphs of this contract. The defendant is the party of the first part and the plaintiff the party of the second part therein referred to. These paragraphs are as follows:

"Second. That said party of the first part agrees to immediately execute a grant, bargain and sale deed conveying to the said party of the second part all his right, title and interest in and to the above-described property, and also to deliver to said party of the second part sixty (60) General Petroleum bonds, and all of the household furniture now in the premises at 770 Dolores street.

"Third. Said party of the first part agrees that on or before five years, he will redeem at par the said sixty General Petroleum bonds for the full face value of said bonds, namely for sixty thousand dollars, and that in the meantime, and until said bonds are redeemed for said sixty thousand dollars, he guarantees that said bonds will give a net income of three hundred dollars per month payable on the interest payment dates of said bonds, and in case said bonds do not bring a net income of three hundred dollars per month, the party of the first part agrees to make up any difference between the amount earned on said bonds and the said sum of three hundred dollars; it being distinctly understood by and between the parties hereto that the said General Petroleum bonds are taken in this agreement as being the equivalent of sixty thousand dollars, and it is the intent and purpose of the party of the first part to give said party of the second part the sum of sixty thousand dollars by means of said bonds, and said party of the first part, not being in a position at this time to turn over said sixty thousand dollars to said party of the second part, agrees that he will leave with said party of the second part said bonds, with the guarantee that on or before five years they shall be redeemed for the sum of sixty thousand dollars; and it being further understood that it is the intent of this agreement that a monthly income of three hundred dollars shall accrue to said party of the second part from said bonds, or failing to accrue from said bonds, then from said party of the first part until redemption of said bonds by said party of the first part."

Defendant partly performed his obligations under the above contract by executing and delivering to plaintiff a deed for the real property therein referred to, and also by delivering to her the household furniture. He has never delivered to her the described bonds nor paid the sum of $60,000. This action was prosecuted for the recovery of this latter sum, and judgment therefor was rendered against the defendant.

It is agreed by both parties that the primary obligation of defendant under the terms of the contract was to pay to plaintiff said sum of $60,000. Appellant contends, however, that this sum was not payable until five years after the date of the contract, to wit, October 22, 1918, and that this action, having been filed on April 17, 1917, was prematurely brought. It is further argued that, while appellant's failure to de-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

liver the bonds specified in the contract or to make payment of the sum of $60,000 constituted a breach of such contract on his part, plaintiff's remedy was limited to one of two causes of action—either to compel the delivery of the bonds, in specific performance of the contract, or for damages for failure to make such delivery; and, further, that, in the latter action, the value of the bonds was a material element in computing the damage, and that no evidence of such value was offered. The contention is that no time for the payment of the sum of $60,000 is specified in the contract, and therefore that the only obligation incurred by defendant was for delivery of the bonds with the accompanying guaranty that he would redeem the same at their face value within five years from the date of the contract. It is asserted, therefore, that defendant was not liable for the cash payment until the expiration of the five-year period. His answer pleads his intention of making payment at that time.

Respondent, on the other hand, contends that the terms of the contract are equivalent to an agreement on the part of defendant to pay to plaintiff the sum of $60,000, in bonds of the General Petroleum Company, and that the five-year period is specified solely as a time of redemption, and can have no bearing upon the liability of defendant unless and until the bonds were delivered; that the obligation of defendant was to deliver the bonds immediately upon the execution of the contract, or at least within a reasonable time thereafter; and that, upon the breach of that obligation, defendant became liable to plaintiff in the sum mentioned as damages suffered by plaintiff by reason of such breach.

[1] In Beckwith v. Sheldon, 168 Cal. 742, 746, 145 Pac. 97, 99 (Ann. Cas. 1916A, 963) the Supreme Court construed a contract which provided " 'that there shall be paid to' Beckwith 'the sum of fifty thousand dollars * * * in bonds of the * * * company, at par,' " and held that, upon the refusal of the promisor to deliver the bonds in payment, the promise became an absolute money obligation, and that the payee had an immediate right of action for recovery of the money without alleging or proving the value of the bonds. Many authorities are cited to sustain the doctrine that, when a contract is made to pay a sum of money in specific articles, upon the failure of the payer to deliver such articles within the time provided, the contract becomes an obligation to pay the sum of money itself. The proper construction of the contract here involved brings it within the rule of the above case. Said contract provides:

> "It is the intent and purpose of the party of the first part to give said party of the second part the sum of sixty thousand dollars by means of said bonds."

This is equivalent to a promise to pay $60,000 in the bonds referred to. It is true that the contract discloses that the defendant was not in position at the time of its execution to make such payment, and that, for the purpose of securing the payment, the bonds were to be delivered to the plaintiff and retained by her, under the defendant's guaranty of a stable income therefrom and ultimate redemption in cash within five years. It is not contended by appellant that plaintiff was obliged to wait five years, without complaint or cause of action, upon the failure of defendant to either deposit the bonds or pay the money. In other words, it is admitted that, at the time this action was brought, defendant had been guilty of a breach of his contract obligations. It is insisted, however, that during the five-year period provided for redemption of the bonds the only obligation of the defendant was to make the deposit as security, and that therefore plaintiff's remedy was limited to the specific performance of that obligation, or to the recovery of damages for failure to make such deposit. Under the rule stated in Beckwith v. Sheldon, supra, the failure of the defendant to make the stipulated deposit converted his agreement into an absolute promise for the payment of the money, and a right of action for recovery thereof matured upon the breach of the covenant of the contract. The only element in the contract here involved, which is urged as distinguishing this case from the doctrine announced in the above cited case, is that the deposit here provided for was to be made as security for the performance of the promise to pay the money, while in the cited case, and authorities therein referred to, the promise was to pay in bonds, or other articles, and not to secure a future payment. Construed as a whole, this contract evidences a primary obligation to pay the sum specified in bonds, with a secondary obligation to redeem the bonds in cash within the five-year period. The addition of the second promise did not alter appellant's obligation upon the first, nor take the case without the rule above referred to. Nor can the contract be construed to mean that the time of payment was postponed for five years without the deposit of the security. The only mention in the contract of the five-year delay is in connection with the redemption of the bonds. Until such bonds had been deposited, the question of redemption, or the time therefor, could not arise. There may be some uncertainty as to whether the word "immediately" at the commencement of the second paragraph of the contract refers to the delivery of the bonds as well as to the execution of the deed. If it does not, the contract is silent as to when the bonds should be delivered. Under that construction of the contract it must be held that the bonds were to be delivered within a reasonable time or upon demand of the plaintiff. The evidence discloses frequent demands for such delivery, and also a demand for payment of the money, if the bonds could not be delivered. It is conceded that, upon such demand and failure upon the part of the defendant to either deliver the security or make the payment, a breach of the contract resulted. Upon such breach plaintiff was entitled to recover the sum of $60,000, the payment of which is conceded to have been the primary obligation of the defendant.

[2] The same result is reached from a consideration of other facts appearing in the record. In an interview between defendant and plaintiff's attorney, prior to the commencement of the suit, defendant admitted that the bonds should have been delivered when the agreement was signed, but that he refrained from doing so by reason of a feeling of animosity toward the plaintiff's former attorney. He further stated that he expected to be compelled to put them up, and that—

> "I am sorry now that I did not do so; now I cannot. I am sorry that I cannot."

At a later interview between the same parties, when a further demand was made for the deposit of the bonds or payment of the money, defendant criticized the plaintiff's act in recording the deed to the house and stated the result of that action was that "everybody came on me and they took everything I had; now I can't do anything." It thus appears that defendant construed the contract as obligating him to make an immediate delivery of the bonds; that he did not do so for reasons personal to the attorney then representing the plaintiff; and that before the interview referred to his ability to perform the contract had ceased. This brings the case within the rule:

> "That if one party to a contract has destroyed the subject-matter, or disabled himself so as to make performance impossible, his conduct is equivalent to a breach of the contract although the time for performance has not arrived." Roehm v. Horst, 178 U. S. 1, 8, 20 Sup. Ct. 780, 44 L. Ed. 953; O'Neill v. Supreme Council, etc., 70 N. J. Law, 410, 57 Atl. 463, 1 Ann. Cas. 422; Wolf v. Marsh, 54 Cal. 228, 232; Poirier v. Gravel, 88 Cal. 79, 83, 25 Pac. 962; Cabrera v. Payne, 10 Cal. App. 675, 678, 103 Pac. 176.

In view of the provisions of the contract and defendant's testimony, it must be assumed that he had the ability at the time of the execution of the contract to make the deposit of bonds therein provided for; that he voluntarily delayed doing so, and thus disabled himself from performing his contract obligation. Defendant's answer contains allegations to the contrary, but no evidence was offered to support them and the findings negative their truth. Under the doctrine of the above cases, plaintiff had the right to treat the contract as terminated with regard to such obligation and to maintain an action at once for the damages occasioned by such breach of contract. Appellant's contention that this rule applies only "in those instances where the refusal to perform, or the renunciation of the contract is absolute and unequivocal and goes to the whole contract," is not sustained by the authorities. In the case relied upon by appellant in support of that position, it is said:

> "To justify such a course of procedure there must be a failure in some substantial particular, which goes to the essence of the contract, and renders the defaulting party incapable of performance, or makes it impossible for him to carry out the contract as intended." Krebs Hop Co. v. Livesley, 51 Or. 527, 533, 92 Pac. 1084, 1086, affirmed in 59 Or. 574, 114 Pac. 944, 118 Pac. 165, Ann. Cas. 1913C, 758.

The failure of defendant to deposit the bonds was a failure in a substantial particular which went to the essence of the contract. His delay in making such deposit, and resultant inability so to do, made it impossible for him to carry out the contract as intended. The authorities also sustain the position that an act of the promisor which disables him from making performance, as well as a formal renunciation of the contract, is within the rule above stated.

[3] The contention of appellant that plaintiff's cause of action was limited to the recovery of damages for failure to make the deposit of the bonds does not justify the conclusion that the recovery herein was unwarranted. The argument is that in such an action the damages must be based upon the value of the bonds at the time of the breach, and that no proof of such value is contained in the record. Under the language of the contract, as construed by appellant, the deposit of the bonds should have been made immediately upon the execution of the contract, and the failure to do so constituted a breach at that time. Paragraph third of the contract, which by special reference is made a part of the complaint, provides that it was distinctly understood between the parties that the "bonds are taken in this agreement as being the equivalent of sixty thousand dollars." This agreement furnished evidence of the value of the bonds at the time of the breach. The complaint contains allegations of failure on the part of defendant to deliver the bonds, and of damage in the sum of $60,000. These allegations may be regarded as stating a cause of action for damages arising from the failure of defend-

ant to make the deposit of bonds. Under that theory the evidence is sufficient to support the judgment. Henry v. North American Railway Construction Co., 158 Fed. 79, 85 C. C. A. 409.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

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41 Cal. App. 763

ELLIOTT v. McINTOSH et al.

(Civ. 2829, S. F. 8665.)

(District Court of Appeal, First District, Division 1, California. June 26, 1919. On Rehearing in Supreme Court in Bank, Aug. 25, 1919.)

1. Boundaries 🔑20(2)—On Dedication of Street Sales by Lot Carry Title to Middle of Street.

In order that a conveyance by lot number with reference to a recorded map should carry title to the center of the street shown, it is necessary that there be first a valid dedication and acceptance of the street; but, there having been a dedication, sales by number of lots abutting on the street carry title to its center.

2. Dedication 🔑19(1) — Designation of Street by Recording Plat if Accepted is Irrevocable.

When an owner of a tract of land plats it upon a map designating certain portions as public streets or highways, and thereafter records the map, he is deemed to have made an offer to dedicate the indicated streets to the public for highway purposes, and if such dedication is accepted it becomes irrevocable.

3. Dedication 🔑31—On Failure to Accept Dedication by Plat Street Reverts to Abutting Owner.

Where the owner of land plats it on a map designating streets or highways, and records the map, thereby offering to dedicate the streets to the public, by such dedication alone the owner does not part with title to the land occupied by the streets, but grants the public merely an easement for travel, and on failure to accept the dedication the easement expires and full title reverts to the owner of the adjoining land.

4. Dedication 🔑35(1)—Filing of Map is Not Acceptance of Dedication.

The mere filing of a map designating certain portions of a tract as streets does not constitute acceptance of their dedication.

5. Dedication 🔑34 — Owner Can Revoke Dedication Not Accepted in Reasonable Time.

Acceptance of a landowner's offer to dedicate streets indicated by the map or plat recorded by him must be evidenced within a reasonable time after the offer, and, if not, the owner may resume possession and revoke his offer.

6. Dedication 🔑35(1), 37—Acceptance of Dedication May be Actual or Implied.

Acceptance of streets offered to be dedicated by recordation of the owner's map or plat may be either actual or implied, by the formal act of the public authorities having jurisdiction, or by mere user on the part of the public long enough to evidence its intention to accept.

7. Dedication 🔑41—On Sale of Lots with Reference to Recorded Map Presumed Irrevocable.

If an owner, having recorded a map showing streets laid out, sells the lots designated thereon by specific reference to the map, he is presumed to have made an irrevocable dedication of the streets.

8. Dedication 🔑39—On Sale of Lots by Recorded Map Owner Estopped to Deny Dedication.

If lots are sold by number, and not by metes and bounds, reference being made to a map previously prepared by the owner showing streets and alleys, and recorded, the owner, original dedicator of the streets, is estopped to deny that the portions designated as streets on the map were in fact dedicated to or accepted by the public.

9. Ejectment 🔑10—When Neither Party Claims by Deed Plaintiff Can Recover by Possession.

Plaintiff in ejectment, who, with her husband, was in actual possession of the premises in dispute for more than 29 years until ousted by defendants' immediate predecessor, during all of which time the premises had been occupied and cultivated by plaintiff's husband, as against defendants was in actual prior and lawful possession, entitled to maintain ejectment, since where neither party relies on a paper title prior actual possession will support the action.

10. Adverse Possession 🔑94 — Failure to Pay Taxes When None are Levied Immaterial.

Failure to pay taxes where none are levied does not defeat a claim of adverse possession under Code Civ. Proc. § 325.

11. Adverse Possession 🔑113—Deeds and Mortgages Not Admissions Against Interest Inadmissible.

In ejectment, deeds and mortgages covering lots adjoining the one in dispute, merely what they purported to be, and not admissions against interest on the part of plaintiff's predecessor, *held* inadmissible.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Agnes Elliott against John O. McIntosh and others. From judgment for defendants, plaintiff appeals. Reversed.

Clarence N. Riggins and Wallace Rutherford, both of Napa, for appellant.

Harry L. Johnston, L. E. Johnston, and Nathan F. Coombs, all of Napa, for respondents.

NOURSE, Judge pro tem. Appeal from a judgment in favor of defendants in an action by plaintiff to eject defendants from a strip of land lying between the lands of the parties hereto, and being a portion of what was formerly laid out on a map as a street, but which was never accepted or opened for travel. The said tract was platted in 1873 and lots sold therein to predecessors of the parties hereto, Samuel Elliott, the husband of appellant, having acquired his title in October, 1883, the defendants having acquired theirs in May, 1917, just prior to the commencement of this action.

Samuel Elliott, the husband and immediate predecessor in interest of the appellant, planted the lots which he thus acquired in an orchard, which orchard extended over the lines of the disputed street, as indicated upon the map of the tract, and up to a fence which was built by one Riordan, a lessor of respondents' predecessor, as early as 1906. All of the land here in dispute was planted in orchard and cultivated by Samuel Elliott for at least 29 years before the action was commenced. The fence erected in 1906, apparently with the consent and approval of appellant and her predecessor, marked the line of their cultivation and occupancy from that date until it was torn down 10 years later by Morgan, the immediate predecessor of respondents. When this fence was torn down, in 1916, a new fence was erected by Morgan on the center line of what appeared on the map as Cedar street, over the objection of appellant. The strip between the old fence erected by Riordan in 1906 and the fence erected by Morgan in 1916 is about 22 feet wide and includes one row of orchard trees planted by Elliott. On May 22, 1917, Morgan conveyed lots 2 and 3 of block B to respondents, and they continued the fence erected by Morgan, and claimed title to the premises on the theory that their deed to the lots carried their title to the center of the street.

[1] As far as respondents' case is concerned, the only evidence of title produced by them is their deed from Morgan, dated May 22, 1917. This deed does not purport to convey any right to the disputed land, but covers the two adjoining lots only. Thus the only claim of title on the part of respondents is based upon the theory that the conveyance by lot number with reference to the recorded map carries title to the center of the street. In order that this may be so, it is necessary that there be first a valid dedication and acceptance of the street. The only evidence of dedication is the record of the map filed in 1873. It is conceded that there was no formal acceptance and no user.

[2, 3] When an owner of a tract of land plats it upon a map, designating certain portions as public streets or highways, and thereafter records the map, he is deemed to have thereby made an offer to dedicate the indicated streets to the public for highway purposes. If such dedication is accepted it thereupon becomes irrevocable. By such dedication alone he does not part with the title to the land designated as streets, but grants to the public an easement only for highway purposes. Upon the failure to accept the offer of dedication the easement expires, and the full title reverts to the owner of the adjoining land.

[4-7] The mere filing of a map designating certain portions of the tract as streets does not constitute an acceptance. Hayward v. Manzer, 70 Cal. 476, 480, 13 Pac. 141; Niles v. Los Angeles, 125 Cal. 572, 577, 58 Pac. 190. Acceptance of the offer of dedication must be evidenced within a reasonable time after the offer, and if this is not done the owner may resume possession, and thereby revoke his offer. Niles v. Los Angeles, supra. Such acceptance may be either actual or implied. It may be done by the formal act of the public authorities having jurisdiction over the premises. It may be done by the use on the part of the public for such a length of time as will evidence its intention to accept the dedication. Hayward v. Manzer, supra. Again, if an owner, having recorded such a map, sells the lots designated thereon by specific reference to such map, he is presumed to have made an irrevocable dedication of the streets, which dedication thereby becomes accepted by use of the public. San Leandro v. Le Breton, 72 Cal. 170, 175, 13 Pac. 405; Berton v. All Persons, 176 Cal. 610, 615, 170 Pac. 151; Davidow v. Griswold, 23 Cal. App. 188, 192, 137 Pac. 619.

[8] Proceeding from this proposition it must follow that if lots are sold by number and not by metes and bounds, reference being made to such a map, the original dedicator is estopped to deny that the portions designated as streets on the map were not in fact dedicated or accepted. Furthermore, conveyances of such a character carry title to the center of the street. Colegrove U. Co. v. Hollywood, 151 Cal. 426, 431, 90 Pac. 1053, 13 L. R. A. (N. S.) 904; section 1112, Civ. Code. But this, of course, is not the case if the portion claimed as a street is not such in fact. Sanchez v. Grace Meth. Church, 114 Cal. 295, 299, 46 Pac. 2.

In the case at bar it is conceded that Cedar street was never accepted by the county and was never opened or used as a public street or highway. The record fails to disclose any conveyance on the part of the dedicator of the lots delineated on the map which would effect an implied acceptance under the rule of the San Leandro Case, supra. Certain deeds were offered in evidence showing conveyances by predecessors of the parties to this litigation, and such deeds refer to the lots shown upon the map filed in 1873; but it does not appear that Cedar street was not abandoned long prior to their execution. The admitted fact that the street was never formally accepted and never opened or used as a highway supports the presumption that it was never even impliedly accepted, and that the land so designated as Cedar street had fully reverted to the owner before any of these deeds were executed.

Such being the case, the respondents cannot claim that by the deed of May 22, 1917, they procured title to the center of the street. This deed, therefore, was not relevant to the issues, as it did not cover the property in suit, and the trial court should have sustained the objection to its introduction in evidence. This leaves the respondents as mere trespassers without any color of title or right to possession.

As the title to the land embraced within the lines of Cedar street reverted to the original dedicator upon failure to accept his offer of dedication, the question remains whether appellant obtained any title or right to possession which would entitle her to maintain this action. She urges in support of her claim actual possession as sufficient against any one who cannot show a better right, and adverse possession for over five years by herself and her predecessor.

[9] It is not disputed that appellant, with her husband, was in actual possession of the premises for more than 29 years and until ousted by the immediate predecessor of respondents in September, 1916. During all this time the premises had been occupied and cultivated by Elliott. As respondents had no record title, but were mere trespassers, there is no evidence to support the finding of the trial court that they were the owners and entitled to the possession. As against them, appellant was in actual prior and lawful possession, and thus entitled to maintain this action. "Where neither party relies upon a paper title, prior actual possession is sufficient to support an action in ejectment." Hart v. Cox, 171 Cal. 364, 367, 153 Pac. 391, 392. Respondents having failed to show any right, judgment should have gone to appellant.

[10] Furthermore, from 1906 to 1916, appellant and her predecessor had been in open and notorious possession of the premises, during all of which time they were inclosed by a fence. Prior to that time, and for a period of 29 years at least, they had been in possession and occupancy of the premises, having planted them in orchard, cultivated and withdrawn the profits therefrom. They had thus met all of the requirements of section 325, Code of Civil Procedure, and section 1006 of the Civil Code, except that they had not paid any taxes upon this strip. This appellant excuses upon the ground that no taxes were levied, and hence none were paid by anyone. That failure to pay taxes where none are levied does not defeat a claim of adverse possession there can be no doubt. Allen v. McKay, 120 Cal. 332, 52 Pac. 828; Oneto v. Restano, 78 Cal. 374, 379, 20 Pac. 743.

[11] Respondents attack appellant's claim of adverse possession by evidence of certain deeds and mortgages covering the adjoining lots. These were offered in evidence on the theory that they constituted admissions against interest on the part of appellant's predecessor. They were, however, no more than what they purported to be. They did not cover or relate to the premises in dispute, and should have been excluded.

There is also some evidence of statements made by the appellant's predecessor to the effect that there was some dispute or uncertainty as to the ownership of this strip; that he did not work some of this land as he did the other; and that there would be trouble for anyone who took the ajoining land. These conversations merely show that there was doubt in the mind of the occupant as to the character of title claimed to the strip of land in dispute. They do not negative the fact that Elliott was the actual adverse possessor, to the exclusion of all others, for some 20 years before the first conversation is alleged to have taken place.

There is no conflict in the evidence upon the fact of the possession, occupancy, or cultivation. There is therefore no evidence to support the finding in this respect against the appellant.

Other points raised in the briefs do not require attention.

For the reasons given the judgment is reversed.

We concur: WASTE, P. J.; RICHARDS, J.

Opinion of Supreme Court denying rehearing:

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division 1, is denied.

We base our denial entirely upon that part of the opinion relating to the matter of adverse possession, and our denial of the application is not to be taken as an indication of our views as to any other part of the opinion.

All concur.

42 Cal. App. 459

SQUIRES v. SOUTHERN PAC. CO.
(Civ. 2146.)

(District Court of Appeal, Second District, Division 2, California. July 29, 1919.)

1. CARRIERS ⚷264—PASSENGER CANNOT REVERSE ROUTE SPECIFIED IN TICKET.

A railroad's passenger was clearly in the wrong in insisting to the conductor on riding from V. to S. on a ticket reading from S. to V., unless he himself was not at fault in the matter of the mistake in the ticket.

2. FALSE IMPRISONMENT ⚷3—UNWARRANTED ARREST OF PASSENGER CONSTITUTES FALSE IMPRISONMENT.

A state policeman's assault upon a railroad passenger who had not paid his fare and the taking of him into custody for evading his fare, having been unwarranted, constituted false imprisonment, or some wrong other than malicious prosecution.

3. MALICIOUS PROSECUTION ⚷16 — NOT MAINTAINABLE WITHOUT MALICE AND WANT OF PROBABLE CAUSE.

There can be no recovery as for malicious prosecution in the absence of evidence to show the prosecution by defendant was malicious, and without probable cause.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Lewis J. P. Squires against the Southern Pacific Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

J. B. Holley, of Long Beach, for appellant.
W. I. Gilbert, of Los Angeles, for respondent.

SLOANE, J. The plaintiff is prosecuting this appeal from a judgment denying his prayer for damages in an action against the Southern Pacific Company for malicious prosecution.

The complaint charges that defendant, through one of its agents, procured plaintiff's arrest and instituted, in the justice's court of the city of Santa Barbara, a criminal action against him, and that said action was begun and prosecuted against him, by and through the defendant, maliciously and without probable cause.

The circumstances leading up to the arrest and criminal prosecution grew out of the fact that plaintiff through some mistake—the blame for which is not clearly accounted for in the evidence—boarded a train of the defendant company at Ventura, on his way to Santa Barbara, and presented for his passage a ticket reading from Santa Barbara to Ventura. The conductor refused to accept the ticket, and demanded that plaintiff pay his fare. This plaintiff refused to do. There was some altercation between him and the conductor, but he was permitted to ride to Santa Barbara. On reaching that city, the conductor pointed out the plaintiff to one William Beck, apparently a police officer on duty at the station, with the statement that plaintiff was the man who refused to pay his fare, and to see if he could get the fare out of him. This ended the conductor's part in the matter. Some controversy arose between plaintiff and the officer, and the plaintiff testifies that the officer struck him, and then arrested him and carried him off to jail, where later the criminal charge of disturbing the peace was sworn to by the officer, Beck. Subsequently the criminal action was dismissed, without coming to trial. Later plaintiff brought this action for malicious prosecution, against the railway company, and on the trial, at the close of the plaintiff's evidence, the court granted a nonsuit.

[1-3] The appeal is taken under the alternative method. It seems to have been quite a prevailing opinion among members at the bar, since this alternative method of appeal was enacted, that about all that was required was to furnish the appellate court with a typewritten transcript, and leave the members of the court to hunt through the record for any errors they might find. In this case, plaintiff's counsel makes no specification of errors, cites no authorities, and points out no parts of the evidence which he may wish to call to the attention of this court. Even in going through the transcript, we are unable to find on just what part of the proceedings plaintiff bases his cause of action. He seems to have had an unfortunate time of it, and is deserving of sympathy, but apparently is not entitled to legal redress. He was clearly in the wrong in insisting upon riding to Santa Barbara on a ticket that was intended to carry him in the opposite direction, unless he can show that he himself was not at fault in the matter. If the mistake in his ticket was the fault of the railway company, he had his redress for that wrong, but could not demand of a conductor, who had no knowledge of the facts, that he be carried on the insufficient ticket, without showing that his possession of an insufficient ticket was the fault of the railway company. But, in any event, the conductor of the defendant company did not molest him. The conductor committed no wrong in pointing him out to the officer as a passenger who had refused to pay his fare. He did not direct or advise his arrest. Beck, the officer, though shown to be in the pay of the railway company, seems to have been a state officer detailed for that service; and the evidence does not show that he was directed by the company, or had any authority to make arrests in its behalf. His assault upon the plaintiff, and the taking of him into custody, if it was for evading his railroad fare, was unwarranted, and constituted false imprisonment, or some

other wrong than malicious prosecution. The complaint that Beck subsequently swore to, charging disturbance of the peace, is not contained in the record; and it does not appear whether the ground of the complaint was plaintiff's conduct on the train, or the controversy which took place with the officer after he ceased to be a passenger of the railway company. Moreover, there is no evidence to show that the prosecution was malicious or without probable cause. The burden was on the plaintiff to establish both of these elements of his case.

The trial judge was justified in granting the motion for a nonsuit.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

42 Cal. App. 292

UNITED STATES FARM LAND CO. v. DARTER. (Civ. 2015.)

(District Court of Appeal, Third District, California. July 19, 1919. Rehearing Denied by Supreme Court Sept. 15, 1919.)

1. Brokers 🔑10 — Notice Necessary to Broker of Cancellation of His Contract.

Owner, to terminate land broker's contract for a period of indefinite duration, must give broker notice of its cancellation.

2. Brokers 🔑44—Executory Contract of Broker Subject to Revocation.

While a contract of employment between a landowner and a real estate broker to sell land on commission remains executory, the principal may rescind it, but he must give notice of rescission to the broker before the latter has performed.

3. Brokers 🔑8(1)—Presumption in Favor of Continuance of Agency.

The presumption is in favor of the continuance of land broker's contract for an indefinite period.

4. Brokers 🔑7 — Unaccepted Offer of Modification of Contract Does Not Change Original.

Owner's proposed modification of broker's contract for an indefinite period did not create a new contract between the parties, where the proposed modification was never accepted by broker.

5. Brokers 🔑40 — Proposed Modification of Brokerage Contract After Sale Does Not Affect Commission.

Where purchaser, procured by broker under broker's contract for indefinite period, had signed contract of sale, owner's subsequent proposed modification of the contract could not defeat broker's right to commission.

6. Brokers 🔑54, 64(1)—Subsequent Insolvency of Purchaser Does Not Affect Commission.

The services of a real estate broker are fully performed, and his commission fully earned, when he has procured a purchaser ready and willing to enter into a contract of sale upon the terms fixed by the owner, and the subsequent insolvency of purchaser cannot defeat his recovery of commissions.

7. Brokers 🔑86(4) — Evidence Sufficient to Show Procurement of Purchasers.

In broker's action for commission, evidence consisting of correspondence *held* to show that broker procured purchasers, who entered into a contract of sale with owner.

8. Brokers 🔑64(1)—Entitled to Commission Though Purchaser Defaulted.

Where owner entered into a contract of sale with purchasers procured by broker, for price in excess of that specified in broker's contract, broker was entitled to commissions though purchasers afterwards defaulted.

9. Brokers 🔑57(2) — Commission Earned Though Vendor Reduced Price.

When a principal makes a sale to a purchaser found by the broker, having availed himself of the broker's services, he is liable for commissions, though the sale was made at a lower price than originally proposed by him to the broker.

10. Brokers 🔑48—Having Accepted Purchaser, Commission is Earned.

If owner was dissatisfied with purchasers procured by broker, he should have notified broker, or have declined to enter into a contract with purchasers; but, having accepted purchasers without being misled by brokers, he is bound to pay broker's commission.

11. Appeal and Error 🔑171(1)—Theory of Case Below Governs on Appeal.

An action tried in lower court on the theory that the relation between plaintiff and defendant was that of agent and principal, the theory that the relation of the parties was that of purchaser and vendor will not be considered on appeal.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by the United States Farm Land Company against R. L. Darter. Judgment for plaintiff, and defendant appeals. Affirmed.

Ben Berry, of Stockton, for appellant.

Butler & Van Dyke, of Sacramento, for respondent.

BURNETT, J. The action was by a real estate broker against a landowner to recover $5,000 commissions for procuring a purchaser for land under a written contract of agency. The answer admitted the execution of said contract, but "denied that in said contract in writing defendant promised and agreed to pay to plaintiff for said services of plaintiff in the event that the plaintiff procured and introduced to defendant a purchaser of said property all money realized in excess of the sum of $35,000 ($30,000?)

as defendant might sell said property to a purchaser procured by plaintiff and introduced by plaintiff to defendant, but, on the contrary, defendant alleges that, by the terms of said contract in writing, defendant agreed to pay plaintiff one-half of the said sum realized from such sale in excess of the sum of $30,000 that defendant might sell said property to purchaser procured by plaintiff and introduced by the plaintiff to defendant." Defendant furthermore alleged in the answer "that on the 22d day of June, 1915, he terminated and canceled the aforesaid agreement entered into between plaintiff and defendant on the 4th day of December, 1914," and denied that plaintiff obtained a purchaser for the premises who "was able or willing to purchase from said defendant said property or any property for the sum of $35,000."

Defendant admitted that plaintiff introduced a Mr. Neergard to defendant, but denied "that said Neergard or any other person purchased said property, or any part thereof, for the sum of $35,000, or for any other sum of money or at all." Defendant, however, alleged that "subsequent to the termination and cancellation of the agreement, dated December 4, 1914, entered into between plaintiff and defendant, to wit, July 2, 1915, defendant entered into a contract of sale with the said Mr. Neergard and W. F. Noble, by the terms of which he agreed to sell to said Neergard and Noble the property described in plaintiff's complaint for the sum of $35,000, which purchase price was to be paid in installments extending over a period of years; that, subsequent to the termination and cancellation of the aforesaid agreement entered into between plaintiff and defendant, defendant agreed that, in the event that the said Neergard and Noble paid the installments provided in said contract of sale to be paid, he would pay plaintiff the amount agreed to be paid by the terms of the agreement dated December 4, 1914, and terminated by defendant; that the said Neergard and Noble failed to pay any of the installments provided to be paid in said contract of sale entered into between defendant and said Neergard and Noble except the sum of $2,500." We may add that there is no objection to the form of the complaint, and we have set out all the material parts of the answer. By the foregoing it appears that the only issues were whether the commission was to be the entire excess of the selling price over the sum of $30,000, or one-half thereof, whether said contract for the payment of a commission was terminated, and whether within the contemplation of said contract plaintiff obtained a purchaser for the premises. The court found in favor of defendant as to the amount of commission and for the plaintiff on the other issues. The discussion of the case by appellant has taken a wide range, and his counsel has displayed much learning and industry, but we think the determination of the merits is a comparatively simple matter.

The transaction between the parties is disclosed by correspondence, the managing agent of plaintiff residing in Los Angeles and defendant in Stockton. The material portions of the correspondence we shall set forth.

The first letter was written by defendant on December 4, 1914, to A. D. Kildahl, the representative of plaintiff. It opened with the statement:

> "Referring to our conversation when you were in Stockton with reference to the dairy ranch, will say that there is 170 acres five miles east of the courthouse of Stockton."

It proceeded with a vivid description of the land and its improvements, and concluded as follows:

> "Make you a price of $30,000 net on this place. There is no unimproved land between this land and Stockton that can be bought below $200 per acre. I will protect you on the difference between $30,000 and what you ask for it. I will also allow you one-half of any commission should I make a sale to any one on this property or any other property."

To this Mr. Kildahl made answer on December 7th, stating:

> "I have to-day received your favor of the 4th, with description of your dairy farm, just east of Stockton. I shall certainly bear this in mind, and make every effort to dispose of it for you, probably on the basis of about $200 per acre, which would mean $4,000 commission."

We may add that, admittedly, respondent advertised the property extensively, enlisted the services of other agents, and made quite an effort to secure a purchaser for it. The result was that one Mr. Neergard became interested in the property, and on May 1, 1915, plaintiff wrote to defendant:

> "This will introduce to you Mr. Neergard, of Noble and Neergard, Compton, Cal. Mr. Neergard, who is an experienced dairyman, is looking for another location for his business, and our friend, Mr. E. L. Parke, has told them about your dairy ranch of 170 acres located close to Stockton. We would be glad if you will show Mr. Neergard the property, if not disposed of, when he reaches there. He will start North in a few days."

Two days later plaintiff wrote another letter, referring to the fact that it had written the letter of introduction of May 1st, and saying:

> "Mr. Neergard will probably reach Stockton in the course of the next ten days or so, and if he does we will be very glad if you could show him your place, if not then sold. We understand that his firm is amply able to fulfill any obligation they undertake, and we hope that success will crown your efforts."

Mr. Darter replied to the letter on May 6th, saying:

> "In reply to your favor of the 3d, will say that I am glad to note that Mr. Neergard is interested in the dairy. I have not sold this place yet, and hope I will be able to do some business with him when he arrives."

In answer respondent wrote:

> "We have yours of the 6th with regard to the dairy ranch; please note that the price quoted to Mr. Neergard by the broker was $35,000, including the stock and implements. We sent you a list some time ago, copies of which were sent to a number of agents and dealers here, and no doubt you have this list yet, and would probably refer to it before talking price to Mr. Neergard, but I thought best to write you and thus make sure that you understood the price that was quoted. We trust that you will be able to interest Mr. Neergard, as he seems to prefer an improved place."

On May 27th defendant wrote to Mr. Kildahl as follows:

> "The parties you sent up to look at the dairy ranch came up and went out to look at the place and would be very glad to buy, but they are unable to raise more than four or five thousand dollars. He promised me that he would bring his father-in-law, and that they might get together and consider it. Hoping you will be able to do something with it," etc.

On June 21st respondent wrote:

> "We understand that Mr. Noble or Neergard, or both, have decided to purchase your dairy ranch of 170 acres, close to Stockton. We have not heard from you in the matter, but presume you have the deal in escrow or as yet in an unfinished state. Please let us know how far you have progressed, and how long in your opinion it will take to close. The broker through whom we secured this prospect has to-day made request for his commission, and, of course, we would like to find out from you just what has been done before talking commissions to anybody. We wrote you on May 7th, calling your attention to the fact that the price quoted Mr. Neergard was $35,000, and we sincerely hope that you secured this price for the ranch."

On the day that this last letter was written Mr. Darter prepared a written contract to be executed by himself as party of the first part, and A. F. Noble and F. C. Neergard, the parties of the second part, providing—

> "That the said party of the first part, in consideration of the covenants and agreements upon the part of the said parties of the second part herein contained, agrees to sell and convey unto the parties of the second part, and the said parties of the second part agree to purchase, all that certain piece or parcel of land" (describing the land involved herein), and also the improvements and personal property as described in the letter authorizing respondent to act as appellant's broker.

Said contract further provided:

> "It is hereby mutually agreed that the purchase price of the premises and personal property herein described shall be the sum of thirty-five thousand dollars, and the said parties of the second part, in consideration of the premises, hereby agree to pay to the said party of the first part the said sum in the manner following, to wit."

Then follows a statement of various installments that were to be paid extending over a period of nine years, deferred payments to bear 6 per cent. interest, the first payment of $4,000 to be evidenced by a note due on or before November 15, 1915. It was further stipulated that the parties of the second part were to pay all taxes on the property after said date of November 15th, and "immediate possession" of the premises was agreed to be given to said parties of the second part. This agreement of sale was forwarded on said date to Neergard and Noble, who promptly executed the same and returned it to defendant. The latter executed it on July 2d. It may be added that Neergard and Noble paid only the sum of $2,500 on said contract. They entered into possession of the property about the 25th of October, but afterward defaulted and surrendered it to the defendant.

On June 22d Mr. Darter replied to Mr. Kildahl as follows:

> "Replying to your favor of the 21st regarding to commission on sale of the dairy ranch, will say that Mr. Noble was up and looked at the ranch. Now they have not got money to buy the ranch as you stated, they want to pay a payment of four thousand dollars. That is out of the question to think of deeding a man that place on that payment, they can not pay that until Nov. 15th. I may make a deal with them, if so at the time they make their payments and get a deed to the property then I will allow you a commission on the sale. I can not do as well by you as if they paid cash or a reasonable payment besides they will not consider the place unless I paint the house outside and also clean and paint the inside floors and do this at my own expense, also hold the place without interest and I have to keep men there to cut alfalfa and tend to the cows. He also wants all the hay. I will keep account of the whole expense and will do the best I can for you but there will be no money on commissions until they pay up enough to get a deed. I hope this will be satisfactory to you; if this is not satisfactory I would rather not close the deal."

The reply was dated June 24th, and contained this:

> "We quite agree with you that it would be out of the question to give him a deed on a $35,000 property, on payment of $4,000. Our purpose in writing you before was to ask for information, the broker, Mr. Parke, having made demand on us for his share of the commission. We have written Mr. Parke to-day with a copy of your letter. In the latter portion of your letter, you stated that no money on commis-

sions will be paid until the purchaser gets a deed. Please write us as to how much you would require paid for a deed. Also let us know at what price you were figuring with Mr. Noble, and what portion of this price you would require in order to pay out the commission. You understand we want to be reasonable in the matter of this commission, but having secured this prospect through another broker, we want to do the right thing by the broker, and we would like to have you secure enough down so that you can pay out our commission, or at least the major part of it."

On June 26th Mr. Darter replied:

"Now as I explained to you in my letter of the 22nd, that Mr. Noble and Neergard has only about $4,000 and they haven't that amount at the present time and that is all the money that they will be able to pay, that if the deal is closed at all. They are only taking an option to buy this property, and as explained in my letter of the 22nd that is if it is not satisfactory to you I would rather not close the deal. There has been no further developments in the deal up to the present time, and if I make the deal with them at all I will have to allow them ten years in which to pay for the property. While you were in Stockton, I stated to you that I wanted $10,000 to $12,000 payment. Since that time I have been losing money and the interest and entire expense of keeping the place, painting the buildings, etc., to November first will run from $1,200 to $1,500. Will say that you could not expect any commission, under about six years unless they are able to pay more than they think they will be able to, if they carry their deal through. Hoping this will be satisfactory," etc.

On June 28th Mr. Kildahl wrote:

"We note that in case of a deal you would have to give Noble and Neergard ten years time in which to pay the deferred installments. While we would not expect you to pay out the whole commission on a down payment from the purchasers if only $4,000, yet we are quite surprised to hear that we would have to wait six years for a $5,000 commission. In fact you estimate in your letter that we could not expect any commission at all until six years have passed by. If you sold the place at $35,000 with $4,000 down the annual payments would be $3,100 in six years $18,600, so that at the end of that period $22,600 will have been paid you. Do you not think you could reasonably be expected to pay out a $5,000 commission in less time than that? We are willing to be reasonable, but even with the larger amount of chattels included and the consequent risk we think you should pay out this commission in annual installments inside of the first three or four years. By the way, you have not as yet stated what the consideration would be in case of a deal. We are trying to get hold of the broker who was instrumental in sending us the prospect but he is out in the country and will not be back in time to find him by phone to-day. His attitude in the matter of commission will largely govern our action."

On the next day, June 29th, he again wrote:

"Referring again to your favor of the 26th, with regard to the Noble-Neergard deal, we may say that we have to-day talked with Mr. Parke, the broker in the transaction, and from what he has told us we gather that these people, if properly handled, are amply able to take care of the purchase. Mr. Parke will have all his time taken to-morrow and Thursday, but promises to see Mr. Noble and Mr. Neergard on Friday without fail. On that day we shall have a report as to what can be done. It is more than likely that the $4,000 cash payment which you mentioned, can be materially increased."

On July 1st Mr. Kildahl wrote as follows:

"Mr. Parke, the broker in the deal with Mr. Noble found that he was able to interview Mr. Noble sooner than anticipated, and states to-day that he has seen a copy of the contract between yourself and Mr. Noble. It seems to me more like an actual straight agreement for sale than an option. We are at a loss to understand why you agreed to accept $4,000 on November 15th next, as a down payment when you have been holding out for $10,000 to $12,000. If you had held out for the original down payment as outlined to the writer when in Stockton, we are quite confident that the $4,000 down payment which is now covered by note could be doubled by next fall. At least Mr. Parke, from his knowledge of Mr. Noble's condition states that he is quite confident of securing $8,000 if we had been advised by you as to the conditions. With regard to commission, of course, there can be no question as to the amount, as the contract between yourself and Mr. Noble gives the consideration at $35,000 and your letter of December 4, 1914, distinctly states that you would protect us on the difference between $30,000 and what we asked for the property. As to the manner of paying this commission, we want only what is fair and reasonable, and since you have agreed to sell to Mr. Noble with such a small payment down, we, of course, will not expect the whole commission to be now paid. However, we feel that in justice to both Mr. Parke and ourselves a portion of the down payment should be used toward the payment of commission. We certainly cannot wait six years (at which time Mr. Noble will have paid $23,000) for this commission."

The next day Mr. Darter replied, saying:

"I am in receipt of your favor of July 1st and note what you have to say with reference to commission on the deal and I will say that I am very much disappointed in your demand under the conditions. I certainly thought that when you sent these people here that you would allow me to use my best judgment with reference to making the sale and that you would be satisfied with whatever I did and will say further that you will have to be satisfied, as the deal has been practically consummated. * * * As I stated before I will keep account of all the extra expense that I have been, and will render you statement of the same and will allow you a commission but will say that you had just as well forget about trying to get any commission out of the first payment of $4,000. * * * I have just made arrangements this afternoon expecting to give Mr. Neergard and

Mr. Noble possession at any time that they are ready."

Two other letters passed between the parties, one of July 7th from Mr. Kildahl, complaining of the conduct of Mr. Darter in closing the deal without informing him, and stating that through Mr. Parke he could probably have secured $8,000 in cash on the purchase. There was no modification of the demands for the commission, but the letter stated:

> "We shall let the present deal rest until Noble and Neergard decide on how much they want to pay in the fall."

The other was written by Mr. Kildahl on August 6, 1915, in which he stated:

> "We are writing you again in the matter of the $5,000 commission in the sale of the dairy farm to Messrs. Noble and Neergard as the matter is not in very satisfactory shape as it now stands. We now ask that you make an indorsement on your copy of the contract to the effect that the United States Farm Land Company has a claim of $5,000 against the contract together with interest since the date thereof, June 21, 1915. This can be made in the presence of a notary public or any one else who can certify to the facts. We are asking this partly because of the fact that Mr. Parke, the broker in the transaction, wants assurance that his claim will be taken care of, and partly because we want the thing fixed along business lines, in case of your death or other unforeseen circumstances."

[1] From the foregoing it is quite apparent there was no revocation or cancellation of the contract of employment. The contract of agency of December 4, 1914, was for an indefinite period, and to terminate it the duty was incumbent upon appellant to give notice of its cancellation. This he did not do.

[2] While a contract of employment remains executory the principal may rescind it, but the party claiming the right of rescission must give notice to the other party to the contract of the fact that he does withdraw, and this before the other party has performed. Gaty v. Sack, 19 Mo. App. 470; Nolan v. Swift, 111 Mich. 56, 69 N. W. 96; Lloyd v. Matthews, 51 N. Y. 124.

[3] The presumption is in favor of the continuance of the agency (Hartford v. McGillicuddy, 103 Me. 224, 68 Atl. 860, 16 L. R. A. [N. S.] 431, 12 Ann. Cas. 1083), and this is strengthened by the evidence to which we have referred. Not only did appellant fail to notify respondent of the termination of the agency, but in the correspondence which we have quoted he recognized the continued authority of respondent, and only sought to secure a modification as to the time and condition of payment of the commission.

[4] The proposed modification, however, was never accepted, and it cannot be said that there was a new contract between the parties, as there was no agreement upon the terms of any modification.

[5] Indeed, we may go further and say that the proposed modification came too late to affect plaintiff's claim, for the reason that the purchaser had already signed a contract binding him to purchase the property, and this, as far as the broker is concerned, is equivalent to a sale. Gunn v. Bank of California, 99 Cal. 349, 33 Pac. 1105; Pehl v. Fanton, 17 Cal. App. 251, 119 Pac. 400.

It is admitted, indeed, by appellant that he could not repudiate the agency after he had entered into a contract of sale with the purchaser.

[6] The only real question left is whether respondent performed services which entitled it to the commission. The rule is that "the services of a real estate broker are fully performed, his commission fully earned, when he has procured a purchaser ready and willing to enter into a valid contract of sale upon the terms fixed by the owner. The subsequent insolvency of the purchaser so procured by the broker, after the sale of the real property has been completed cannot defeat the recovery of the broker's commissions." Root v. Greadwohl, 20 Cal. App. 139, 128 Pac. 418.

[7, 8] There is no doubt herein from the foregoing correspondence that respondent procured Noble and Neergard as purchasers for the property; that appellant entered into a contract of sale with them for the consideration of $35,000, and therefore the commission was earned, notwithstanding the purchasers afterward defaulted.

[9] Indeed, the rule is that "when a principal makes a sale to a purchaser found by the broker, having availed himself of the broker's services, he is liable for commissions, though the sale was made at a lower price than originally proposed by him to the broker." Walker on Real Estate Agency, § 302.

[10] If defendant was dissatisfied with the purchasers secured by plaintiff, he should at least have notified respondent to that effect, or have declined to enter into the contract of sale (Cal. Land Security Co. v. Ritchie, 180 Pac. 625); but having accepted them as worthy of confidence, without being misled in any respect by respondent, he is bound to pay for said service.

[11] Some contention is made in the opening brief of appellant that the relation between him and respondent was that of vendor and purchaser rather than of principal and agent. This view, however, is opposed to his admission in the pleadings and to the theory upon which the case was tried. This theory cannot, therefore, be regarded in the appellate court. Blanc v. Connor, 167 Cal. 719, 141 Pac. 217.

It may be added that there is no averment or proof of fraud, there is no pretense that respondent took any advantage of appellant, and it would seem that the only debatable question is whether respondent was not entitled to a judgment for $5,000 instead of $2,500. As to this, however, respondent has not appealed, and therefore does not complain.

We are satisfied there is no legal ground for interfering with the conclusion of the lower court, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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42 Cal. App. 523

NATIONAL SURETY CO. v. WILCOX et al.
(Civ. 2295.)

(District Court of Appeal, Second District, Division 1, California. July 31, 1919.)

INDEMNITY ⚿8—AGREEMENT TO INDEMNIFY SURETY COMPANY CONSTRUED.

Where a lumber company and defendants agreed to indemnify plaintiff surety company for any payments made under any bond issued at the request of the lumber company and defendants, defendants were not liable to indemnify the surety company on a bond issued at the request of the lumber company alone and without defendants' knowledge.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the National Surety Company against W. W. Wilcox and Dan Johnston. From judgment for defendants, plaintiff appeals. Affirmed.

Bennett, Turnbull & Thompson, of Los Angeles, and Rupert B. Turnbull (Albert J. Harno, of counsel), for appellant.

Barstow, Rohe & Jeffers, of Los Angeles, for respondents.

SHAW, J. In this action plaintiff, at the special instance and request and for and on behalf of Standard Lumber & Wrecking Company, whose property was attached in a suit brought against it by the Pacific Lumber Company, executed a bond under and by virtue of which the property so attached was, as provided by law in such cases, released therefrom. Thereafter judgment was rendered in favor of the Pacific Lumber Company and against Standard Lumber & Wrecking Company, defendant in said suit, for the sum of $769.82, which the plaintiff herein, as surety upon said bond, paid, and, claiming the bond so given for the release of the property attached by the Pacific Lumber Company was made and executed by it in consideration of a written agreement of Wilcox and Johnston, defendants herein, to indemnify it against loss due to its act in making the bond, brought this action to recover thereon.

Plaintiff appeals from a judgment rendered in favor of defendants based upon a finding that—

> "It is not true that said contract of indemnity was the consideration and inducement, or consideration or inducement, upon which and for which, or upon which or for which, the plaintiff executed, signed, and delivered, or executed or signed or delivered, the said bond or undertaking. * * * It is true that said bond or undertaking so issued by the plaintiff in said action was issued upon the plaintiff's own responsibility on application only of Standard Lumber & Wrecking Company, without any reference to, and without relying upon, the contract of indemnity attached to the plaintiff's said complaint, marked 'Exhibit A,' and without any promise or agreement on the part of the defendants, or either of them, to reimburse the plaintiff therefor."

These findings are attacked upon the ground that the evidence is insufficient to support them.

It appears that the Standard Lumber & Wrecking Company had frequent occasion to call upon plaintiff for the execution of bonds for and on its behalf, and for the purpose of protecting plaintiff from liability upon the bonds so issued to said company, defendants Wilcox and Johnston were in the habit of executing instruments in writing, whereby they agreed to indemnify plaintiff for any loss sustained by reason of the making of such bonds for and on behalf of said company. Under these circumstances, a writing in the nature of a blanket agreement of indemnity, and signed by the Standard Lumber & Wrecking Company, and defendants W. W. Wilcox and Dan Johnston, was executed on January 30, 1912, which contained the following recital:

> "This agreement witnesseth: That, whereas, Standard Lumber & Wrecking Company, Incorporated, W. W. Wilcox and Dan Johnston (hereinafter called applicant), may from time to time hereafter request the National Surety Company, a corporation under the laws of the state of New York (hereinafter called the company), to make and execute various and sundry bonds and undertakings; and, whereas, the company, by making and executing such bonds and undertakings, may become liable to pay, and may pay, various and sundry sums and amounts of money under such bonds and undertakings: * * * Now, therefore, in consideration of the premises, we, the undersigned, hereby covenant with the company, its successors and assigns, in manner following—that is to say"

—followed by various and sundry provisions and covenants on the part of the signers of the agreement, among which was one to the effect that they would indemnify and hold the company harmless from any demands, liabilities, expenses, and loss of whatsoever kind or nature sustained or incurred by reason of its executing such bonds and undertakings, which agreement appellant claims covered and included the bond so given by it for the release of the property of the Standard Lumber & Wrecking Company levied upon by writ of attachment issued in the action brought against it by the Pacific Lumber Company.

It is clear, we think, that the agreement sued upon has reference solely and alone to bonds executed by plaintiff at the request of the applicant therefor and named therein; and it is likewise clear that the applicant was the Standard Lumber & Wrecking Company, Incorporated, W. W. Wilcox, and Dan Johnston. The writing given by these parties was in the nature of a blanket agreement to indemnify plaintiff for losses sustained by reason of executing certain specific bonds, viz. those requested, not by the Standard Lumber & Wrecking Company, but by those designated in the agreement as constituting the applicant, the effect of which was that defendants Wilcox and Johnston incurred no liability to plaintiff under said agreement, unless it was made to appear that they joined with the Standard Lumber & Wrecking Company in a request for such bond. It is neither alleged, proved, nor claimed by plaintiff that either of these defendants ever requested it to issue the bond in the suit brought by the Pacific Lumber Company against the Standard Lumber & Wrecking Company, but that it was executed at the request of the latter company alone and without defendants' knowledge. Defendants' covenant was to indemnify plaintiff for loss sustained upon bonds executed upon their request. They did not request the issuance of the bond in question, and knew nothing about it. Hence it is one not covered by the agreement to indemnify plaintiff, and imposes no obligation upon defendants to answer for any loss resulting from its execution.

Our conclusion renders it unnecessary to discuss other alleged errors, since, if we are correct, they could in no event affect the determination of the case.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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40 Cal. App. 432

DAVIES v. RAMSDELL.

(Civ. 2713; S. F. 8530.)

(District Court of Appeal, First District, Division 2, California. March 25, 1919. Opinion of Supreme Court Denying Rehearing May 22, 1919.)

1. Injunction 🔑1 — Within Inherent Power of Equity.

Equity has inherent power in aid of its jurisdiction to grant injunctions, and the exercise of the power rests very largely in the discretion of the chancellor.

2. Receivers 🔑8—Appointment Within Inherent Power of Chancellor.

Equity has inherent power in aid of its jurisdiction to appoint receivers, and the exercise of the power rests very largely in the discretion of the chancellor.

3. Appeal and Error 🔑920(5)—On Review Apointment of Receiver Presumed Regular.

On appeal every presumption is in favor of the regularity of an order of a chancellor appointing a receiver.

4. Appeal and Error 🔑1024(2)—Weight of Affidavits on Review of Order Appointing Receiver.

On appeal from an order appointing a receiver on plaintiff's application, where there is any conflict in the affidavits, those in favor of the prevailing party must be taken as establishing the facts stated therein, and also facts which may reasonably be inferred or presumed from direct and positive statements.

5. Appeal and Error 🔑1097(1)—Decision on Another Appeal Based on Same Facts Law of The Case.

On appeal from an order appointing a receiver in an action to remove a cloud on title, a decision on another appeal from the final judgment in the action, so far as it is based on the same facts, furnishes the law of the case.

Opinion of Supreme Court Denying Rehearing.

6. Appeal and Error 🔑1043(4)—When Final Judgment was for Plaintiff Appointment of Receiver was Harmless to Defendant.

Where the final judgment in an action to remove a cloud on title established the right of plaintiff to the possession of the property and to be freed from all claims of the defendant as of the date of the filing of the complaint, defendant, on appeal from an order appointing a receiver, cannot complain that the order was erroneous, because he could not have been injured thereby; the final judgment in the case having been affirmed.

Appeal from Superior Court, Alameda County; William H. Waste.

Action by Glennie Davies against Lucie C. Ramsdell. The District Court of Appeal affirmed an order appointing a receiver, and the Supreme Court denied a rehearing.

See, also, 181 Pac. 94.

C. D. Dethlefsen, of Oakland, and Peck, Bunker & Cole, of San Francisco, for appellant.

Ralph R. Eltse and Elston, Clark & Nichols, all of Berkeley, for respondent.

LANGDON, P. J. [1-4] This is an appeal from an order appointing a receiver pendente lite, in a suit in equity, more resembling the old suit to remove a cloud on title than the Code suit merely to quiet title. The appellant contends the order should not have been made, as such appointments are not usually made in suits to quiet title. In this case there were equitable considerations before the court in addition to those of the ordinary suit to quiet title. Equity has inherent power in aid of its jurisdiction to grant injunctions and to appoint receivers, and the exercise of the power rests very largely in the discretion of the chancellor. Every presumption is in favor of the regularity of the order. Mere denial of the facts in the plaintiff's verified complaint and affidavits simply presents an issue of fact, which the court below determined adversely to the appellant. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as establishing the facts stated therein, and also all facts which may reasonably be inferred or presumed from the direct and positive statements. Doak v. Bruson, 152 Cal. 19, 91 Pac. 1001.

[5] After the order appointing the receiver was made, judgment was rendered for the plaintiff, from which judgment the defendant below, the appellant here, appealed. The judgment has this day been affirmed. Davies v. Ramsdell (No. 2724) 181 Pac. 94. The decision on the appeal from the judgment, so far as it is based upon the same facts as those presented on this appeal, furnishes the law of the case. On the application for the appointment of the receiver both parties relied upon substantially the same facts as those set forth in the pleadings on which judgment was entered. Eversdon v. Mayhew, 85 Cal. 1, 21 Pac. 431, 24 Pac. 382. The judgment established the right of the plaintiff to the possession of the property and to be freed from all claims of the defendant as of the date of the filing of the complaint. At the date of the order appointing the receiver, the defendant had no right to the possession of the property nor to collect its rents. How, then, was she injured by the appointment of a receiver? Even though the appointment was erroneous, in determining this appeal the rule that the appellant must show injury as well as error would require the order to be affirmed for the reason that the reversal would not benefit the appellant. Horton v. City of Los Angeles, 119 Cal. 602, 51 Pac. 956; Foster v. Smith, 115 Cal. 611, 47 Pac. 591. The order was a remedial process and was followed by judgment in favor of the prevailing party. In such a case the court will not revise the propriety of the order. Hicks v. Davis, 4 Cal. 67; Imperial Land Co. v. Imperial Irr. Dist., 173 Cal. 674, 161 Pac. 119; Adams v. Prather, 176 Cal. 164, 167 Pac. 867; Estate of McSwain, 176 Cal. 288, 168 Pac. 117.

The order appealed from is affirmed.

We concur: HAVEN, J.; BRITTAIN, J.

Opinion of the Supreme Court Denying Rehearing.

In Bank.

PER CURIAM. [6] The application for a rehearing in this court after decision by the District Court of Appeal of the First Appellate District, Division Two, is denied on the ground last stated in the opinion of the District Court of Appeal, which is substantially that, the judgment in favor of the plaintiff, on whose application the receiver was appointed, having been affirmed, and having become final, it does not appear how the appellant could possibly have been prejudiced by the making of the order. We express no opinion upon the first question discussed in the opinion, viz. the propriety of the appointment of a receiver in such a case as this.

All concur.

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42 Cal. App. 435

LEACH v. KLEIN. (Civ. 2004.)

(District Court of Appeal, Third District, California. July 28, 1919.)

1. APPEAL AND ERROR 🔑981—ABUSE OF DISCRETION—NEW TRIAL—EXCUSING FAILURE TO PRODUCE WITNESSES.

Discretion of trial court in excusing defendant for not producing witnesses at trial to show that his cattle were not present at such a time that they could have committed the trespass complained of *held* not to be interfered with on appeal.

2. NEW TRIAL 🔑104(1)—NEW EVIDENCE—PROBABLE CHANGING OF RESULT.

The test as to whether a new trial shall be granted for proposed new evidence objected to as cumulative is whether it would probably change the result.

3. NEW TRIAL 🔑76(2)—EXCESSIVE DAMAGES—DISCRETION OF COURT.

Where plaintiff recovered $1,250 for damages for trespass by cattle resulting in the destruction of certain fig trees, *held*, that trial court would not abuse its discretion in granting a new trial on ground that the amount of damages awarded was entirely disproportionate to the actual loss.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Edith Leach against O. H. Klein. Verdict for plaintiff, and, from an order granting a new trial, plaintiff appeals. Order affirmed.

J. T. Fuller, of Portersville, for appellant.
D. E. Perkins, of Visalia, for respondent.

BURNETT, J. The action was for damages alleged to have been caused by defendant's cattle to plaintiff's fruit trees and crops, and the jury rendered a verdict in her favor for $1,250. A motion for a new trial was made by defendant on the grounds of newly discovered evidence, and that the verdict was excessive, appearing to have been given under the influence of passion or prejudice, and the motion was granted by the trial judge in the following language:

> "Said motion having heretofore been argued and submitted for decision, now at this time, the court, having duly considered the law and the evidence and being fully advised of its opinion therein, doth order that said motion for a new trial be and is hereby granted."

The appeal is by the plaintiff from said order.

Plaintiff owned a tract of land of 14.84 acres, 10 of which she claimed was under cultivation. This tract was fenced and was surrounded by a larger tract used as a cattle range, which was rented by defendant. It is claimed by plaintiff that the damage was caused between May 20, 1917, and June 10th of that year. Defendant contends that he took his cattle away from this pasture on May 20, 1917, and that they were not in that vicinity thereafter. No one testified to have seen any cattle on plaintiff's premises, the plaintiff herself being absent from the place at that time. However, there is sufficient evidence to justify the conclusion that the damage was caused as alleged in the complaint. In addition to the defense that his cattle were not in the vicinity at the time and could not, therefore, have caused the damage to plaintiff's property, defendant endeavored to show that the extent of the injury was grossly exaggerated by plaintiff; but there is substantial support in the record for the amount of the verdict.

In support of her theory that defendant was responsible for the damage, plaintiff testified to a conversation with him in which she claims he admitted that it must have been his cattle that trespassed upon her land. As to this point, she relied, in her case in chief, upon that admission. In opposition to this showing defendant gave an entirely different version of the conversation and, furthermore, testified that the cattle were taken away as before indicated. In rebuttal, plaintiff called a witness, L. McClary, who testified that "along the last of May—the last days of May," he saw in said pasture "about 80, close to 100, head of red and white-faced cattle, just as testified by Mr. Klein." It is claimed by respondent:

> That after the testimony of McClary, the former had no opportunity "to consult his witnesses as to exact dates," and that "the testimony of McClary was particularly damaging and undoubtedly influenced the jury largely in their verdict. It was totally unexpected because he had been on the stand in plaintiff's main case and had testified that he was at plaintiff's land on July 1st, when he saw cattle on the pasture. If true, his testimony was of vital importance. If successfully contradicted it leaves plaintiff without any evidence whatever that defendant's cattle were in a locality where they could have caused the damages complained of."

In consequence of the foregoing situation, defendant upon his motion for a new trial introduced the affidavits of himself, John W. Hewey, George Guinn, and Henry Bellah. In his own affidavit he avers:

> That he was taken by surprise by said testimony of "L. C. St. Claire" (meaning, no doubt, L. C. McClary) "because he had removed his cattle from said field about May 20, 1917, and had not returned them thereto and had no reason to suppose that his testimony to that effect would be controverted; that he files herewith the affidavits of John W. Hewey, George Guinn, and Henry Bellah, each of whom swears that defendant's cattle were not in said pasture adjoining plaintiff's land on or after May 27, 1917; that affiant could not with reasonable diligence have produced this evidence at said trial because the evidence of said St. Claire (McClary?) was given in rebuttal and at the end of said trial and affiant had no opportunity to talk with any of said witnesses or to learn from them what they knew in regard to said matter; that he had not talked to them previously because he had no reason to believe or did not believe that the evidence of himself and Karl B. Klein that said cattle were removed from said pasture on May 20, 1917, would be controverted or disputed."

It may be added that said affidavits of Hewey, Guinn, and Bellah are in effect as claimed by respondent in the foregoing.

[1] The objection to the consideration of these affidavits made by appellant is that sufficient diligence is not shown therein and that said evidence would be merely cumulative. As to "diligence," it may be said that it is a comparative term and in its determination much is left to the discretion of the trial court. No doubt, many persons, in the situation of respondent would have been more alert to secure all the available evidence to support the defense. It also seems somewhat singular that respondent should not anticipate that his testimony as to the removal of the cattle would be controverted, since it related to a circumstance that was vital to appellant's case. It is generally supposed that a plaintiff expects to offer evidence to sustain the material allegations of his complaint, and every careful lawyer would advise his client to be prepared for that situation. Still, we are not prepared to say that it would be an abuse of discretion under the circumstances for the trial court to hold that respondent was excusable for not producing said witnesses at the trial. The trial judge might be satisfied that the verdict was unjust, and that a different result would follow if said witnesses gave their testimony. In that event, he should be liberal in construing the conduct of the moving party in order that justice might prevail.

[2] Nor is it a sufficient objection that the proposed evidence would be cumulative. As to this, the test is whether it would probably change the result. No one could with certainty say whether it would produce a different verdict from a jury, and it might be diffi-

cult for any one to determine whether it would probably do so; but the trial judge is in a better position than any one else to determine that question, and, assuredly, in a case like this it cannot be said that he abused his discretion if he concluded that the testimony of these three persons would likely turn the scales in favor of respondent.

[3] Again, the trial court may have believed that, while plaintiff was entitled to receive something for the damage suffered by her, the amount awarded by the jury was entirely disproportionate to the actual loss. If so, the plaintiff might have been put to an election to remit a portion of the amount with the alternative of a new trial, or the motion could be granted on the second ground specified. This ground, indeed, does not necessarily imply misconduct on the part of the jury, but it does presuppose that the result has been induced through excited feelings or prejudice of which the jury may not, perhaps, have been aware, but which has, nevertheless, precluded an impartial consideration of the evidence. Harrison v. Sutter St. Ry. Co., 116 Cal. 162, 47 Pac. 1019. The essence of the contention is that a fair view of the evidence would not lead an impartial mind to the approval of such a verdict. In effect, it means that the verdict is not fairly supported, and, if the court granted the motion, its action could be interpreted as signifying:

> "That the trial court was not satisfied that the finding of the jury as to the extent of the damage suffered by the plaintiff was supported by the evidence adduced upon that phase of the case." Meinberg v. Jordan, 29 Cal. App. 762, 157 Pac. 1006.

We can readily understand how the lower court might have so regarded the case. While, as before stated, there is support in the record for the verdict, the evidence consists entirely of the opinion of plaintiff and another witness, and the former admitted that her opinion was somewhat arbitrary. We can understand also how the trial judge might have greatly discounted that opinion, and made an allowance for exaggeration, which self-interest is likely to produce. In fact, to one living in another part of the state it seems rather startling that land in Tulare county worth $125 per acre should be increased to the value of $400 by the addition of fig trees, 15 months old. It is true that no witness on behalf of defendant expressed an opinion as to how much the value would be depreciated by the destruction of the trees, but facts were disclosed from which a reasonable inference would follow that the award was at least twice as great as it should have been. We do not deem it necessary to set out the evidence specifically; but we think it sufficient to say that after a careful reading of the transcript we are satisfied the lower court did not abuse its discretion in granting a new trial, whether upon the first or second ground or both.

Of course, the principle that must govern us in the determination is well settled and hardly needs restatement.

We may, though, in closing, make the following quotations from the decisions of the Supreme Court in Oberlander v. Fixen & Co., 129 Cal. 692, 62 Pac. 254, and Mercantile Trust Co. v. Sunset, etc., Co., 176 Cal. 456, 168 Pac. 1033. In the former it is said:

> "Hence, where the motion is denied, the fact that the newly discovered evidence is merely cumulative will in general be a sufficient ground for affirmance; but, where the motion is granted, the contrary will hold. For, in either case, it is for the trial judge to determine whether the evidence is of character probably to affect the result on a new trial; and unless the evidence be of such a character as to make it manifest and certain to this court that in the one case it would, or in the other that it would not, result differently on retrial, the order will not be disturbed. * * *
>
> "Whether in this case the evidence could with reasonable diligence have been discovered and produced at the trial was also a question upon which the judgment of the court below must be regarded as conclusive, unless it appear that his discretion has been abused."

In the latter this is found:

> "In deciding a motion for a new trial the court below has large discretionary power. Its order denying or granting such motion will not be reversed on appeal unless an abuse of discretion appears. In considering the evidence upon such motion that court has power to draw inferences from the evidence opposed to those which were drawn by it upon the trial, provided they are not unreasonable. The order granting the motion for a new trial was general in its terms. It did not specify the reasons upon which the motion was granted. This court must uphold the order if any ground upon which it might have been granted is supported by the record."

We think within the purview of the foregoing the action of the lower court should not be interfered with, and the order is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

42 Cal. App. 246

WARREN BROS. CO. v. BOYLE, Auditor of City and County of San Francisco.

(Civ. 2870.)

(District Court of Appeal, First District, Division 1, California. July 16, 1919.)

1. Municipal Corporations 🔑269(2)—San Francisco Can Improve Accepted Street by Board of Public Works.

The city and county of San Francisco, under its Charter, art. 6, c. 1, §§ 3, 9, 22, has authority to improve an accepted street under the direction and control of its board of public works.

2. Municipal Corporations 🔑278(½) — Procedure in Street Improvements Paid by Assessments.

City and County of San Francisco Charter, art. 6, c. 2, describing the proceedings to be followed by board of public works in the making of street improvements, has reference to improvements the expense whereof is to be assessed against property benefited, and not improvements the entire expense of which is to be paid by city and county, in view of article 2, c. 2, § 9.

3. Municipal Corporations 🔑278(2)—Proceedings for Improvement of Accepted Streets.

Under City and County of San Francisco Charter, art. 2, c. 2, §§ 1, subd. 2, and 9, subd. 2, and article 6, c. 2, §§ 1, 2, 8, 9, 23, all that was necessary to legally initiate proceeding for improvement of accepted street at city's expense was that board of public works recommend improvement, and board of supervisors order work done, whereupon board of public works could do work under contract, or by and through its own organization.

4. Municipal Corporations 🔑303(1) — What Constitutes "Order" for Street Improvement.

Board of supervisors of city and county of San Francisco, by fixing and allowing in its budget an item of expenditure for street improvement pursuant to board of public works' recommendation, and appropriating out of budget an amount to be expended for such improvement, did not order the improvement within the Charter, art. 6, c. 2, §§ 1, 2, empowering board of supervisors to "order" improvements.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Order.]

5. Municipal Corporations 🔑278(4)—Improvements by Board of Public Works under Control of Supervisors.

City and County of San Francisco Charter, art. 2, c. 1, § 9, authorizing board of public works to improve accepted street "under such ordinances as may from time to time be adopted by the supervisors," *held* to place action of board of public works under the direction and control of board of supervisors.

6. Municipal Corporations 🔑339(1) — When Contract for Patented Pavement Compliance with Charter.

City's agreement with paving material concern, furnishing city with patented paving material, *held* a sufficient compliance with City and County of San Francisco Charter, art. 6, c. 2, § 26, providing that, where patented pavement material is ordered, owner of patent shall transfer to city and county right to use patent, with privilege to any person to manufacture and lay the pavement upon the streets under contract with the city and county.

7. Municipal Corporations 🔑330(4) — When Use of Patented Surface Pavement Permitted.

In improving accepted street, city and county of San Francisco, under the charter, may use a patented wearing surface mixture.

8. Municipal Corporations 🔑330(1)—Proposals for Materials Necessary for Accepted and Unaccepted Streets.

City and County of San Francisco Charter, art. 6, c. 2, § 31, requiring board of public works to invite proposals for contract to supply materials for improvement of street, applies to accepted as well as unaccepted streets.

9. Municipal Corporations 🔑278(4) — Street Work to be Done on Order of Board of Supervisors.

All street work in the city and county of San Francisco, except possibly urgent repairs, shall be done on the order of the board of supervisors.

10. Municipal Corporations 🔑330(4)—On Transfer of Use of Patented Pavement, Owner and Others May Compete.

Where right to use of patented pavement has been transferred to city and county of San Francisco under Charter, art. 6, c. 2, § 26, board of public works is in a position to call for sealed bids for contract to furnish necessary quantities of the pavement, for which contract owner of patent and others may compete.

11. Municipal Corporations 🔑320—Ordinance Ratifying Street Improvement Cures Omission of Supervisors.

Ordinance ratifying, approving, and confirming purchase of paving materials, and conferring authority upon board of public works to do all acts set forth as fully as if authority had been conferred before the doing of the acts, *held* to cure omission of board of supervisors, in the first instance, to order the street improvement and the purchase of the material.

12. Municipal Corporations 🔑365 — City Accepting Pavement Estopped to Refuse to Pay for Same.

City and county of San Francisco, having accepted, used, and retained pavement material which the board of supervisors had the general power to authorize board of public works to purchase, could not refuse to pay for it upon ground that certain provisions of the charter or ordinances were not strictly complied with.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Mandamus by Warren Bros. Co. against Thomas F. Boyle, as auditor of the city and county of San Francisco, etc. Petition denied, and petitioner appeals. Reversed.

Frank English, of San Francisco, for appellant.

George Lull, City Atty., M. T. Dooling, Jr., Ed. F. Moran, and J. B. Gartland, all of San Francisco, for respondent.

WASTE, P. J. Plaintiff sought a writ of mandate to compel the defendant to allow certain claims alleged to be due for material furnished the city and county of San Francisco, and used in the improvement of Mission street, a duly accepted public street in said city. The trial court denied the petition, and this appeal, taken upon the judgment roll, is from that judgment. The findings of fact, together with the allegations of the pleadings, not denied, constitute the record for the purposes of this appeal.

The board of public works of the city and county of San Francisco recommended to the board of supervisors the improvement of the roadway of Mission street, easterly from Fourth street, by constructing thereon a certain pavement. The board of supervisors, in acting upon this recommendation, carried an item into its budget for the fiscal year 1917–18, for the amount of $30,000, for the performance of the work, and thereafter, by proper resolution, specifically set aside and appropriated that amount for the said improvement. The board also thereafter set aside and appropriated to the board of public works the sum of $23,375 out of the urgent necessity fund for the fiscal year 1917–18, for repairs, reconstruction, and paying of streets.

The board of public works in proper manner transferred, set aside, and applied said amount of money for the reconstruction of Mission street. The board of public works, by and through its own department organization, then proceeded to reconstruct and improve Mission street, easterly from Fourth street, by removing therefrom the existing pavement of basalt blocks, constructing in lieu thereof a concrete pavement with a wearing surface of the material best adapted, in the judgment of the board, to meet the conditions created by the traffic in said street.

For the purpose of providing for this wearing surface, and as a necessary and desirable ingredient for the pavement, the board of public works, on the 20th day of August, 1917, entered into a contract with petitioner to purchase, for and on behalf of the city and county of San Francisco, a quantity of certain material constituting such wearing surface for the pavement, which material, petitioner alleges, was a proprietary and patented article, the patents to which were controlled by it. No proposals calling for competitive bidding for the furnishing of the paving material were invited. The price agreed to be paid for this material was $7 per ton. Petitioner furnished to the city, and the city used and incorporated in the reconstruction of the pavement of Mission street, such material to the value of $7,756. Claims against the city for the amount were presented by the petitioner.

After a previous approval thereof by the board of public works, the board of supervisors approved the demands on the treasury of the city and county for the specified sum, for the quantity of petitioner's paving material delivered and used. Each of these demands was in an amount less than $500, and all of them were based on the contract price of $7 per ton for the materials delivered. The auditor refused to audit the claims.

There was subsequently regularly adopted and passed by the board of supervisors an ordinance which ratified and approved and confirmed the action of the board of public works in the reconstruction of the pavement on Mission street, and all the proceedings had and taken by the board of public works in relation thereto. The ordinance specifically appropriated and authorized to be expended out of the funds set aside and appropriated by the board of supervisors for improving Mission street the sum of $7,756 for payment to the appellant for the materials furnished by it to the city and county.

By stipulation at the trial of the action, the amount of the claims against the city was reduced to $5,764, being the aggregate amount of 12 different claims approved by the board of public works and the board of supervisors. The occasion for this reduction appears to have been certain claims by way of set-off on the part of the city which were agreed to by appellant.

The lower court reached the conclusion, first, that the city and county was not permitted by its charter to perform the work in question; and that, as the requirements of that instrument relating to award of contracts and purchase of supplies had not been complied with, no legal obligation rested upon the municipality to pay the claim of petitioner. The findings relied upon to support that phase of the court's determination are that the board of supervisors of the city and county of San Francisco did not order, or authorize by ordinance, the board of public works to improve or repair Mission street, except as such authorization might be gathered from its action on the recommendation of the board, in appropriating the money therefor; that the board of supervisors did not authorize the purchase of any materials from the plaintiff, except as such authorization might be found in the same proceedings; that no proposals were invited for competitive bids; and that the board of public works did not at any time pass a resolution determining that the material delivered by petitioner was necessary for street repairs or improvements.

Appellant challenges the correctness of the court's conclusion, and contends that by virtue of section 14, c. 1, art. 6, of the charter of the city and county of San Francisco, the board of public works has the power to, and in the instant case did, improve a duly accepted street, by and through it own departmental organization, freed from the necessity of following the requirements of the charter in the matter of awarding contracts therefor. That section provides as follows:

> "All public work authorized by the supervisors to be done under the supervision of the board of public works shall, *unless otherwise determined by the board of public works* (the italics are ours), be done under written contract, except in case of urgent necessity as hereinafter provided; and except as otherwise specifically provided in the charter, the following proceedings shall be taken in all cases of letting contracts by said board. Before the award of any contract for doing any work authorized by this article, the board shall cause notice to be posted conspicuously in its office for not less than five days, and published for the same time, inviting sealed proposals for the work contemplated; except, however, that when any repairs or improvements, not exceeding an estimated cost of five hundred dollars, shall be deemed of urgent necessity by the board, such repairs or improvement may be made by the board under written contract or otherwise, without advertising for sealed proposals."

[1] That the city and county of San Francisco has authority, under its charter, to improve an accepted street, under the direction and control of its board of public works, seems to be settled. Chapter 1, art. 6, provides, in part, as follows:

> "Sec. 9. The board of public works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the supervisors:
>
> "1. Of all public ways, streets, * * * and of all work done upon, over, or under the same;
>
> "Sec. 3. [The board of public works] may employ such clerks, superintendents, inspectors, engineers, surveyors, deputies, architects and workmen as shall be necessary to a proper discharge of these details.
>
> "Sec. 22. The work in this article provided [improvement of streets, among other things] must be done under the direction and to the satisfaction of the board of public works; and the materials used must be in accordance with the specification of said board."

Construing provisions of the charter of the city of Los Angeles in part identical with, and similar as to the remainder to, the above-quoted section, but relating to "the design, construction, maintenance, and use of all sewers," and "the design, construction, alteration, repair, maintenance, and care of all public works and improvements, and of all public buildings belonging to the city" (charter of the city of Los Angeles, art. 16, § 146, subds. 1, 2, and 4), the Supreme Court of this state, in an opinion by Chief Justice Angellotti, decided that the city of Los Angeles had the power to construct an outfall sewer, involving an aggregate expenditure of more than $500, "without letting any contract therefor, in other words, by day's labor, under the authority and control of the city by its board of public works, purchasing such material as it may require therefor." Perry v. City of Los Angeles, 157 Cal. 146, 106 Pac. 410.

The duty to keep in repair and improve its duly accepted streets, or portions thereof, is imposed upon the city and county of San Francisco by the charter. Section 23, c. 2, art. 6. By subdivision 2, § 1, c. 2, art. 2, of the charter, the board of supervisors is given general power "to regulate and control, for any and every purpose, the use of the streets * * * and sidewalks of the city and county." By section 1, c. 2, art. 6, the same board is "empowered to fix the width and grade thereof, and to order done therein and thereon any and all street work and street improvement under the proceedings" in that chapter described.

[2] These proceedings, it may be here noted, are the various steps to be followed by the board of public works, and deal entirely with work or improvement the expense whereof is to be assessed according to the nature and character of the work upon the property benefited (subdivision 2, § 9, c. 2, art. 2), and do not, in our judgment, apply to the improvement of, or work upon, accepted streets, the entire expense of which must be paid by the city and county.

Application for the doing of *any* street work, or improvement, however, must, in the first instance, except as otherwise provided in the charter, be made by the proper parties to the board of public works, which may in turn recommend the work to be done. No street work, or improvement of any kind, shall be ordered by the supervisors to be done unless a written recommendation to do the same has been made to them by the board of public works, except that in case an application is made for any work or improvement the expense of which is to be paid by the city and county, and the board of public works shall not approve of the application, and it shall report to the supervisors its reasons for such disapproval, the supervisors may then, after having obtained from the board of public works an estimate of the expense of the work or improvement, by ordinance passed by the affirmative vote of not less than 14 members of the board, order the work done. The board of public works may recommend any improvement the expense of which is to be paid by the city and county, though no application may have been made therefor, and must make, with said recommendation to the supervisors, an estimate of the expense. In such cases the supervisors may order the same done. Section 2, c. 2, art. 6, of the charter.

The expense of all work or improvement

done on streets, crossings, and intersections of streets, that have been accepted by the city and county, after acceptance of the same, and all repairs and improvements deemed of urgent necessity that may be made upon the public streets, shall be borne and paid for out of the general fund of the city and county. Section 8 of the chapter and article last mentioned. The expense of all other street work and improvement, except certain emergency repairs done at the expense of the owner of the property, shall be assessed upon the lots and lands fronting on the street improved, according to the nature and character of the work. Section 9 of the same chapter and article.

[3] It seems reasonable to conclude, therefore, starting with the premise we have reached, that the city and county has power to do the work in question; that all that was necessary in the present instance, to legally initiate the proceeding for doing the work, was for the board of public works to recommend to the board of supervisors, and for that board to order that the work be done; that, so much accomplished, the board of public works, acting for the city and county, was in position to either do the work under contract, or, by and through its own organization, purchasing the materials therefor. Perry v. City of Los Angeles, supra.

The first step was duly taken. The board of public works in writing made recommendation to the board of supervisors that the work be done. The record fails, however, to furnish evidence that the second requirement was directly performed. The allegation of the complaint, not denied by the answer, is merely that "the said board of supervisors did act upon said recommendation of the board of public works by fixing and allowing in its budget for the fiscal year 1917–1918 an item of expenditure (No. 66) in the amount of thirty thousand ($30,000) dollars for the reconstruction of Mission street easterly from Fourth street." This allegation is followed by a recital of the fact that "thereafter, and by resolution No. 14,579, new series, approved July 17, 1917, the said board of supervisors did set aside, appropriate, and authorize to be expended out of said special budget allowance (No. 66) the sum of thirty thousand ($30,000) dollars," as appears from the copy of the resolution made a part of the complaint, "for the reconstruction of Mission street easterly from Fourth street." The trial court found, as before stated, "that the board of supervisors of the city and county did not, at any time before the delivery by plaintiff of the said paving material, order, or authorize by ordinance, the board of public works to improve or repair Mission street, * * * or the laying of the said pavement, or of the said paving material, or the purchase of any materials from plaintiff, except as such authorization" might be found in the recommendation made by the board of public works, and the subsequent action of the supervisors in carrying an item into the annual budget for the estimated cost of the work, and its later action in making direct appropriation of the sums of money needed to defray the expense thereof.

[4] Our conclusion is in harmony with the decision of the lower court, to the effect that these proceedings do not present facts sufficient to warrant a finding that the board of supervisors in the present case "ordered" the work of improving Mission street to be done, or the materials necessary therefor to be purchased, at any time prior to the doing of the work or the furnishing of the materials. The so-called ratification ordinance, to which we shall hereinafter refer, in its preamble contains the important admission on the point, when it recites: "Whereas, the board of the public works, in view of a necessity existing for an immediate performance of the said work, and without a formal order of this board in that behalf, did, by and through its departmental organization," do the particular work, describing it.

[5] Under the provision of the charter, hereinbefore quoted, the board of public works is given authority to do work of the nature involved here, "under such ordinances as may from time to time be adopted by the supervisors." The direction and control of the board of supervisors is, by this direct language of the charter, impressed upon whatever action the board of public works may take in pursuance of the authority granted thereby. That fact seems manifest from even a cursory reading of the section itself. The Supreme Court has so held. In construing the very broad powers of the board of public works, as related to public utilities owned and operated by the city and county, and which power is expressly granted by the section of the charter we are now considering, Mr. Justice Wilbur, speaking for the court in Vale v. Boyle (Sup.) 175 Pac. 787, said:

> "Under the charter provisions concerning public utilities, the city and county of San Francisco, through its board of public works, is acting in a proprietary, and not in a governmental, capacity, and it may well be assumed that, in placing such utilities in charge of one of the boards of the city, it was contemplated that, so far as consistent, such board should have the usual powers incidental to the operation of such public utility, including the power to purchase the necessary supplies and equipment, this power to be exercised under the charter of the city of San Francisco by the board of public works, under such limitations as may from time to time by ordinance be prescribed by the board of supervisors. Section 9, subd. 8, Charter, supra. While it is true that this general consideration alone should not control the express language of section 1, c. 3, art. 2, of the charter, if applicable thereto, it aids us in construing

such general provisions of the charter concerning the purchase of supplies, etc., to consider that they were adopted for the purpose of regulating the conduct of the board of supervisors of San Francisco, acting in their governmental capacity."

The court then held that the charter having given the board of public works "charge, superintendence, and control" of public utilities, in a proprietary capacity, the board was authorized to purchase, in conformity with the ordinance of the board of supervisors, certain automobile busses required, and that the limitations contained in section 1, c. 3, art. 2, of the charter, relating to the manner of purchasing supplies, and awarding of contracts in the ordinary case of governmental affairs, did not apply. Vale v. Boyle, supra.

As we understand them, in neither of the foregoing decisions does the Supreme Court go so far as to hold that the charter requirements relating to the purchase of supplies can be dispensed with. In the Vale Case Mr. Justice Wilbur lays emphasis upon the fact that, while the authority of the board of public works is derived from the charter, its activities are confined within the scope of such directions by ordinance as the board of supervisors may from time to time adopt, as in that case was actually done. The real point determined in the case of Perry v. Los Angeles, supra, as stated by the court in the opinion, was "whether the city may itself do such work without letting any contract therefor, in other words, by day's labor," purchasing such material as it may require. The manner in which the materials for the construction of the outfall sewer were to be purchased was not referred to in the opinion. That question does not appear to have been in issue. The opinion, however, does say, in discussing two sections of the charter of Los Angeles in substance the same as the provisions contained in the organic instrument of San Francisco:

> "The charter provisions * * * undoubtedly require that wherever it is proposed to make an agreement for the purchase of certain materials or supplies for a sum exceeding five hundred dollars, or to make an agreement with another by which he is to furnish such labor for a sum of money exceeding five hundred dollars, a written contract must be let and entered into in the manner prescribed." Perry v. City of Los Angeles, supra.

By section 31, c. 2, art. 6, of the charter, the board of public works shall "from time to time, after it shall have been directed to do so by the supervisors by ordinance, invite proposals for supplying to the city and county such materials as may be required for the repair of the public streets, or for any improvement thereof, and such proceedings shall be had in awarding contracts therefor as are in this article provided for awarding other contracts." The proceedings referred to in this section are those set forth in sections 14 to 22, c. 1, art. 6, which, as the lower court found in the present case, were not complied with, in that no sealed proposals calling for competitive bidding, for furnishing the materials, were advertised for or secured.

Another provision of the charter (section 26, c. 2, art. 6), relating to the definition of terms, and the use of patented pavements in street work in the city and county, provides:

> "The word 'paved' shall include any pavement of stone, iron, wood, or other material which the supervisors may by ordinance order to be used; but no patented pavement shall be ordered during the existence of the patent therefor, until the owner of such patent shall have transferred to the city and county all right to the use of the same therein, with the privilege to any person to manufacture and lay the same upon the streets under any contract that may be awarded to him with the city and county."

The trial court found that the supervisors did not, at any time, order the laying of a patented paving on Mission street, and that the further provision of the section just quoted, relating to the transfer of the right to use the same, had not been complied with by petitioner in this case, "except as such transfer may be found in the contract entered into by petitioner and the board of public works."

This contract consisted of two parts. As they appear in the findings, the first is a formal agreement between the petitioner and the board of public works, acting for and on behalf of the city and county. It refers to a "License Mixture Agreement" filed by petitioner with the board, which is made a part of the contract, and to a resolution of the board, executing the contract, referring to the license mixture agreement, and approving the specifications therefor. By the agreement petitioner agrees to furnish the city and county the material and the services provided in the license mixture agreement, at the rate of, and the city and county agrees to pay therefor, $7 per ton of said wearing surface. The license mixture agreement, made a part of the contract, contains these provisions:

> "Whereas, it is deemed advisable by the proper authorities of the city and county of San Francisco, state of California, that portions of Mission street, and of such other accepted public streets in said city and county as may be determined by the said authorities, be paved with the bitulithic pavement, under and in accordance with approved specifications, a copy of which is attached to and made a part hereof; and whereas, the said improvement requires the laying of a certain patented bitulithic wearing surface and seal coat; and whereas, the undersigned, Warren Bros. Company, is the owner of all patents and processes covering the said bitulithic pavement—Warren Bros. Company hereby proposes and agrees to furnish to the city and county of

San Francisco, at any time up to and including December 31, 1917, the following materials ready for use, as specified and required under and by said specifications: * * * (3) The right to use any and all patents owned or controlled by Warren Bros. Company which are necessary to be used in the laying of said pavement, and the perpetual right to use and repair or reconstruct the patented pavement so constructed. The right of the city and county to repair or reconstruct such pavement with such patented material or other material is hereby reserved in this proposition to said city and county. (4) * * * This agreement shall inure to the benefit of said city and county of San Francisco, and of any person to whom any contract may be awarded by, or entered into with, said city and county of San Francisco for the performance of said work."

Then follows full details and specifications relating to the "construction of Bitulithic Wearing Surface," which appears to be the proper name for said patented wearing surface.

[6] We are of the opinion that there was a sufficient compliance with the charter provisions relative to the transfer to the city and county of the right to the use of the patented wearing surface. While the language might be more explicit, as to the privilege granted any person to manufacture and lay the same upon the streets under contract awarded to him, or entered into by the city, we think the intention to comply with the requirement of the charter is manifest, and that we are right in so holding.

Much of the argument of counsel in the numerous briefs in this case has been devoted to the question of this use by the city of the patented wearing surface, which was laid on the concrete base, on Mission street, as reconstructed. On oral argument this question was referred to as the principal contention.

[7] That such patented composition, or mixture, may be used, if called for by proper jurisdictional procedure, is settled. Nicolson Pavement Co. v. Painter, 35 Cal. 699; Dunne v. Altschul, 57 Cal. 474; Sarver v. Los Angeles, 156 Cal. 187, 189, 103 Pac. 917. The charter provision we have heretofore quoted provides for such use in the city and county of San Francisco. Appellant contends that the board of public works, although required to let all contracts to the lowest bidder, may, nevertheless, let a valid contract for improving its streets by a patent process and subject to a monopoly. Such is undoubtedly the law relating to the purchase of patented articles generally, such as fire engines, machinery, furnishings for public buildings, and ordinary supplies. But the framers of the San Francisco charter had a well-defined object in view, in the enactment of the section in question, the purpose of which was to secure active competition, regardless of the use of a patented pavement in the improvement of its streets.

[8] We are not prepared to hold with appellant that the provision shall apply only in case of street work on unaccepted streets, in which case the proceedings are in invitum. All street work in the city and county, except, possibly, urgent repairs, shall be done on the order of the board of supervisors.

[9] No patented pavement shall be ordered by the supervisors until the owner shall have made the assignment, required by the section, of the right to use the same, with the privilege to any person to manufacture and lay the same upon the streets under any contract that may be awarded to him or entered into by him with the city and county.

[10] This jurisdictional step taken, the board of public works is in position to follow the provisions of the charter in the matter of securing sealed bids for the furnishing of such quantities of the patented pavement as may be necessary, as in the case of ordinary supplies. Nicolson Pavement Co. v. Painter, supra. On such bids being called for the owner of the patents governing the pavement, and all other bidders, are in position to compete for the contract which should be awarded the successful bidder in the manner provided in the contract. To hold otherwise would, in our judgment, be doing violence to the intent and terms of the charter.

Two situations are to be dealt with: First, the board of supervisors did not "order" the reconstruction of Mission street; second, the contract between petitioner and the board of public works was entered into without the formalities required by the charter, although the contract has been fully performed to the satisfaction of the board, and the city and county has received the full benefit thereof. To meet these situations petitioner relies, first, upon the effect of the ordinance of ratification, adopted after the doubt as to the regularity of the proceedings by the board of public works presented itself; and, second, it invokes the doctrine of equitable estoppel.

After reciting the facts relating to the matter, much as they appear here, the said ordinance ratifies, approves, and confirms the purchase of the paving material by the board of public works, confers authority on said board "to do all of the acts hereinbefore set forth as fully as if such authority had been conferred prior to the doing of said acts," and appropriates "the sum of $7,756 for payment to Warren Bros. Company for the wearing surface material purchased from the said company by said board of public works," etc.

[11] We are of the opinion that this ordinance had the effect, contended for by appellant, to cure the omission of the board of supervisors, in the first instance, to order the work of improving the street, and the laying thereon of the patented wearing surface. People v. Swift, 31 Cal. 26, 28. As an

ordinance was necessary in the first instance to inaugurate the work, it was proper that the ratification be in the form required in the original act. When passed, its effect was equivalent to a previous authority. It operated upon the action of the board of public works as though the authority had originally been given. McCracken v. City of San Francisco, 16 Cal. 591; Zottman v. City & County of San Francisco, 20 Cal. 96, 81 Am. Dec. 96.

The contract between petitioner and the city and county, by and through its board of public works, for furnishing the material used in the improvement of Mission street, did not arise from, or result in, proceedings in invitum, whereby any interests of third parties could be affected. In improving one of its accepted streets the municipality was acting more in a proprietary than in a governmental capacity. It was to all intents and purposes caring for its own property as an individual or private corporation would do.

> "When a municipal corporation engages in ordinary business transactions, such as purchasing supplies, it exercises merely the right of a private corporation or a natural person; and when making contracts about such matters it is not to be regarded as exercising political or governmental powers; and, like natural persons, it is subject to the principle that after it has received the benefit of a contract within the scope of its power to make, it is estopped from denying its validity in an action based upon such contract." Contra Costa Water Co. v. Breed, 139 Cal. 432, 436, 73 Pac. 189, 191.
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> "Substantially the authorities indicate no different rule in applying the doctrine of estoppel to the acts of individuals or private corporations than is proper to be applied to the acts of municipal corporations. There is, however, a distinction suggested, and it is this: That where the contract or agreement upon which recovery is sought is one wholly without the scope of the power of the municipality to make—in other words, is ultra vires—then there can be no estoppel; but where the authority exists to make the contract, but the proceedings precedent thereto have been informally taken only, then the rule of estoppel may be made to operate against a municipality as completely as it would against an individual under the same circumstances." McCormick Lumber Co. v. Highland School District, 26 Cal. App. 641, 147 Pac. 1183.

[12] The board of supervisors clearly had the general power to provide for the purchase, by the board of public works, of the supplies, including the wearing surface, necessary for the improvement of Mission street, whatever the contention may be about the manner in which the contract for such supply ought to be made. Even if it be that certain provisions of the charter, or ordinances, were not strictly complied with, the city, under well-settled legal principles, should not be allowed to accept, use, and retain the benefit of petitioner's property, and then refuse to pay for it upon the plea that in making the contract it has not proceeded in strict conformity with some part of the complicated internal machinery of its complex corporate organization. Contra Costa Water Co. v. Breed, supra; Higgins v. San Diego Water Co., 118 Cal. 555, 45 Pac. 824, 50 Pac. 670; Brown v. Board of Education, 103 Cal. 534, 37 Pac. 503.

The judgment is reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

42 Cal. App. 465

PEOPLE v. BRAY. (Cr. 663.)

(District Court of Appeal, Second District, Division 2, California. July 29, 1919.)

1. CRIMINAL LAW 🔑1023(8)—DENIAL OF MOTION IN ARREST—APPEAL FROM ORDER.

Since no appeal from an order denying defendant's motion in arrest of judgment finds any warrant under the Penal Code, an attempted appeal therefrom must be disregarded, in view of Pen. Code, § 1237.

2. HOMICIDE 🔑268 — CAUSE OF DEATH — QUESTION FOR JURY.

In a prosecution for manslaughter, the weight of the evidence as to the cause of death, whether influenza or an assault by defendant, was for the jury.

3. CRIMINAL LAW 🔑722½ — ARGUMENT — REFERENCE TO DECEDENT'S ADULTEROUS RELATIONS WITH ACCUSED.

In prosecution for manslaughter of the woman with whom defendant was living, she being undivorced from her husband, the district attorney was justified in referring to decedent by her proper married name, and not as defendant's wife.

4. CRIMINAL LAW 🔑727—EVIDENCE TO OVERCOME ARGUMENT OF DISTRICT ATTORNEY.

In prosecution for manslaughter of the woman with whom defendant was living as his wife, she not having been divorced from her husband, certified copy of marriage certificate and license, showing that defendant and decedent had gone through the form of a marriage ceremony, was inadmissible, offered for alleged purpose of overcoming district attorney's repeated and proper reference to decedent as the wife of her real husband.

5. CRIMINAL LAW 🔑367—EVIDENCE—BODILY OR MENTAL FEELINGS—RES GESTÆ.

When the bodily or mental feelings of a person are material issues, the usual expressions of those feelings, involuntary declarations, and exclamations are admissible as tending in some degree to show bodily pain and suffering, or present physical condition, being the mental reflexes of what it might be impossible to show otherwise.

6. Criminal Law 🔑366(6) — Evidence — Cause of Death—Declarations of Decedent—Res Gestæ.

In prosecution for homicide, the state claiming that defendant was the cause of the death of decedent, the woman with whom he was living, and defendant claiming that she died from influenza, testimony was inadmissible that decedent told a witness, five days after the time when the state claimed defendant inflicted the deadly blows, that she had been delirious, had had a fever, and had fallen in the bathroom and hurt herself.

7. Criminal Law 🔑367 — Evidence — Res Gestæ—Statements of Physical Condition.

Testimony of complaints of bodily pain and suffering is admissible on the principle of res gestæ only, and statements of a person's present condition or symptoms, or of the preceding cause of a present condition, are not admissible.

8. Criminal Law 🔑367—Res Gestæ—Narrative Declarations as to Causes of Injury.

Declarations or complaints by one in his last illness which are but a narrative of the cause of sickness or injury, or the manner in which, or the time at which, the injury was inflicted, or the nature of past symptoms, or the bodily condition at a prior time, are incompetent and inadmissible.

9. Criminal Law 🔑367—Evidence—Declarations of Decedent as to Condition.

In a prosecution for manslaughter of the woman with whom defendant was living, he claiming that she died of influenza, testimony as to declarations by decedent of present bodily condition, offered to show that decedent disregarded the conditions that would make for health or sickness, etc., *held* inadmissible.

10. Criminal Law 🔑1114(1)—Appeal—Refusal of Subpœna Duces Tecum—Record Showing Contents of Paper.

In prosecution for manslaughter of woman with whom defendant was living, defendant claiming that she died of influenza, the Appellate Court, despite any statement of counsel to the trial court, cannot reverse conviction for refusal to grant defendant's motion for an order directing issuance of a subpœna duces tecum directed to the city health officer, and requiring production of the certificate of death filed with him, in the absence of showing that such certificate gave influenza as the cause of death.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Edward J. Bray was convicted of manslaughter, and from the judgment and an order denying his motion for new trial he appeals. Judgment and order affirmed.

Charles W. Lyon, Arthur Veitch, and Fredericks & Hanna, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. [1] Defendant was convicted of manslaughter. He appeals from the judgment of conviction and from an order denying his motion for a new trial. He also has given notice of appeal from an order denying his motion in arrest of judgment, but, as no appeal from an order of that character finds any warrant under our Penal Code, the attempted appeal therefrom must be disregarded. Pen. Code, § 1237.

The information charges that on or about October 27, 1918, in the county of Los Angeles, defendant wrongfully, unlawfully, and feloniously, and with malice aforethought, did kill and murder one Bertha May Wiswell.

The following summary of some of the facts will suffice for an understanding of the questions presented: For some time prior to October 19, 1918, defendant and the deceased had been living together in an apartment house on Main street, in the city of Los Angeles. The deceased was a married woman. She had been married to one Kent Wiswell, from whom she had not been divorced, and who was still alive at the time of her death, but from whom she had lived separate and apart for some years prior to the homicide. About 3 o'clock on the morning of October 19th the deceased returned to the apartment where she and defendant were then living. Just prior to her return she had been in the company of a man of the name of Julius Hammer. She died on October 27, 1918. On the evening of October 19th, in front of the apartment house, defendant, in a conversation with a witness for the prosecution, on being asked if he was going to a dance that night, replied that he had "had his dance last night"; that "he and the old lady" had a battle about 3 o'clock in the morning. On the next day defendant told the same witness that "he had been to the drug store to get some medicine for the old lady"; that "he guessed he had hurt her pretty bad"—that "I beat her up pretty bad." To another witness, who lived in the same apartment house, defendant, on October 20th, said: "She [the deceased] is not feeling very well; I knocked hell out of her," or "I beat hell out of her." He said that he did this on the morning of Saturday, the 19th day of October. After his arrest defendant told an officer that, as he was leaving the apartment house about 3 o'clock in the morning of October 19th, he met deceased in the lobby; that he suspected her of being out with Julius Hammer; that they had an argument; that he slapped her and struck her two or three times, and kicked her. The mother of deceased, who saw her on October 25th, testified that at that time deceased, who had been confined to her bed from the time when defendant struck her until her death, had a terrible black eye, and that the whole side of her face was mashed and bruised and in a terrible condition. On November 6th, the body meanwhile having been exhumed, a post mortem was held. Doctor Wagner, the county autopsy surgeon, who attended the post mortem and testified to many bruises on the body, enumerating and describing about 30 contusions or abrasions, said:

> "The contusions on the abdomen were rather extensive. There is interstitial hemorrhage and contusion of the abdomen and other tissues, with similar hemorrhage in the rectus muscles. * * * The fibres were parted. * * * These contusions, taken all together, with the interstitial hemorrhage or hematoma, were, in my opinion, the cause of death."

The mother, in giving her testimony, said that, on the occasion when she saw her daughter on October 25th, she complained all the time of terrible pain across her stomach and bowels.

[2] We have deemed it necessary to state thus in detail some of these gruesome particulars, for the reason that defendant, who did not take the stand, advanced the theory that influenza was the cause of his victim's death, and upon this theory of the cause of death bases two of his claims of error in the rejection of certain proffered evidence. It is needless to say there was evidence for defendant directly contradicting the prosecution's contentions. The weight of that evidence, however, was for the jury.

[3, 4] Defendant offered in evidence a certified copy of a marriage certificate and license, showing that defendant and deceased had gone through the form of a marriage ceremony at Santa Ana, in Orange county, on October 2, 1918, and he now assigns as error the ruling of the court sustaining an objection to this offer. Appellant concedes that ordinarily such evidence would be immaterial, but argues that it was admissible here in order to overcome the effect of the district attorney's repeated references to deceased as Bertha May Wiswell; thus creating in the minds of the jurors, so it is claimed, the idea that defendant was living with deceased in adulterous and illicit cohabitation instead of as her lawful husband. But the district attorney was justified in referring to deceased as Mrs. Wiswell, or as Bertha May Wiswell, and not as Mrs. Bray. Bertha May Wiswell was her true name. She had been married to Kent Wiswell, who was still alive. In fact, he testified at the trial. She had not been divorced from him. The husband himself so testified. Moreover, one of defendant's witnesses, who was present at the marriage ceremony performed in Santa Ana was permitted, without objection, to give oral evidence of that ceremony, testifying that defendant and Mrs. Wiswell were married at Santa Ana by a justice of the peace on October 2, 1918.

[5-8] Appellant complains of the exclusion of his offer to show that on October 24th, or about five days after the time when the prosecution claims defendant inflicted the lethal blows, the deceased told a witness over the telephone that she had been delirious and had had fever, and that she had fallen in the bathroom and had hurt herself severely. The offer to show that the deceased told this witness that "she had been delirious and had had fever" was for the purpose of laying a foundation for the testimony of experts that influenza was the real cause of death. Counsel for appellant say that "complaints and declarations of a decedent made during the course of the last illness are competent evidence upon the question of the cause of death." If by this counsel mean that declarations, during the last illness, as to the cause of the fatal injury or disease, are admissible, they state the rule too broadly. The rule is that, when the bodily or mental feelings of a person are material issues in a case, the usual expressions of those feelings, involuntary declarations, and exclamations are admissible as tending in some degree to show present pain or suffering or present physical condition. The expression of physical or mental feeling—pain or sorrow—may take any form, inarticulate, as in groanings, articulate, as in exclamations, or more detailed statements, summarized as "complaints." Such expressions are but the natural reflexes of what it might be impossible to show by other evidence. But though declarations, exclamations, or complaints are admissible as indicative of what the bodily or mental condition of the declarant is at the time of the declaration or complaint, such bodily or mental condition being an issue in the case, they are not admissible when they are but statements of the person's past condition or symptoms, or of the preceding cause of his present condition. Testimony of complaints of present pain and suffering is admissible upon the principle of res gestæ. Declarations, to become a part of the res gestæ, must accompany the bodily pain or suffering, or the feeling or act which they are supposed to characterize and explain, and must so harmonize as clearly to be one transaction. To be competent as evidence, the declarations must exclude the idea of a narrative of past occurrences. Hence, declarations or complaints by one in his last illness, that are but a narrative of the causes of the sickness or injury, or the manner in which, or the time at which, the injury was inflicted, or the nature of past symptoms, or the bodily condition at a prior time, are incompetent and inadmissible. Kennedy v. Rochester, etc., R. Co., 130 N. Y. 654, 29 N. E. 141; Gulf, etc., Ry. Co. v. McKinnell (Tex. Civ. App.) 173 S. W. 937; Smith v. Chicago, etc., Ry. Co., 42 Okl. 577, 142 Pac. 398; Hamilton, etc., Co. v. Hoskins, 244 Pa. 1, 90 Atl. 541; Kelley v. Detroit, etc., R. R. Co., 80 Mich. 237, 45 N. W. 90,

20 Am. St. Rep. 514; Green v. Pacific Lumber Co., 130 Cal. 435, 62 Pac. 747; 16 Cyc. p. 1162; 1 R. C. L. p. 493; Wigmore on Evidence, § 1722. Tested by these principles, the proffered evidence was inadmissible.

[9] Defendant's counsel asked one or two questions that, possibly, were not objectionable under the rule applicable to declarations of present bodily condition by one who is injured or ill. But just before he asked these questions counsel stated to the court that his purpose was to show, by the declarations of the deceased, that she "disregarded the conditions that would make for health or for sickness," and "gave no thought to what would occur." In view of this preliminary statement as to what counsel expected to prove by decedent's declarations, the court was justified in sustaining the objections. Counsel indicated that it was not his purpose to use the declarations as probative circumstances showing the existence of a particular bodily or mental condition at the very time when the declarations were made.

[10] Finally, complaint is made of the court's refusal to grant defendant's motion for an order directing the issuance of a subpœna duces tecum, directed to the city health officer, and requiring the production of the recorded certificate of death, showing the cause of death as certified to by Dr. Finch, a physician who was called in to examine the decedent shortly prior to her death, and who himself departed this life while the case was on trial. Defendant's counsel told the court that his purpose was to show by the certificate that Dr. Finch had certified that influenza was the cause of death. The application for the order directing the issuance of a subpœna duces tecum was not accompanied by any affidavit. At any rate, the record before us fails to disclose that the motion was accompanied by an affidavit showing any of the contents of the death certificate, or that the court was apprised of its nature otherwise than by the unsupported statement of counsel as to his purpose in asking for the issuance of the subpœna.

The health officer of the city of Los Angeles is the local registrar of vital statistics for that city. Section 4, Vital Statistics Act, Stats. 1915, p. 576. A certificate of death is required to be filed with the local registrar, showing the primary cause of death, and the contributory or secondary cause, if any, with the signature and address of the physician making the medical certificate. Subdivision 17, § 7, Vital Statistics Act, Stats. 1915, p. 579. Every local registrar is required to make a complete and accurate copy of each death certificate, to be preserved permanently in his office as the local record, and to transmit to the state registrar at Sacramento, on the 5th day of each month, all original certificates registered by him for the preceding month. Section 19, Vital Statistics Act, Stats. 1915, p. 586. A certified copy of the record of any death, certified to by the state or local registrar, must be supplied to any applicant on payment of a fee of 50 cents, and shall be "prima facie evidence in all courts and places of the facts therein stated." Section 21 of Vital Statistics Act, Stats. 1915, p. 586.

Assuming, for the purpose of this decision, that if the death certificate did contain a statement that influenza was the cause of death it would be admissible as prima facie evidence of the facts stated therein, nevertheless there is nothing in the record before us to indicate what the certificate showed the cause of death to be. The colloquy between the court and counsel, when the latter was asking for the issuance of a subpœna duces tecum, justifies the conclusion that counsel, in good faith, believed that the death certificate showed influenza to be the cause of death; and we likewise may justly infer from the remarks of the learned trial judge at that time that, even if the certificate did show influenza to have been the cause of death, he nevertheless would neither have admitted it in evidence nor have issued a subpœna for its production. But even so, we cannot reverse for this assigned error. For non constat but that counsel was mistaken in his supposition that the certificate gave influenza as the cause of death. Though he doubtless in good faith believed that the certificate stated that decedent died of influenza, there is nothing in the record to show that there was any reasonable ground for such belief. A copy of the original certificate was on file in the office of the local registrar at Los Angeles, and, upon the payment of the trifling sum of 50 cents, a certified copy could have been obtained and presented to the court with the application for the subpœna; or counsel himself could have examined the record in the local registrar's office, and, having done so, could have presented with his motion for the subpœna an affidavit setting forth what the certificate showed the cause of death to be. Had he pursued either of these courses, the record here, if it were a full and correct transcript of the proceedings in the court below, would have enabled us to see whether the death certificate showed the cause of death to be other than as contended for by the prosecution. In the absence of something in the record before us disclosing what the death certificate did show as to the cause of death, we cannot say that the court erred in refusing to order the issuance of a subpœna for its production. Error warranting a reversal must affirmatively appear in the record, otherwise this court cannot determine whether a substantial right of a defendant has been prejudiced by a ruling assigned as error. People v. Harris, 169 Cal. 64, 145 Pac. 520. The case falls within the principle of those authorities which hold that where documentary evidence is offered and refused, the contents of the writing, or so much thereof as is necessary to show that error has been committed, should be set forth in the record on appeal, in order that the court may determine whether the rejection of the offered writing was prejudicial to any substantial right of the appellant. San Francisco, etc., Agency v. Hogan Co., 6 Cal. App. 408, 92 Pac. 312; In re Angle, 148 Cal. 102, 82 Pac. 668. Nor will the statement of counsel, made to the court at the time of the offer, supply the lack of the document itself, or of so much thereof as may be sufficient to enable the appellate court to determine whether its rejection was prejudicial. Bensch v. Farnsworth, 9 Ind. App. 547, 34 N. E. 751, 37 N. E. 284. Though appellant could have procured from the local registrar a certified copy of the record in his office, upon paying the fee of 50 cents, he argues that, "where the issues are as serious as they were in this murder case, the defendant would only be fully equipped against all quibble by the production of the original document before the jury, supplemented by proof of the handwriting of the physician whose name was signed to the document." This argument proceeds upon the false assumption that the original certificate, signed by Dr. Finch, was on file in the office of the local registrar at Los Angeles. The trial did not take place until some months after the homicide; and, presumably, the original, signed by Dr. Finch, was at that time on file in the office of the state registrar at Sacramento, where the local registrar, after making a copy for his office, was required by section 19 of the act to send it.

The judgment and the order denying a new trial are affirmed.

We concur: SLOANE, J.; THOMAS, J.

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42 Cal. App. 337

SCHAAD v. BARCELOUX. (Civ. 1828.)

(District Court of Appeal, Third District, California. July 23, 1919.)

1. APPEAL AND ERROR 🔑918(1)—OVERRULING MOTION TO STRIKE AMENDED COMPLAINT PRESUMED TO BE JUSTIFIED.

Order overruling defendant's motion to strike plaintiff's amended complaint must be presumed to have been justified by the facts, in the absence of anything in the record to the contrary, and if at the hearing of the motion it appeared that the amended complaint was filed as of course, under Code Civ. Proc. § 472, and not by leave of court, some memorial to such effect should have been incorporated in the bill of exceptions; otherwise regularity of proceedings will be presumed.

2. PLEADING 🔑248(17)—AMENDMENT OF COMPLAINT NOT CHANGING CAUSE OF ACTION BUT REMEDY ALLOWABLE.

Amended complaint alleging plaintiff's ownership of corporate stock, delivery of the certificate to defendant under a pooling agreement, sale of the franchise and property of the company, with extinguishment of the trust and conversion by defendant of plaintiff's shares to his own use, *held* not to have introduced an entirely new and different cause of action, the original complaint having alleged delivery of the stock to defendant as trustee under the pooling agreement, sale of the company's property, and defendant's refusal to account to plaintiff for his proportionate share of the proceeds; the remedy only, not the cause of the action, having been changed by the amendment.

3. APPEAL AND ERROR 🔑757(1)—ON APPEAL BY ALTERNATIVE METHOD PARTIES MUST PRINT NECESSARY PORTIONS OF RECORD IN BRIEFS.

Under Code Civ. Proc. § 953c, in filing briefs on appeal taken under the alternative method, both parties must print such portions of the record as they desire to call to the attention of the court, as in support of a contention that denial of defendant's motion for nonsuit was erroneous.

4. TRIAL 🔑419—ON DENIAL OF NONSUIT FAILURE TO ATTACK VERDICT ADMITS SUFFICIENCY OF EVIDENCE.

Where, though plaintiff did not make out a prima facie case, defendant introduced evidence, oral and documentary, on the merits, which was followed by further evidence introduced by plaintiff, the order denying defendant's motion for nonsuit, at the close of plaintiff's evidence, will not be disturbed, defendant not having attacked general verdict or special findings for plaintiff, thus conceding the evidence had supplied any deficiency existing when motion for nonsuit was made.

5. CORPORATIONS 🔑116—ON CONVERSION OF STOCK BY TRUSTEE LIABLE FOR ITS VALUE.

Where corporate stock was delivered to plaintiff by the promoter of the company in consideration of services, and plaintiff deposited the stock with defendant, as trustee, under a pooling agreement, and defendant, in violation of his trust, by collusion with the promoter surrendered plaintiff's certificate to the promoter, who had it canceled, and a new certificate issued to him, defendant was guilty of a conversion, and liable to plaintiff for the return of his certificate or its value before any dissolution or winding up of the company, which would involve no violation of Civ. Code, § 309.

6. EVIDENCE 🔑121(6)—DECLARATIONS OF THIRD PERSON ADMISSIBLE AS RES GESTÆ.

In an action for the conversion of corporate stock by the trustee under a pooling agreement, testimony as to declarations made by the promoter of the company to plaintiff, though not in the presence of defendant, tending to dispute defendant's claim of ownership of the stock in the promoter, *held* admissible as part of the res gestæ.

7. Appeal and Error ⚿1050(1)—Admission of Evidence as to Declarations Harmless Where Fact Otherwise Shown.

In an action for conversion of corporate stock against the trustee under a pooling agreement, admission in evidence for plaintiff of testimony as to declarations made by the promoter of the company to plaintiff as to ownership, though not in the presence of defendant, if erroneous, *held* harmless to defendant.

Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by C. L. Schaad against H. J. Barceloux. From judgment for plaintiff, defendant appeals. Affirmed.

C. L. Donohoe and W. T. Belieu, both of Willow, for appellant.
Frank Freeman and George R. Freeman, both of Willow, for respondent.

CHIPMAN, P. J. The original complaint in the action had for its object to recover the value of certain 5,000 shares of the capital stock of the Glenn County Telephone Company, evidenced by certificate No. 12, of which plaintiff claimed to be the owner on March 14, 1908. Subsequently to the filing of the original complaint, plaintiff filed an amended complaint alleging that defendant had converted said shares, and praying for the judgment of the court that said shares be returned to plaintiff or that defendant pay the value thereof. Defendant filed a motion to strike out portions of the first amended complaint for the following reasons:

> "(1) That no order was had or obtained for the filing of said first amended complaint; or if an order was had or obtained for the filing of said amended complaint, the same was not filed within the time allowed by law or by the court; (2) that said amended complaint changes the original cause of action, from an action in contract to an action in tort, and that said first amended complaint is not germane to the issues as framed by the original pleadings, and introduces a different cause of action."

It was alleged in the original complaint that on March 14, 1908, plaintiff deposited a certain certificate No. 12, with defendant as a trustee under the terms of a certain pooling agreement, a copy of which is attached to the complaint and made a part hereof; that this pooling agreement provided that the stock so deposited with defendant was to be pooled for 10 years from that day for the purposes set forth in said agreement; that said pooling agreement was entered into between plaintiff and defendant and several other stockholders of said company on March 14, 1908, and, among other things, provided that the signers of said agreement represented 51 per cent. of the capital stock of said company, and they agreed that the stock should be vested in a trustee for their benefit for 10 years after the incorporation of said company, the said shares to be voted in a body for any and all purposes during that period, and that the votes to be cast, whether for directors, or any other purpose, should be cast as a whole, agreeable to the direction or control of a majority of the 51 per cent. of said stock; that each of the signers was the owner of a specified number of shares, of which the agreement showed that plaintiff owned 5,000 shares; that defendant owned 12,000 shares, and that pursuant to, and to attain the purposes mentioned therein, the certificates of stock belonging to the signers should be placed in the physical possession of defendant, to be held by him during that period; that said certificates of stock, representing 51 per cent. which had been, or might be, issued to the signers should bear the indorsement showing that it was subject to said pooling agreement; that during the time covered by the agreement no part of the stock should be sold or transferred except by consent of a majority of the owners, and that defendant accepted such trusteeship and agreed to and did accept physical possession of said certificate subject to the terms of said pool agreement.

It is further alleged in the complaint that in December, 1915, the franchise and property of said company were sold for $83,000, the company receiving that amount on account of such sale; that, deducting the indebtedness of the company, there remained the balance of $51,500, to be divided among the 100,000 shares of stock of said company then outstanding; that defendant received from the corporation all moneys due the plaintiff from said incorporation on account of his said 5,000 shares of stock, amounting to $3,000, and before the commencement of this action plaintiff demanded the same of defendant, and that defendant refused and still refuses to account to plaintiff therefor, or for any sum of money due him, as owner of the said stock; that defendant has converted the money to his own use; that the owners of said stock received from the said sale $0.60 per share, as their proportion of the proceeds thereof.

The complaint also sets forth a second cause of action in the form of a common count for money had and received by defendant for and on account of plaintiff, and for the use of plaintiff, in the sum of $3,000, and it was alleged that defendant became indebted to plaintiff for that sum, and, though often requested to pay the same, had failed at all times to do so.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

The original complaint was filed on or about May 8, 1916. Defendant demurred thereto, which being overruled, he filed his answer to the complaint on July 10, 1916. In his answer he denied plaintiff's ownership of said certificate of said shares, evidenced by said certificate No. 12, but admitted that on March 14, 1908, plaintiff deposited said shares with defendant, as trustee, under the terms of said pool agreement, and admitted that ever since he has retained the possession thereof, subject to conditions as later in the answer alleged, and admitted that said indorsement and delivery of said stock to defendant was for the purpose set out in said pool agreement; admitted that during the month of December, 1915, the franchise and property of the said company was sold to the Sacramento Valley Telephone Company, and alleged that the sum of $40,311.40 and $10,000 in bonds remained to be divided among the stockholders, after deducting the indebtedness of said company; denied that defendant received from said company any money alleged to be due plaintiff from said company on account of the alleged ownership of said 5,000 shares; and denied that he received any money on behalf of plaintiff on account of or by virtue of the alleged possession of any stock of said company.

Admits that prior to the commencement of said action plaintiff demanded of defendant all moneys received by him on account of the said shares, and admits that defendant refused and now refuses to account to plaintiff for the sum, or any sum of money, on account of said shares, and denies that plaintiff herein has converted said shares, or anything of value, to his own use to the detriment of plaintiff herein; denies that all of the owners of the shares of stock of said company received $0.60 per share, but alleges that some received that amount, others received $0.50 per share, and still others received bonds in lieu of their said stock; denied that the value of said alleged 5,000 shares of stock was of the value of $3,000.

Further answering the said complaint, the defendant denies that he had received for, or on account of, plaintiff the sum of $3,000, or any other sum; denies that he is indebted to plaintiff in said sum or any sum whatever; admits demand and refusal as alleged in the complaint.

For a further and separate defense, defendant alleges that on or about the month of March, 1908, one A. S. Lindstrom was the owner and in possession of 51,500 shares of the capital stock of said company, and at that time said Lindstrom had a contract with the said Glenn County Telephone Company by which he was obligated to pay certain expenses connected with the organization of the said Glenn County Telephone Company; that on or about the month of March, 1910, said Lindstrom contracted and agreed to and with the plaintiff herein that if the said plaintiff "would pay and defray one-fifth of said organization and promotion expenses of said Glenn County Telephone Company, a corporation, that he, the said A. S. Lindstrom, would convey to the said plaintiff, C. L. Schaad, and cause to be transferred to him on the books of said corporation, 5,000 shares of the capital stock of said corporation, Glenn County Telephone Company, to be and remain the sole and exclusive property of the said C. L. Schaad, as soon as and when the said C. L. Schaad should pay his one-fifth of the expenses of the organization and promotion of said corporation"; that, plaintiff agreed thereto, and that in consideration of said shares he would pay and defray one-fifth of the said expenses; that thereafter, and in pursuance of said agreement, said Lindstrom did convey to plaintiff and cause to be transferred on the books of said corporation, subject to the conditions above specified, 5,000 shares of the capital stock of said company, and had issued to him certificate No. 12, evidencing said shares.

The answer then alleges the termination of said pooling agreement referred to in the said complaint, by the terms of which the defendant herein was made a trustee of all the parties thereto, and that at said time plaintiff indorsed to defendant and delivered to him, as such trustee and as part of said pooling agreement, said certificate No. 12; that by the terms of said agreement between said Lindstrom and said plaintiff, the title and ownership of said 5,000 shares and said certificate No. 12 was to remain in and be the property of said Lindstrom until the plaintiff had fully paid his part of said expenses; that thereafter there became due and payable on account of the expenses of the organization of said company the sum of $——— from said Lindstrom, and that thereafter, on or about the ——— day of March, 1909, said Lindstrom demanded of plaintiff herein that he pay to said Lindstrom his said one-fifth of said expenses, but plaintiff refused and ever since has refused so to do; that thereafter, in the month of September, 1909, the said Lindstrom notified plaintiff that on account of his failure and refusal to defray his part of said expenses that he, the said Lindstrom, rescinded the said agreement, and demanded a redelivery to him of said certificate No. 12, and that said plaintiff failed and refused so to do, or to authorize the defendant herein to redeliver the said certificate to the said Lindstrom; that in the month of April, 1910, said Lindstrom demanded of said defendant herein the redelivery to him of the said certificate No. 12, held in the name of plaintiff, as aforesaid, on account of the failure of plaintiff to comply with the terms of his agreement, and to withdraw said certificate from said pooling agreement, and that said certificate be canceled.

That thereafter said certificate of stock was withdrawn from said pooling agreement and redelivered to said Lindstrom, and was canceled on the books of said corporation, and the certificate issued to said Lindstrom in lieu thereof, and the same was thereafter delivered by said Lindstrom to said defendant herein, and again placed in said pooling agreement; that said defendant now holds said certificate as trustee under the terms of said pooling agreement, and ever since the said month of April, 1910, said Lindstrom has been the owner and now is the owner of said certificate, "and ever since the said time, the plaintiff has had no interest in or to said certificate of stock in any manner whatever or at all"; that by reason of the plaintiff's refusal to comply with the terms of his said contract with said Lindstrom in not making the payments connected with the organization expenses of said company, the said plaintiff never became the owner of said stock, or entitled to any of the proceeds arising therefrom.

On September 5, 1916, defendant filed an amended answer, substantially the same as before, but, in addition thereto, pleaded the statute of limitations. On March 26, 1917, plaintiff filed an amended complaint on which the action was tried. It was alleged in the amended complaint that plaintiff is the owner of 5,000 shares of the capital stock of the Glenn County Telephone Company, evidenced by certificate No. 12 of said corporation, and that on that day he deposited the said certificate with defendant as aforesaid, under the terms of a certain pooling agreement, "a copy of which is attached to the original complaint, marked 'Exhibit A', and made a part thereof, and by reference said 'Exhibit A' is hereby made a part of this first amended complaint"; alleges the sale of the property and franchise of said company, in December, 1915, and "that the purposes of said trust ceased and said trust was extinguished, and that defendant converted said 5,000 shares of the capital stock of said corporation to his own use, and at that time claimed and asserted, and now claims and asserts, that plaintiff has no interest or ownership in or to said 5,000 ($5,000) shares of stock, and then repudiated and now repudiates his trust in connection therewith"; alleges the value of said stock to be the sum of $3,500, and prays judgment for the return of said shares or the sum of $3,500, the value thereof, with interest thereon from December 15, 1915.

On April 2, 1917, defendant filed a motion to strike out portions of the amended complaint on the grounds heretofore stated, which motion being denied, the defendant answered plaintiff's amended complaint, in which he denied plaintiff's alleged ownership of said shares of said corporation, admitted that on the 14th day of March, 1908, he deposited said certificate with defendant, as trustee under the terms of said pooling agreement; admitted that during the month of December, 1915, the franchise and property of said company were sold to the Sacramento Valley Telephone Company, but denied that the purposes of the trust under the said pooling agreement "then or ever ceased or was ever extinguished"; denied that defendant converted said 5,000 shares to his own use or at all; denied that he had ever asserted that plaintiff has no interest or ownership in said shares except as herein and hereinafter set out and described; denied that defendant at any time repudiated or repudiates his trust in connection with said 5,000 shares of stock, and alleges the fact to be that said trust is now in full force and effect; denies that said shares were of the value of $3,500, or any greater sum than the sum of $———; alleges that in April, 1910, he delivered said certificate of stock to one A. S. Lindstrom and that ever since said time said defendant has not had in his possession or under his control said certificate No. 12.

For a further defense, defendant set up particularly all the facts stated in his answer to the original complaint and the amendments thereto.

Defendant, also, on September 11, 1917, filed what purports to be an amended answer to plaintiff's amended complaint; the pleadings are verified. The cause was tried by the court with a jury, and a verdict was rendered on September 28, 1917, in which the jury found "in favor of the plaintiff for a return of the certificate of stock, being certificate No. 12 for 5,000 shares of the capital stock of the Glenn County Telephone Company, a corporation, being the same certificate of stock referred to in plaintiff's complaint herein, or for the value thereof in case a return cannot be had, to wit, the sum of $1,816.60 and interest, from December 1, 1915."

Certain particular questions of fact were submitted to the jury and answered as follows:

"(1) At the time of the delivery of certificate No. 12 for 5,000 shares of the capital stock of the Glenn County Telephone Company to the plaintiff C. L. Schaad, was it understood and agreed between A. S. Lindstrom and the plaintiff that the title to said stock was not to pass to the plaintiff until he paid to Lindstrom one-fifth of the moneys expended by Lindstrom in connection with the promotion and organization of the said telephone company? Answer: No.

"(2) When did the defendant Barceloux deliver said certificate No. 12 to A. S. Lindstrom? Answer: April 6, 1910.

"(3) Did the plaintiff Schaad consent to the delivery of said certificate No. 12 by the defendant Barceloux to said Lindstrom? Answer: No.

"(4) When did plaintiff Schaad first learn that the defendant Barceloux had delivered said certificate No. 12 to Lindstrom? Answer: Latter part of 1915."

Judgment passed for the plaintiff in accordance with said verdict. Defendant moved for a new trial, and, his motion being denied, appealed from the judgment, and has brought up the record under the alternative plan, pursuant to section 953a, etc., of the Code of Civil Procedure.

[1] 1. As to plaintiff's alleged ground for his motion to strike out the amended complaint: The record shows nothing in relation thereto except the recital in the amended complaint, the motion to strike out, and the order overruling the motion. The amended complaint reads:

> "Now comes the plaintiff, and, leave of court having been first had and obtained, files this his amended complaint."

Appellant claims that the amended complaint was filed "as of course" under section 472, Code of Civil Procedure. It does not so purport to be. On the contrary, it purports to have been filed by leave of the court "having been first had and obtained." This recital not only negatives the inference that the pleading was filed "as of course" under leave given by section 472, but shows on its face that it was filed after leave given by the court. The order overruling the motion must be presumed to have been justified by the facts in the absence of anything in the record to the contrary. If at the hearing of the motion it was made to appear, as defendant now claims was the fact, some memorial to that effect should have found its way into the bill of exceptions. Otherwise, the regularity of the proceedings will be presumed.

[2] 2. By plaintiff's amended complaint, was "an entirely new and different cause of action introduced into the case," as claimed by defendant? Substantially the facts constituting the cause of action set forth in the original complaint also constitute the cause of action set forth in the amended complaint. In the original complaint plaintiff alleged ownership of certain shares of the Glenn County Telephone Company, which plaintiff delivered to defendant as trustee under the alleged pooling agreement; that subsequently the company sold all its property and franchise to the Sacramento Valley Telephone Company, thus realizing a certain sum of money of which defendant received a certain portion on account of said shares so held by him as trustee; that defendant demanded the money so received by him, "but that defendant refused and now refuses to account to plaintiff for said sum or any sum received from the sale of said property and due to the plaintiff as the owner of 5,000 shares of said capital stock, and said defendant has converted said sum and all of them to his own use."

In his amended complaint plaintiff alleges his ownership of these same 5,000 shares in said telephone company, evidenced by certificate No. 12; that plaintiff delivered said certificate to defendant under said pooling agreement made part of both the original and amended complaint; that the franchise and property of said telephone company were sold and the purposes of said trust ceased and said trust was extinguished and "that defendant converted said 5,000 shares to his own use, and claimed and now claims that plaintiff has no interest in said shares, and that defendant 'then repudiated and now repudiates his trust in connection therewith'; alleged the value of said shares, and prayed for judgment for their return or the value thereof."

As to the two pleadings the identity of the facts, constituting the cause of action, is plainly perceivable. In the original complaint plaintiff sought to recover the value of the shares which it was alleged defendant received and converted to his own use. In the amended complaint he sought to recover the shares or their value. Technically the amended complaint might be said to "sound in tort," but in reality the amended complaint sets forth the defendant's obligation, as did the original complaint, and the obligation was the cause of action in both pleadings.

The cause of action was not changed by the amendment, but only the remedy was changed. Mr. Pomeroy points out the difficulty in framing a complaint under reformed pleadings in actions for conversion of chattels, and the like wrongs, that will show on its face that the plaintiff has elected to bring his action either in tort or in contract. "The very facts which are alleged in the action of tort are the facts from which the promise is inferred, and according to the true theory of pleading, these facts must be stated in the action ex contractu, without any legal inferences or conclusions. It conclusively follows that, in this general class of liabilities, as the facts which constitute the cause of action are the same in each, the averments of the complaint or petition must be the same in each kind of action, if the essential principles of the reformed system are complied with, so that it is impossible to indicate upon the face of the pleading alone the election which the plaintiff has made." Pomeroy's Code Remedies (4th Ed.) § 464. In whatever class the original complaint may be placed, whether ex contractu or ex delicto, if, as we think is true, the amended complaint, in its material elements, is the same as the original complaint, no new cause of action is pleaded therein. Not only does this similarity of facts exist, but the same evidence would be admissible in support of both the original and amended complaints. Frost v. Witter, 132 Cal. 421, 64 Pac. 705, 84 Am. St. Rep. 53, is an instructive case, as showing that where the cause of action set up in the original and amended complaint was simply the obligation sought to be enforced, an amendment may be made which merely changes the remedy. As stated in a syllabus, it was there held that—

> "All that can be required is that a wholly different cause of action, which is entirely foreign to the original cause of action, cannot be introduced, and that the plaintiff cannot be allowed to strike out the entire substance and prayer of his complaint, and insert a new case by way of amendment."

The Supreme Court, in Glougie v. Glougie, 174 Cal. 126, 162 Pac. 118, had the question before it. In considering the original and amended complaint the court said that:

> "In both cases the fundamental equitable consideration was the same, namely, was there a breach of trust by virtue of which the defendants were inequitably retaining possession of property rightfully belonging to plaintiff?"

In Born v. Castle, 22 Cal. App. 282, 134 Pac. 347, Frost v. Witter, supra, is cited, and the rule stated in 1 Ency. Pleading and Practice, 564, is approved:

> "As long as the plaintiff adheres to the contract of injury originally declared upon, an alteration of the modes in which the defendant has broken the contract or caused injury is not an introduction of a new cause of action. The test is whether the proposed amendment is a different matter—another subject of controversy—or the same matter more fully or differently laid to meet the possible scope and varying phases of the testimony."

[3] 3. At the close of the evidence submitted by plaintiff a motion for nonsuit was made by defendant and denied by the court. This evidence is found in the first 17 typewritten pages of the reporter's transcript. The grounds of the motion are that the evidence was insufficient to sustain the issues in several particulars pointed out in the motion. The Supreme Court and the several District Courts of Appeal have many times called attention to section 953c of the Code of Civil Procedure, which reads:

> "In filing briefs on said appeal [taken under the alternative method] the parties [not one but both] must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court."

Utter disregard of this provision by attorneys in presenting their briefs has led the appellate courts to warn attorneys that the law must be obeyed if they expect to avoid the consequences that may follow their dereliction. In Miller v. Oliver, 174 Cal. 404, 163 Pac. 357, where the appellant, after his attention was called to the matter, failed to print any part of the record in his brief, the court said:

> "In the face of this contumacy, the court would be justified in affirming the judgment without further consideration."

In Barker Bros. v. Joos, 171 Pac. 1085, no portions of the record were printed in appellant's brief; reference being made to pages of the typewritten transcript only. Said the court:

> "It has been repeatedly held that appellate courts will not look to the typewritten transcripts filed under the alternative method of appeal for the purpose of determining whether grounds exist for the reversal of the judgment appealed from"—citing twelve different cases, to which others, subsequently decided, may be added.

Attorney for appellant calls attention to certain folios of the transcript as showing the evidence upon which the objection was considered, and refers to certain exhibits to be found at certain folios. Attorneys for respondent do no more.

[4] Inasmuch as plaintiff's prima facie case is made in a few pages, we have read this part of the record, and, while some facts might have been brought out more clearly, we think enough appeared which, with the admissions in the pleadings, justified the court in denying the motion. But if the court erred, the order will not be disturbed in view of the fact that defendant then took up the matter of his defense and introduced evidence oral and documentary upon the merits of the case, which was followed by further evidence of like character introduced by plaintiff, the record comprising nearly 500 typewritten pages. Van Horn v. Pac. Refining Co., 27 Cal. App. 105, 110, 148 Pac. 951, and cases cited.

It was upon this evidence that the jury rendered a general verdict in favor of plaintiff, and also made answer to the special questions submitted to them. Appellant has not attacked the general verdict or special findings of fact. This must be taken as a concession that the evidence supplied any deficiency existing when the motion for nonsuit was made. If the sufficiency of the evidence to sustain the verdict were challenged, we would feel at liberty to affirm the judgment for the failure of the parties in dealing with the evidence to comply with the statute already pointed out.

[5] It was urged in support of the motion for nonsuit that the stock in question was part of the assets of the corporation, and that in seeking to have it returned or its value plaintiff not only sought to have defendant violate the pooling agreement, but also sought to compel him to distribute the assets of the corporation before its dissolution or the winding up of its affairs, contrary to the provisions of section 309 of the Civil Code, citing Kohl v. Lilienthal, 81 Cal. 378, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520, and Tapscott v. Mexican Colo, etc., Co., 153 Cal. 664, 96 Pac. 271. It will be recalled that defendant's special defense was that this stock belonged to Lindstrom, who had agreed to sell

it to plaintiff conditionally, and that, the conditions having been broken, it never became plaintiff's. There was evidence that this defense was unfounded, and that the stock was delivered to plaintiff by Lindstrom (the promoter of the company) in consideration of services rendered and to be rendered by plaintiff in connection with the enterprise; that it was placed in the pool in plaintiff's name, the agreement reciting that it belonged to him, and this agreement was signed by Lindstrom and by defendant, among other stockholders; that without plaintiff's knowledge or consent defendant surrendered the certificate, evidencing these shares to Lindstrom under circumstances tending to show that defendant was acting in collusion with Lindstrom to deprive plaintiff of any benefit arising from his ownership, and that defendant took part in causing the certificate to be canceled and reissued to Lindstrom and placed back in defendant's possession as Lindstrom's; that defendant denied plaintiff's ownership of the stock, or that he had any right to share as such in the proceeds of the sale of the company's property, or otherwise to participate in any benefits as a stockholder. Defendant was guilty of a gross violation of his trust, and by thus surrendering the certificate to Lindstrom for the purpose of having it canceled and reissued to Lindstrom defendant was guilty of conversion, and became answerable tto plaintiff for its return or the value thereof. We can see no necessary connection of defendant's liability to plaintiff with the sale of the company's property. If that sale was invalid and the distributees of the proceeds of the sale should be compelled to restore the money to the company's treasury, defendant must look to Lindstrom, in whose name this certificate now stands, for protection. Plaintiff calls attention to section 1825 of the Civil Code, which requires a bailee to give prompt notice to the bailor "of any proceedings taken adversely to his interest in the thing deposited, which may tend to excuse the depositary from delivering the thing to him," and, also, to the rule that a bailee in an action brought against him by the bailor cannot set up the title of a third person except by the authorization of that person, citing several cases. It is pointed out that defendant surrendered the certificate to Lindstrom, of which fact plaintiff knew nothing until long after defendant had received it back as issued to Lindstrom.

Attention is also called to the fact that in his answer the defense is confined to the statement that no notice was given to plaintiff of the delivery of the certificate to Lindstrom or of Lindstrom's claim to it until after the delivery had been made; and it is claimed that the answer is wholly inadequate in view of the provisions of the Civil Code, §§ 1822–1826.

[6, 7] 5. There remains but one other point made in defendant's brief, namely, that the court erred in admitting certain testimony. In support of Lindstrom's claim of ownership of the shares in question he testified that the sale to plaintiff was conditional and on the terms stated in his answer. Certain witnesses were called by plaintiff, and over objection were permitted to testify to certain declarations made by Lindstrom to plaintiff not in the presence of defendant, tending to dispute the claim of ownership. These statements were made while the Glenn County Telephone Company was in process of organization, and were admitted for the twofold purpose: First in rebuttal of Lindstrom's testimony; and, second, as corroboration of the fact, directly testified to by plaintiff, that Lindstrom was to and did deliver to plaintiff the shares in question for plaintiff's services in organizing the company and subsequently to be rendered thereto. The character of this testimony may be judged from the following answer of one witness, who was asked to state what had been said to plaintiff by Lindstrom about the stock:

> "He told him that they wanted him in the Glenn County Company; that they desired to have him very much; that he was a large stockholder there in the Colusa County Company, and it would assist him a great deal in having him in this company; that they wanted him, and he also told him that he would be in the division of the promotion stock if he came in."

There was testimony that subsequently Lindstrom caused 5,000 shares to be issued to plaintiff in consideration of his influence and services in effectuating the organization of the company. These declarations were made before defendant had anything to do with the shares, and at a time when the acts or declarations of Lindstrom did not concern him. They related wholly to plaintiff and Lindstrom and to the effort the latter was making to induce plaintiff to interest himself in the proposed company. They may properly be classed as part of the res gestæ. There was direct and positive testimony that the shares were delivered to plaintiff in consideration of his services rendered and to be rendered, and whatever view may be taken of these so-called declarations they were not prejudicial.

Our conclusion is that the judgment should be affirmed; and it is so ordered.

We concur: HART, J.; BURNETT, J.

42 Cal. App. 398

HALE v. KENNEDY et al. (Civ. 2652.)

(District Court of Appeal, Second District, Division 1, California. July 25, 1919.)

1. Quieting Title 🔑2—Action to Quiet Title to Personalty Not Maintainable.

A general demurrer to a complaint seeking a judgment determining that plaintiff was the sole owner of certain promissory notes secured by mortgages, should have been sustained, because an action to quiet title to personal property does not lie.

2. Appeal and Error 🔑867(3)—On Appeal from Denial of New Trial Overruling General Demurrer Not Reviewable.

The overruling of a general demurrer to a complaint cannot be considered where the appeal is only from an order denying a motion for new trial, in which the sufficiency of the complaint was not an issue.

3. Appeal and Error 🔑1011(1)—Conclusion of Court on Conflicting Evidence Not Reviewable.

The matter of resolving conflicting evidence is for the trial court, and if any substantial conflict appears, the appellate tribunal has no right to disturb the conclusion of the trial judge.

4. Husband and Wife 🔑133(1)—Evidence Sufficient to Sustain Finding that Personalty Belonged to Wife.

In widow's action to determine that the sole ownership of certain promissory notes secured by mortgages was in plaintiff, *held* that testimony as shown by a statement of the case shows some substantial evidence to sustain the findings of the trial judge for plaintiff.

5. Husband and Wife 🔑131(2)—Presumption That Conveyance to Wife Was Her Separate Property Applies to Personalty.

In an action brought to secure judgment determining certain promissory notes secured by mortgages, to be the sole property of plaintiff, the presumption under Civ. Code, § 164, that where conveyance is made to a married woman title is vested in her as her separate property, *held* to apply to notes and mortgages, the proceeds of certain property sold; the question for the trial judge being whether the presumption had been overcome.

6. Husband and Wife 🔑49½(8) — That Notes and Mortgage Were Made to Wife Evidence of Gift to Her.

In a widow's action to secure a judgment determining that the sole ownership of certain notes secured by mortgages was in her, the fact that the notes were made to the wife, with the incidental mortgages, is some evidence of a gift by her husband.

7. Husband and Wife 🔑49½(8)—Terms and Formal Declarations Unnecessary to Gift to Wife.

It is not necessary that a husband should in terms and formally declare that he presented his interest in property consisting of notes and mortgages to his wife, but circumstances consisting of conduct, words and admissions may be sufficient to establish the fact of a gift.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Bridget O'Neill against Mary G. Kennedy, administratrix of the estate of Michael O'Neill, deceased, and others. Judgment for plaintiff, and from an order denying defendant administratrix's motion for a new trial, the latter appealed, and pending the appeal, Kate Hale as administratrix of Bridget O'Neill, deceased, was substituted as plaintiff. Order appealed from affirmed.

G. Roy Pendell and Pendell & Gleason, all of Los Angeles, for appellant.

Kemper B. Campbell and A. W. Sorenson, both of Los Angeles, L. B. Hibben, and Frank P. Doherty, of Los Angeles, for respondents.

JAMES, J. Bridget O'Neill and Michael O'Neill, now deceased, were husband and wife. The husband died in January, 1913, leaving surviving him a widow, two sons and two daughters. One of the daughters, Mary G. Kennedy, procured letters of administration to represent the estate of Michael O'Neill. The widow, Bridget O'Neill, held title to some real property, the same standing of record in her name, and she brought first an action against the administratrix of her husband's estate for the purpose of having it determined that such property was her sole and separate estate. She succeeded in that action and obtained judgment. Subsequently she brought this action against Kennedy, administratrix, to secure a like judgment determining that she was the sole owner of six promissory notes secured by mortgages. She was successful in this action, and the administratrix of the husband's estate has taken an appeal from an order denying her motion for a new trial. Pending the hearing on this appeal Bridget O'Neill died, and Kate Hale, another of the daughters, has been substituted plaintiff herein, she having been appointed administratrix of her mother's estate.

[1] The subject of this action, as has already been stated, concerns promissory notes, with the mortgage security which was incidental thereto. The notes and mortgages were all taken in the name of Bridget O'Neill. In passing, we note that there was a demurrer to the complaint made upon the ground that no sufficient cause of action was stated. Evidently the demurrer should have been sustained, because an action to quiet title to personal property does not lie. This has been directly decided in this state. Fudickar v. East Riverside I. Dist., 109 Cal. 29, 38, 41 Pac. 1024; Lamus v. Engwicht, 179 Pac. 435.

[2] We are not permitted to consider that matter, however, as the appeal is only from

an order denying a motion for a new trial, under which the sufficiency of the complaint cannot be reviewed. Wadman v. Burke, 147 Cal. 351, 81 Pac. 1012, 1 L. R. A. (N. S.) 1192, 3 Ann. Cas. 330.

[3] The question to be reviewed under the appeal from the order denying the motion for a new trial is as to the sufficiency of the evidence to sustain the judgment. At the outset of a consideration of the question we may reiterate the oft-repeated statement of the rule that the matter of resolving conflicting evidence is for the trial court, and that if any substantial conflict appears the appellate tribunal has no right to disturb the conclusion reached by the trial judge.

[4] And our conclusion is, after a careful examination of the testimony as shown in the statement of the case, that there was some substantial evidence to sustain the findings of the trial judge. Enumerating briefly the promissory notes mentioned in the complaint, all of which were secured by mortgages, there were: The note of Hendersons for $1,110; the note of Wilcoxes for $1,621.80; the note of Gerwings for $1,000; the note of Webbs for $1,500; the note of Rusts for $2,100, and the note of Fred and Clara O'Neill for $750. The complaint shows that at the time of the commencement of the action the notes of the Hendersons and Webbs had been paid to Bridget O'Neill, and that she held the proceeds. The O'Neills, husband and wife, came from Ireland to the United States in 1860. At the trial Bridget testified that she had some money when she arrived in America, and that when she married Michael he had nothing; that she worked out and accumulated some money which she converted into paper money called "shinplasters"; that the couple lived in New York for two years and then moved to Iowa, and that at that time she used about $800, investing in a cow and building a house; that they later moved to Michigan, where she gave her husband some money, with which he purchased four acres of ground. Various purchases of real estate were thereafter made, and considerable profit was realized on the transactions, especially on the real property acquired in California, to which state the family removed a number of years prior to Michael's death. Bridget testified that after making the purchase of land in Michigan with the money which she had saved prior to the marriage, and with money received from crops growing on the land and chickens, pigs, and calves which she sold, she made complete payment on the Michigan property. In that connection she testified as follows: "My husband, Michael O'Neill, told me that I could have, as my separate property, all moneys received from the sale of potatoes, chickens, pigs, calves, butter, eggs," etc. While in Michigan she received $250 from an estate of her aunt. She loaned this $250 to her husband, taking his promissory note for it, which she testified had not been paid. The Michigan farm was sold for $2,000 and 40 acres of land, $1,000 of the money being used to repay a loan, and the 40 acres received were mortgaged for the sum of $1,000. Some property was purchased in Pomona, Cal., consisting of several parcels. Some property was purchased in South Pasadena, this state.

[5] During the residence of the family in California $1,000 was received by Bridget as beneficiary under a life insurance policy after the death of her son. This $1,000 was used to pay a portion of the purchase price of the Pomona property. Between the years 1863 and 1880 nine children were born to the O'Neills. Bridget O'Neill testified that her husband's health was not good, and that he was not able to work a great deal; that this was particularly true as to the latter years of their residence in California. It appears that the husband was suffering from cancer of the face, which was of some years' standing. The notes mentioned in the complaint were all received to represent a portion of the proceeds upon the sales of various parcels of real property owned by the O'Neills. The deeds to what we will call the Webb property and the Fred and Clara O'Neill property, as originally made, were directly to Bridget O'Neill. The deeds to the other property were made in the name of Michael O'Neill. It is the contention of appellant that section 164 of the Civil Code, which provides that in case a conveyance is made to a married woman the presumption is that the title is vested in her as her separate property, does not apply to notes and mortgages taken in the name of the wife. It is very evident that this presumption does apply to the proceeds of the property sold to the Webbs and to Fred and Clara O'Neill, and that the question for the trial judge in the case of those notes was to determine whether the presumption had been overcome.

[6] Conceding that the presumption did not apply to the other notes, the question was as to whether there was sufficient evidence to indicate that the other property had always been the separate property of Bridget O'Neill, or whether a gift of it had been made to her by the husband. The fact that these notes were made to the wife, with the incidental mortgages, is certainly to be taken as some evidence tending to show a gift by the husband. We cannot, as counsel seem to suggest we should, assume that these mortgages may have been taken without the knowledge of the husband, for it was necessary for the husband to make a deed of the property to the grantees, and the court would be altogether justified in inferring that he knew of the mortgages being made in the name of the other spouse, even though there was no evidence indicating such knowledge. But there was evidence to indicate that the husband intended that the wife should have this property as her separate estate. A neighbor of

the O'Neills living at Pomona, testified that in conversation with the husband the latter referred to some real estate at San Bernardino which Mrs. O'Neill was about to purchase, and that O'Neill "just told me that mother had bought a piece of ten acres down there." This witness further testified that he sold feed for a cow and horse to the O'Neills, and that Mrs. O'Neill always paid him; that at one time he owed O'Neill money, and, there being money owing for feed, he thought to equalize accounts, but O'Neill said: "No; you pay me, and mother will pay for the feed." Fred O'Neill, a son, testified that prior to his father's death he visited him at Pomona, at a time when the last piece of property which had theretofore stood in the name of the father had been sold, and talked with the father; that the father said to him: "It is all right now. The property has all been disposed of, and mother owns it all." Katherine Hale, a daughter, testified that on one occasion she remembered her mother bringing home a mortgage (it being the Rust mortgage), and that her father examined it, and, after he had read it, said: "Everything is all right now."

[7] There was other testimony of a similar character to that narrated, but we think that enough has been stated to illustrate the fact that the court was not without warrant in concluding that the promissory notes and mortgages were the separate property of Bridget O'Neill. The circumstances would justify such a conclusion. Assuming that the husband's earnings as a part of the community estate made up a portion of the purchase price of the real property, it was most natural that in the latter years of his life, being afflicted with an incurable disease which was progressing toward a fatal termination, he should desire that the wife should have the results of the hard-earned capital which they had produced by their joint efforts. We do not think it necessary that he should in terms and formally declare that he presented his interest in the property to the wife. Circumstances, consisting of conduct, words, and such admissions as were testified to, would be sufficient to establish the fact of a gift. We are leaving out of account, of course, testimony introduced on behalf of defendants in contradiction of that produced for the plaintiff, because it is wholly immaterial in view of the restrictions upon this court's duty in examining the appeal. It seems unnecessary, in view of the fact that the only question under consideration relates to the sufficiency of the evidence, to review any of the authorities cited. As to the real property, deeds to which were originally taken in the name of Bridget O'Neill, the presumption under the section cited that the spouse taking it took it as her separate estate applied unless overcome by testimony for the defendant. Concerning the other notes and mortgages, as we have before stated, the fact that they were taken in the name of the wife (even though the presumption allowed by the section did not apply) afforded some evidence, not sufficient perhaps by itself, tending to show that the wife had acquired the same as her own. Aided by the other facts and circumstances shown in evidence, a sufficient case can easily be made out.

For the reasons given, the order appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

181 Cal. 202

NATIONAL BANK OF SAN MATEO v. WHITNEY. (S. F. 8377.)

(Supreme Court of California. Sept. 3, 1919.)

1. BANKS AND BANKING ⚷112—PAYMENT OF NOTE BY CHECK TO CASHIER'S ORDER SUFFICIENT.

Where the cashier of plaintiff bank demanded payment of the note sued on, and such payment was made by a check payable to such cashier and applied to cashier's own overdrawn account, the form of payment was immaterial, and the fact that the cashier requested a check payable to himself was without significance, where the request was made in his capacity as cashier.

2. BANKS AND BANKING ⚷112 — MAKER'S RIGHT TO RELY ON CASHIER'S REPRESENTATIONS ON PAYMENT OF NOTE.

Although bank cashier's demand for payment of a note, made about 24 hours after the note's execution, by personally coming to defendant maker's office and requesting check payable to himself, was unusual, yet, where defendant

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

knew his company had borrowed to the limit, and while an officer thereof he had given this personal note to the bank for money put into the company, the cashier's statement that the bank examiner objected to the bank's carrying the note was sufficient to allay all suspicion of defendant, who was not by such demand put on notice that the cashier was trying to defraud defendant or the bank.

3. BILLS AND NOTES 🔑538(7)—INSTRUCTIONS NOT APPLICABLE TO ISSUES INVOLVED ERRONEOUS.

In a bank's action to recover on a note, defended on the ground that it had been paid by the check of a company of which defendant was a stockholder, payable to plaintiff's cashier, an instruction that, in the absence of contrary evidence, the jury were entitled to believe such check was given in payment of an obligation due from the company to the cashier, when the real issue was whether the check was given plaintiff by delivery to its cashier, or to the cashier personally, was erroneous, being a misapplication of Code Civ. Proc. § 1963, subd. 7.

4. TRIAL 🔑194(12) — INSTRUCTION ON WEIGHT OF EVIDENCE ERRONEOUS.

In a payee bank's action on a note, defended on ground of payment by a corporation in which defendant maker was a stockholder, by check to plaintiff's cashier, an instruction that the drawing of such check was not in the ordinary course of business between defendant company and the bank was erroneous, as being an instruction on a question of fact, and particularly where this was the only note paid by the defendant, although the company had drawn checks payable to the bank.

5. TRIAL 🔑243—CONFLICTING INSTRUCTIONS AS TO PAYMENT OF NOTE.

In payee bank's action against maker of a note, defended on ground of payment by check to order of plaintiff's cashier, drawn by a corporation in which defendant was a stockholder, and made upon the cashier's false representation that it was required by the bank examiner, an instruction that cashier's requirement of making check payable to him was notice putting defendant on inquiry *held* erroneous, as conflicting with another instruction that defendant was entitled to rely upon the cashier's integrity.

6. APPEAL AND ERROR 🔑1050(2) — BANKS AND BANKING 🔑111—DEMAND BY CASHIER OF PAYMENT OF NOTE WITHIN HIS AUTHORITY.

In payee bank's action on a note, defended on ground of payment by check of corporation in which maker was a stockholder, payable to plaintiff's cashier, on the latter's misrepresentation that the bank examiner required it to be paid, testimony of the bank's directors that they had not authorized a demand for payment of the note was immaterial, as the position of cashier carried such authority, and was harmful, where it was shown that the cashier had appropriated it to his own use.

7. BANKS AND BANKING 🔑107—AUTHORITY OF CASHIER AS TO COLLECTION OF NOTE.

The rule that, where the payee of a promissory note pays an agent who does not produce the note, payment is at the maker's risk, has no application to a payment made to a bank cashier subject to his order, since he has authority to collect notes due the bank.

In Bank. Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by the National Bank of San Mateo against St. John Whitney. Judgment for plaintiff, and defendant appeals. Reversed.

See, also, 180 Pac. 845.

Norman A. Eisner, of San Francisco, for appellant.

Walter H. Linforth, of San Francisco, and Ross & Ross, of Redwood City, for respondent.

WILBUR, J. This is an action upon a promissory note executed on September 13, 1915, to the plaintiff for $3,000. The case was tried before a jury. Plaintiff recovered judgment, and defendant appeals. The sole issue presented to the jury was whether or not the promissory note was paid on September 14, 1915, by a check of the Leslie Salt Refining Company, drawn on the Bank of California for $3,000. This check was issued by the defendant as secretary of the Salt Company, and was received by W. M. Roberts, cashier of the plaintiff. That it was deposited by him to his credit with the plaintiff bank is admitted. The plaintiff, in support of its contention that the note was not paid by the check in question, relies upon the possession of the note as prima facie evidence of its nonpayment, and upon the fact that the check was made payable to W. M. Roberts, instead of to the bank, and was a check of the Leslie Salt Refining Company, instead of the defendant, and in support of its claim presented instructions to the jury, which were given by the court, to the effect that its possession of the note raised a presumption of its nonpayment; that the giving of the check to W. M. Roberts personally gave rise to the presumption that it was in discharge of an obligation owing to Roberts.

In order to understand fully the assignments of error made by the appellant, it will be necessary to state additional facts. The defendant was a stockholder and the secretary of the Leslie Salt Refining Company. W. M. Roberts, plaintiff's cashier, was a director of the Leslie Salt Refining Company, holding five shares of stock to qualify him as such director. The Salt Company was a borrower from the plaintiff, and, having borrowed to the limit of its credit, the defendant negotiated a loan for $3,000 on the 13th day of September, 1915, and gave his personal note, herein sued upon, as evidence of such indebtedness. Miss Zula

Clements, stenographer and general office assistant of the Leslie Salt Refining Company, testified that, on September 14th, William M. Roberts, plaintiff's cashier, called at the office of the Salt Company in the Flatiron Building, in San Francisco, between 3 and 4 o'clock in the afternoon and left a message for the defendant to the effect that the bank examiner had been at the bank and had questioned the loan, and that it was necessary for the bank to have a check for $3,000 to take up the note, and that the check was to be made out personally to him and mailed down that night without fail, as he expected the examiner would be there again in the morning; that about 4:30 of that afternoon she gave this message to the defendant; that the check in question for $3,000 was made out at that time. The defendant testified that in pursuance of this message he wrote the check in question and mailed it to Mr. Roberts at the bank; that the check was made payable to W. M. Roberts, because it was requested in that form, although other checks in payment of moneys borrowed from the plaintiff had been made payable to the plaintiff bank; that neither the defendant nor the Leslie Salt Refining Company owed anything to Mr. Roberts personally, nor was there any debt to Mr. Roberts in which the defendant or the Salt Company was interested; and that the $3,000 check was not sent as a loan to Mr. Roberts. Roberts testified that he received the check in question for the purpose of taking up a note of the defendant for the sum of $3,000, that he received the check at the bank, that he had no personal transaction with the defendant, and that the defendant owed him no money and loaned him no money.

[1] It will be observed, then, that the only persons who have any knowledge as to the purpose for which the check in question was given by the defendant, namely, the defendant, his stenographer, and Roberts, all testified that it was given in payment of the note herein sued upon, and for no other purpose. The authority of Roberts, as cashier, to receive the payment of the note must be conceded. McBoyle v. Union National Bank, 162 Cal. 277, 279, 122 Pac. 458; Morse on Banking (5th Ed.) vol. 1, § 159, pp. 356, 357; 7 Corpus Juris, § 160. His application of the check to his own overdrawn account was a confessedly fraudulent misappropriation of the check, and the only question involved in the case is as to whether the plaintiff or defendant must suffer by reason of the cashier's dishonesty. If we assume that both the plaintiff and defendant were equally innocent of wrong in connection with the transaction, and that the loss resulted by reason of the fraud of the plaintiff's agent in misapplying the proceeds of the check paid to him by the defendant, then, under a familiar principle of the law, the bank, for whom Roberts was acting, would be required to bear the loss, for "where one of two innocent persons must suffer by the fraud or negligence of a third, whichever of the two has accredited him ought to bear the loss." Mundorff v. Wickersham, 63 Pa. 89, 3 Am. Rep. 531, cited in Schultz v. McLean, 93 Cal. 329, 356, 28 Pac. 1053. Still assuming equal innocence of both parties hereto, the loss resulted from the fact that the plaintiff had in its employment in a position of trust and confidence a dishonest employé, who dishonestly utilized his position of trust and confidence to appropriate $3,000 paid to him as such agent for and on behalf of the principal. Where the agent of a depositor of a bank utilized his position of trust and confidence to fraudulently raise certain checks intrusted to him, and thereby secured from the bank larger sums than called for by the checks, it was held that, although such conduct amounted to forgery, and the bank would ordinarily be responsible to the depositor for payment of such forged checks, nevertheless, by reason of the fact that the crime was committed by the depositor's agent, the depositor and not the bank should bear the loss, upon the theory that the principal was liable "for the fraud, torts, or other wrongful acts committed by such agent in and as part of such business." Otis Elevator Co. v. First Nat. Bank of San Francisco, 163 Cal. 31, 39, 124 Pac. 704, 707 (41 L. R. A. [N. S.] 529). Similar reasoning would require us to hold the bank liable for the misconduct of its cashier, Roberts.

Plaintiff, however, contends that both parties are not equally innocent in the transaction; that the defendant, by making the check payable to the cashier, and by acceding to the unusual demand of the cashier, either had notice of the cashier's fraud, or thus put it within his power to commit the wrong, and that therefore the defendant must suffer the loss. In view of the law that the cashier, by virtue of his office, had authority to collect the note, does the fact that he asked for and received a check payable to himself in payment so far inculpate the defendant in the wrongdoing of the cashier as to change the rule? It is undoubtedly true that the form of the check received by Roberts may have enabled him to deposit the same in his own name in the bank without arousing suspicion, which might have resulted from the deposit by Roberts to his own account of a check payable to the plaintiff. But this would have been equally true in case the payment had been made by money, or by the transfer of negotiable paper by indorsement in blank, or, in short, by any form of payment other than by negotiable paper payable to the order of the plaintiff. It cannot be said, therefore, that the form of the payment facilitated the fraud of the cashier, but rather that the payment by a check drawn to the order of the bank might have made it less easy to effectuate the fraud. Even if the check had been payable to the order of the plaintiff, the cashier, by virtue of his agency, would have had authority to indorse the same and thus gain the possession of the proceeds thereof. Dyer v. Sebrell, 135 Cal. 597, 67 Pac. 1036; McBoyle v. Union Nat. Bank, supra, 162 Cal. 279, 122 Pac. 458. Where, as here, the duly authorized agent of the plaintiff bank was demanding payment, and such payment was made by a negotiable instrument, the proceeds of which were subsequently secured by the agent, the form of the payment is immaterial. Nor was the fact that the agent requested the payment by check to his own order of any significance, for the reason that he made such request in his capacity as agent for the plaintiff, and such request was, in effect, the request of the plaintiff. The defendant was not bound to view with suspicion the conduct of plaintiff's agent.

[2, 3] It is next contended that the facts and circumstances surrounding the payment were such as to put the defendant upon inquiry; in other words, to cause the defendant to suspect the intended fraud of the cashier. It being conceded that the demand for payment of a note 24 hours after its execution, at the office of the defendant in San Francisco, instead of at the bank, by the cashier personally coming to the office, was unusual, and not in the ordinary course of business, the character of the demand was such as might justly allay all suspicion of the defendant. The defendant knew that the Salt Company had borrowed up to its limit from the bank, and that the $3,000 represented by the promissory note had been secured by him while an officer of the Salt Company for the Salt Company. Defendant knew that the plaintiff bank was supervised by the bank examiner, and therefore that the demand of the bank for payment was not, under the circumstances, unreasonable. Bearing in mind that Roberts came to the defendant for the purpose of demanding payment by the defendant of an obligation owed by defendant to plaintiff for reasons peculiarly applicable to the business of the plaintiff, there was apparently nothing in the transaction to put defendant upon notice that Roberts was trying to defraud either defendant or the bank. The fact that the statements were untrue, and were made for the purpose of allaying the suspicion of the defendant concerning the unusual demand, was not known to the defendant. Defendant had a right to rely upon the truth of these representations in determining his course of conduct, and such representations must be deemed to have been made by the plaintiff. As the question involved is the fact of payment, the representations are wholly immaterial, except as they tended to allay the suspicion which might be aroused in the defendant by reason of the demand for payment and a request that the check be made to the order of the cashier. Upon the issue of payment it is true that there was a conflict of the testimony, arising not only from the fact that the plaintiff had possession of the note, but also because of the fact that the plaintiff was justified in relying upon certain circumstances brought out in the testimony of the defendant concerning the delay of the defendant in notifying the bank that the note had been paid, thus tending, together with other things, to discredit in some measure the testimony of the defendant. If the issue of payment had been submitted to the jury under proper instruction and evidence, the finding of the jury would be binding on this court. But in the light of the foregoing discussion some of the instructions must be held erroneous. For instance, at the request of the plaintiff the court gave the following instruction:

> "(2) The court instructs you that the presumption of law is that money paid by one person to another was due the latter, and therefore in this action, if you believe from the evidence that the Leslie Salt Refining Company issued its check, payable to W. M. Roberts, and delivered or sent said check to said Roberts, then the presumption of law is that said Leslie Salt Refining Company did so because it wished to make the check payable to said Roberts."

The jury were thereby instructed that under the circumstances and proof in the case, in the absence of evidence to the contrary, they were entitled to believe that the check given to Roberts was in payment of an obligation due from the Salt Company to Roberts. The real question in issue was whether or not the check was given to the plaintiff by the delivery of the same to its cashier, or whether it was given to Roberts personally for some other purpose. Under these circumstances the instruction of the court, based upon the form of the check, was an erroneous application of the presumption "that money paid by one to another was due to the latter" (Code Civ. Proc. § 1963, subd. 7), for the very question involved was: To whom was the money paid?

[4] At the request of the plaintiff the court instructed the jury as follows:

> "(7) The court instructs you that if you believe from the evidence in this case that W. M. Roberts went to the office of the Leslie Salt Refining Company in San Francisco, and there made a demand for the payment of the note here in question, and directed that any check drawn for the purpose of payment thereof be made payable to him, said W. M. Roberts, and that no other check for the payment of any note to said bank by the defendant, or by said Leslie Salt Refining Company had been made payable

to said W. M. Roberts, but had been made payable to the plaintiff, then you are further instructed that the drawing of the check here in favor of W. M. Roberts was not in the ordinary course of business between the defendant and the Salt Company and the bank, and that therefore the direction to have said check made payable to said W. M. Roberts was sufficient notice to put the defendant on inquiry as to why said check should be made payable to said Roberts instead of to the plaintiff bank."

This instruction was erroneous, for the reason that it was an instruction upon a question of fact, namely:

> "That the drawing of the check here in favor of W. M. Roberts was not in the ordinary course of business between the defendant and the Salt Company and the bank."

[5] It is true that the evidence showed that the Salt Company usually paid the bank by checks drawn in favor of the bank, but the instance under consideration is the only one in which the defendant paid an obligation of his own. But, however that may be, the ordinary course of business, so far as involved in this case, was the payment to the cashier of the bank, and not the form of said payment. It was in the ordinary course of business, so far as this case is concerned, for payments to be made to the cashier of the bank. It was also an instruction which, in effect, informed the jury that—

> "The direction to have said check made payable to W. M. Roberts was sufficient notice to put the defendant on inquiry as to why said check should be payable to said Roberts, instead of to the plaintiff bank."

As has been above stated, there was no reason why the check should not be made payable to Roberts. The only legal question properly involved by the form of the check given in payment was whether or not the payment was made to Roberts as cashier of the bank, or to him in his personal capacity and for his personal benefit. This instruction is particularly objectionable, in view of an instruction given at the request of the defendant, as follows:

> "A bank's client or customer, dealing with the cashier of the bank permitted by its directors to have complete control of the business relations with its clients and customers, may trust in the integrity of such cashier in transacting its banking business with him, when there is nothing in the known state of the affairs of the bank, or of his relation to it, to excite suspicion that he is using his position to the prejudice of his bank."

Under these instructions, upon the admitted facts, the jury must have understood, as a matter of law, that the defendant was not entitled to rely upon the integrity of the cashier, or, in other words, that defendant could not claim the check to be a payment if the cashier misappropriated it, as it is conceded he did. These instructions were erroneous. The question as to whether the suspicions of the defendant were or should have been aroused was a question of fact for the jury. Other instructions were given, at defendant's request, tending to modify, in some degree, the effect of these instructions; but we cannot say that they cured the basic error of the instruction that defendant's suspicions must necessarily have been aroused by the facts stated in instruction No. 7.

[6] The testimony of the directors of the plaintiff bank was received, over the objection of the defendant, to the effect that they had not authorized the cashier to demand payment of the note in question, and that no examination was made or was to be made by the bank examiner. The effect of this evidence was merely to prove that the statements made by the cashier to the defendant at the time he demanded payment of the note in question were false. The defendant had a right to rely upon the representations of the plaintiff's agent, and the plaintiff could not take advantage of their falsity. It was therefore immaterial whether or not such representations were true. The evidence, being immaterial, might be regarded as harmless, were it not for the fact that in this case the considerations involved are so evenly balanced that it is difficult to say what the effect of such testimony might be upon the mind of the jury. It showed that the bank was being imposed upon by its own agent, and might therefore give the impression to the jury that the bank was to that extent "innocent," while as a matter of law the bank must be deemed to have made such representations. Nor was it proper to show that there was no express authority on the part of Roberts to collect the money. That authority resulted from his official position as cashier, and, in the absence of an express prohibition by the directors, he had authority, as such, to make the collection in question. The evidence should not have been admitted.

The defendant complains of those rulings of the court upon the admissibility of evidence which precluded his proving a transaction by which Roberts sought to reimburse the plaintiff for his wrongdoing. Under proper pleading and offers of proof it would no doubt be permissible for the defendant to show that the plaintiff had received the fruits of the check given by the defendant, if such was the fact. We cannot say, however, that there was error in sustaining the objections to the particular questions that were asked.

[7] Respondent relies upon the rule that where the payee of a promissory note pays an agent who does not produce the note—

> "the payment is at the risk of the maker of the note, and if such person were not, in fact, en-

titled to receive payment of the note, the maker of the note must bear the loss, for it is his duty to demand the production of the note before he made payment."

The principle, however, has no application here, for the reason that the cashier of a bank has authority to collect notes due to the bank.

In view of the necessity of a new trial it perhaps should be noted that the evidence in this case is not entirely clear as to what became of the credit of $3,000 which the cashier secured to himself by the deposit of the check given by the defendant. If such deposit was used by him to reduce an overdraft, and was not subsequently withdrawn by the cashier for his own purposes, the bank, of course, having received the benefit of the check, could not now collect upon defendant's note, upon the theory that the same had not been paid, for it would in fact have received the benefit of the check in the form of a payment upon the indebtedness of the cashier, and the remedy of the bank would be against the cashier. and not against the defendant in that event.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SHAW, J.; LAWLOR, J.; OLNEY, J.

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181 Cal. 106

In re DOW'S ESTATE.

CASEY et al. v. HANLEY et al.

(S. F. 9122.)

(Supreme Court of California. Aug. 25, 1919. On Petition for Rehearing in Bank, Sept. 22, 1919.)

1. WILLS ⚷123(5)—ATTESTATION AND SIGNATURE BY WITNESSES — PRESENCE OF WITNESSES.

Under Civ. Code, § 1276, requiring two attesting witnesses to sign at testator's request and in his presence, it is unnecessary that the witnesses sign in the presence of each other.

2. WILLS ⚷52(1)—MENTAL CAPACITY—PRESUMPTION.

It will be presumed that deceased was of sound mind when her will was executed.

3. WILLS ⚷289 — EXECUTION — PRESUMPTIONS.

The presumption that deceased was of sound mind when her will was executed justifies the conclusion, in absence of testimony to the contrary, that she was neither unconscious nor asleep when will was witnessed.

4. WILLS ⚷302(1)—SIGNING IN TESTATRIX'S PRESENCE—SUFFICIENCY OF EVIDENCE.

Conflicting evidence, and the presumption that testatrix was of sound mind, *held* to sustain finding that she was neither unconscious nor asleep when the will was witnessed.

5. WILLS ⚷302(1) — EXECUTION — SUFFICIENCY OF EVIDENCE.

The written declaration of subscribing witnesses in attestation clause of a will that they signed at testatrix's request, the direct testimony of one witness that they signed at such request, which was later modified or retracted, testimony that other witness had been requested by testatrix's brother to sign, etc., *held* to sustain a finding that will was witnessed at testatrix's request.

Department 2.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Proceeding by George E. Hanley and Ernest Hanley to probate the will of Alice Dow, deceased, opposed by George E. Casey and W. J. Anderson, as executor. From a judgment admitting the will to probate, the contestants appeal. Affirmed.

James H. Boyer, of San Francisco, for appellants.

Pierre A. Fontaine and W. J. Hennessey, both of Oakland, for respondents.

WILBUR, J. This is a contest over the will of the deceased, on the ground that the same was not executed as required by law. The will having been admitted to probate, contestants appeal, basing their appeal upon three grounds: (1) That the subscribing witnesses did not sign the attesting clause to said will in the presence of each other; (2) that the finding of the trial court that the subscribing witness, Jennie Kinsman, signed the attesting clause while in the presence of the testatrix, is not supported by the evidence; (3) that the finding that the subscribing witnesses signed at the request of the testatrix is not sufficiently supported by the evidence.

[1] With reference to the first contention, it is sufficient to say that section 1276 of the Civil Code does not require that the subscribing witnesses shall sign in the presence of each other. The requirement in that regard is:

> "There must be two attesting witnesses, each of whom must sign the same as a witness at the end of the will, at the testator's request and in his presence."

The Supreme Courts of New York and Connecticut, under similar statutes, have held that it is not required that the witnesses sign in the presence of each other. Hoysradt v. Kingman, 22 N. Y. 372; Gaylor's Appeals, 43 Conn. 82; 1 Williams, Executors, 93; 6 Surg. Real Property St. 342; 1 Jarman on Wills, 85. There is nothing in Estate of Toomes, 54 Cal. 509, 35 Am. Rep. 83, and Estate of Cartery, 56 Cal. 470, in conflict with this view. The question was not there involved.

[2-4] The evidence was sufficient to sustain the finding that the witnesses were requested

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

by the testatrix to sign the same as subscribing witnesses. One of the witnesses, Belle Brush, testified:

> "At the time she signed this document she said it was her will. Mrs. Dow requested me and the other witness to sign her will as a witness, and I signed my name as a witness."

On cross-examination, in detailing the circumstances, she said:

> "I went in the room and she asked me if I would sign her will. * * * I think Mrs. Dow was the first one to speak when I went in that room. She asked me if I would sign her will. * * * When she asked me that, I said, 'Certainly.' Then I went over to the stand in the front window, the bay window, and signed it. * * * Mrs. Dow had just simply asked me if I would sign her will. She asked me if I would sign her will before she signed it. She said, 'Belle,' that is the name she always called me, 'Would you sign my will?' I said 'Certainly.' "

In response to a question of the court she repeated:

> " * * * The only thing she said was, 'Will I sign the will?'—her will. Q. She didn't declare it to be her will in so many words? A. Didn't declare that it was. When she said, 'Will you sign my will?' I didn't see it just then. I saw it about a minute after. * * * I don't know where the document was at the time Mrs. Dow asked me if I would sign her will. She signed the document after she said to me, 'Will you sign my will?' Mrs. Dow signed the will, then a very short time after she said to me 'Will you sign my will?' "

When recalled by the proponents, she testified as follows:

> "The Court: Mrs. Brush, are you quite positive that Mrs. Dow said to you, at the time or about the time she signed the will, 'Will you sign this will?' A. I didn't say at that time. This might have been a week before. I could not say just when. She said, if she made a will, would I be a witness. I said, 'Certainly.' I didn't say at that time. That was about a week before. Neither at the time it was signed, or before or after it was signed by Mrs. Dow, did she ask me to sign it as a witness. No, sir; not at that time. She didn't ask me to sign her will at that time. She didn't say anything about its being her will at that time. Q. Did she ask Mrs. Kinsman to sign it? A. Mrs. Kinsman, I believe, brought the will in. I am not sure. Mrs. Kinsman asked her; said her brother had given her that paper and said it was a will, and asked if she could read the will, if she knew what it was, and she said 'Yes.' She asked her if she wanted to sign it. Mrs. Dow said, 'Yes.' That was about all I can remember that was said. Q. You are quite sure Mrs. Dow didn't ask you to sign the will? A. Not at that time; no, sir, not at that time. And she didn't ask Mrs. Kinsman to sign the will; I don't think so. That is my best recollection. She didn't ask me, just before she signed the will, 'Will you sign my will?' Not at that time; no, sir. You misunderstood me if you think I said at that time."

It should be stated that at the time that the will was executed the testatrix was very ill; that Mrs. Kinsman, one of the subscribing witnesses, had been called as a nurse; that Mrs. Brush had been specially called for the purpose of witnessing the will. The will had been prepared during the morning at the request of the testatrix, and had been read to her by her brother, and had then been typewritten, and was returned in the afternoon by the brother, who handed it to Mrs. Kinsman, the nurse, with the request that she have the will signed and that she witness the will. The will was then taken into the sickroom; the only persons present being the testatrix and the two subscribing witnesses. They were together in the room only about 5 minutes. The testimony of the brother, if accepted by the trial court, would justify the conclusion that both witnesses signed at that time in the presence of the testatrix. His testimony is to the effect that he looked into the room and saw Mrs. Kinsman sitting over a desk as though writing, and that the will was handed to him immediately upon being brought into the sickroom, and was at that time in the same condition that it was when presented in court; i. e., signed by the two subscribing witnesses. The court, however, found that it was not signed by the witnesses in the presence of each other. Mrs. Kinsman testified that after Mrs. Brush, the other subscribing witness, had left the room, she remained in attendance upon the testatrix until about 15 minutes had elapsed from the time she first entered the room; that she at that time took the will to Mr. Hanley, the brother of the testatrix, who handed it to her and asked her to have it executed, and that he observed that she had not signed it, and requested her to sign it; that she re-entered the sickroom, sat down at a table within four or five feet of the testatrix, and signed the will and returned it to Mr. Hanley.

The only question raised by the contestants with reference to this signing being in the presence of the testatrix grows out of the testimony of Mrs. Kinsman. At the time she re-entered the sickroom the testatrix was lying in bed with her eyes closed, and she did not know whether or not the testatrix observed or had knowledge of the fact that she was signing the will as a subscribing witness. The attitude of this witness was somewhat peculiar in connection with her signing the will. She testified that, the first time she saw the will, it was handed to her by George Hanley, the proponent.

> "He said, 'Mrs. Kinsman, it is a will of my sister's,' or 'that my sister has made,' or something to that effect; but anyway this was a will of hers. 'I have read it to her. She knows what it is. It is all right, but she has not signed it yet. Will you have her sign it?' And then he says, 'Mrs. Brush will be a witness.' I said, 'Very well,' and went and took it in to Mrs. Dow."

She then said, when she took it to the testatrix to have it signed in the presence of Mrs. Brush and herself:

> "I just said to her, 'Your brother says this is a will, that he read it to you; do you know what it is—do you know how it is made out?' She said, 'Yes.' * * * I says, 'Is everything fixed as you want it?' I put it that way to her on account of a remark, a little talk that we had had before, several weeks before, about the will. She says, 'Yes.' I said, 'Do you want to sign it?' She said, 'Yes.' 'Do you want to sign it now?' She said, 'Yes.' I said, 'Very well, sign it there;' and then I pointed to it and put it on; it was turned, your honor, but it was turned—she signed it there. At the time of this conversation Mrs. Brush was at the foot of the bed, and I was at the side, and Mrs. Dow was upon the bed. When Mrs. Dow signed it, I took it from her; she didn't hand it to me. Absolutely nothing was ever said in the room."

The witness then directed Mrs. Brush to sign as a subscribing witness, and she testified:

> "Then I took it and gave it to the brother. I knew how to direct Mrs. Brush where to sign this will, because the next place was a space there to sign, and I thought that Mrs. Brush should sign next. I didn't intend to sign it. There was still another place later on, and I left it there. I didn't sign it, because it was turned so I didn't know what I was signing, and I don't sign my name to something, unless I know what I am signing it to. The brother said: 'Mrs. Brush will be a witness.'"

She further testified:

> "When I first entered Mrs. Dow's bedroom, to have Mrs. Dow execute this will, I suppose I knew that I was to sign this will as a witness, but didn't intend to do it without knowing what it was about and know what it was. I have been a witness to wills before, and the lawyer always read them before the party and before me, and I knew what I was signing. I knew enough to ask Mrs. Brush and indicate to her where to sign. As I understood, Mrs. Brush was an old friend of Mrs. Dow's. She was a stranger to me, and it mattered not to me who signed it."

She further testified with reference to taking the will to the proponent after it was signed by the testatrix and Mrs. Brush:

> "I was carrying the document with pen and ink in my hand, because I took that out when I went out the first time, not intending to sign it unless I was asked the second time."

She repeatedly testified, in effect, that when she handed the will to the proponent he said:

> "'Mrs. Kinsman, you have not signed it.' I says, 'No.' He says, 'Will you?' 'If you wish.' I took it back in the room. The reason I didn't sign the first time was the paper was turned. I didn't know what I was signing, and I never sign anything unless I know what I am signing. Then I took it back, and went into the room, and went over to the table and signed it, and took it back to the brother. * * * When I went into the room, as I remember, Mrs. Dow had her eyes shut. She was very sick, as I told you."

Again, on cross-examination, she testified:

> "When I went into Mrs. Dow's room, there was no one in the room besides Mrs. Dow and me. I closed the door when I went in there. Mrs. Dow had her eyes shut then. She was asleep as far as I know. I don't know whether she was asleep; she had her eyes closed, though. * * * She may have opened her eyes. That I couldn't swear to, but her eyes were closed when I came into the room. I don't know whether she opened her eyes after I turned my back or not. I didn't speak to her at any time on this second occasion when I entered the room to sign the will, and she didn't speak to me at all on that occasion."

When the witness was asked by the court whether she was prepared to say that the deceased could not have seen her sign the will she answered:

> "No; I am not prepared to. She might have, but I turned my back to her."

The proponent, George E. Hanley, testified that, when he first gave the will to Mrs. Kinsman, he asked her if she would take it in, and told her "that my sister wanted her to sign as a witness." Accepting the finding of the trial court upon this conflicting testimony, to the effect that Mrs. Kinsman did not sign the will as a witness while Mrs. Brush was in the room, and taking the view most favorable to the proponent in support of the finding that the will was signed by the witness in the presence of the testatrix, we have this somewhat unique situation: Mrs. Kinsman entered the sickroom with the will in her hand, having been requested to sign the same as a witness, and, knowing that it was expected by the testatrix that she would sign as a witness; that she prepared the will for the signature of the testatrix after having ascertained her intention to execute the will, provided the testatrix with pen and ink, and secured her signature thereto, and thereupon handed the will to the other subscribing witness, requesting her in an audible tone of voice in the presence of the testatrix to sign the same as a subscribing witness, and thereafter seated herself at the same table, with pen and ink in hand, and went through the motion of subscribing the same as a witness, and either did so sign after the other subscribing witness had retired from the room, or purposely refrained from so doing for the reason that she did not feel herself sufficiently advised as to the contents of the document, and returned the document to the proponent, whereupon, again being requested to sign as a witness, she returned to the sickroom, and in the presence of the testatrix and within a few feet of the bed actually signed the document and returned the same to the proponent. That the will was actually signed in the bodily presence of the testatrix is testified to by the very witness relied upon by the contestants to establish the fact that it was not signed in her presence, by reason of the fact that she was asleep or unconscious at the time it was signed.

The most that can be said in favor of the appellant on the question as to whether or not the subscribing witness, Kinsman, signed the will when the testatrix was asleep, is that the evidence upon this point is so conflicting that the finding of the trial court upon the question is conclusive on this court. The evidence of the witness Hanley, if believed, would have justified the court in wholly disregarding the testimony of Mrs. Kinsman as to what occurred after the time she handed the will to Hanley on first leaving the sickroom. It is true that the express finding of the court that Mrs. Kinsman did not sign the will in the presence of the other subscribing witness justifies the inference that the court accepted the testimony of Mrs. Kinsman rather than that of Hanley as to the time when the will was signed by this subscribing witness; but in view of the testimony of Mrs. Brush that she did not see the will signed by Mrs. Kinsman, and the uncontroverted fact that Mrs. Kinsman remained in the room after Mrs. Brush retired therefrom, we cannot say that the court did not arrive at the conclusion that the will was signed by both witnesses before it was returned to Hanley, as he testified, and wholly disbelieved the testimony of Mrs. Kinsman in relation to the time and circumstances under which she signed as a subscribing witness. Moreover, it was the duty of the trial court to "closely scrutinize" the testimony of Mrs. Kinsman in so far as that testimony tended to discredit her solemn act of attestation. Estate of Tyler, 121 Cal. 405, 413, 53 Pac. 928. The most that can be said of the testimony of this witness adverse to the will is that she made no effort to attract the attention of the testatrix to the fact that she was about to subscribe the will as a witness; that she observed the eyes of the testatrix were closed, and thereupon signed the will with her back to the testatrix, without noticing or being able to testify whether the testatrix did or did not observe her act of signing. She returned the will to the brother, the principal beneficiary under the will, who had intrusted her with the direction of the execution thereof, without notifying him that the testatrix was asleep or unconscious, and thus placed it entirely in her own hands to discredit or destroy the efficacy of the will by an inference wholly inconsistent with her position as a subscribing witness. Opposed to this we have the presumption that at the time of the execution of the will the deceased was of sound mind; a presumption which obtains during the entire process of the execution of the will, in the absence of credible evidence to the contrary. This presumption justifies the conclusion, in the absence of affirmative and credible evidence to the contrary, that the testatrix was neither unconscious nor asleep during the execution of the will. In view of the foregoing consideration, the finding of the trial court that the witness Kinsman signed the will in the presence of the testatrix is conclusive on this court.

[5] With reference to the question of whether or not the finding of the court that the will was signed by the subscribing witnesses at the request of the testatrix is correct, we have the attestation clause so declaring and the direct testimony of Mrs. Brush that at the time and place of the execution of the will the testatrix requested both of the subscribing witnesses to sign. It is true that on cross-examination she said that she did not intend to make this statement, but the record hardly bears out the latter statement. It also appears that she had been asked some time before by the testatrix to sign as a witness, and that Mrs. Kinsman, in the presence of the testatrix, requested Mrs. Brush to sign the will as a subscribing witness, and that she did so sign in the presence of the testatrix. "* * * A request may be implied by acquiescence in the request of another that the will be signed." 40 Cyc. 1116. Mrs. Kinsman was requested to sign the will as a subscribing witness by the brother, who had been intrusted by the testatrix with the preparation of the will, including, no doubt, the necessary formalities in connection with the execution thereof, and this request, he stated to Mrs. Kinsman, was so made by him at the instance of the testatrix. There is no direct testimony as to whether the testatrix did or did not request the brother to request Mrs. Kinsman to sign the will as a witness. The written declaration of both subscribing witnesses in the attestation clause, together with the facts and circumstances surrounding the execution of the will, and the evident desire of the testatrix communicated to the subscribing witnesses, justified the trial court in its conclusion that the will was attested by the subscribing witnesses at the request of the testatrix. Estate of Cullberg, 169 Cal. 368, 146 Pac. 888; Estate of Silva, 169 Cal. 120, 145 Pac. 1015; Estate of Clark, 170 Cal. 422, 149 Pac. 828.

Judgment affirmed.

We concur: LENNON, J.; MELVIN, J.

On Petition for Rehearing in Bank.

PER CURIAM. In the petition for rehearing it is claimed that the decision in department, in effect, overrules the decision by the court in bank in the Estate of Emart, 175 Cal. 238, 165 Pac. 707, L. R. A. 1917F, 866. The distinction between that case and this seemed too obvious to require discussion. It is true in that case that the witnesses did not sign in the presence of each other. But the decision against the validity of the will was not based upon that fact, but upon the fact that both witnesses were not present together at the time the testator signed or acknowledged his signature, or published the will. In this case these formalities as to signing and acknowledgment by the testatrix were complied with, but one witness left the room before the other subscribed as a witness. If it be said that the reasoning of the Emart Case leads us to the conclusion that both witnesses should sign in the presence of each other, it is a sufficient answer to say that we are not disposed to follow it to that conclusion, which would place our law out of harmony with that of nearly every other state in the Union. 40 Cyc. 1121, note 70. Moreover, if we assume that this court is committed by the decision in Estate of Emart to the English interpretation of the Victorian Act therein referred to, it would appear from the note (13) to our decision in L. R. A. 1917F, 866, 877, that the English courts have held that under the latter act it is not essential that witnesses sign in the presence of each other. See In the Goods of Jane Webb, 1 Jurist. N. S. (Eng.) 1096. To hold that the witnesses must sign in the presence of each other would be to write into the statute a requirement that is not there, and would be digging another pitfall for those unfamiliar with judicial decisions who rely upon what seems to be the plain letter of the Code.

The application for rehearing is denied. All concur.

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181 Cal. 227

In re McCLELLAND'S ESTATE.

McCLELLAND v. ALTHOUSE et al.

(L. A. 5760.)

(Supreme Court of California. Sept. 8, 1919.)

1. Husband and Wife 🔑278(1)—Validity of Separation Agreement Can be Determined Only by Direct Proceeding.

Neither petition of widow to set aside probate of will, nor her petition to determine heirship, nor her objection to the final account, brings into issue the validity of the separation and settlement agreement between her and deceased; but this can be raised only in a direct proceeding attacking it.

2. Descent and Distribution 🔑71(7) — Finding That Widow Had No Interest, a Finding That Separation Agreement was Valid.

A finding, in proceedings to determine heirship, that widow was not entitled to any part of estate, *held* to import a finding that settlement agreement between widow and deceased had not been obtained through duress or undue influence.

3. Husband and Wife 🔑279(4)—Separation Agreement Sufficient to Bar Wife's Right to Inherit from Husband.

Separation and settlement agreement between husband and wife *held* to bar her right to inherit from him.

Department 1.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of David S. McClelland, deceased. From a decree of distribution therein in favor of Harry Althouse and others, against Lettie J. McClelland, widow, she appeals. Affirmed.

A. Schapp, of San Francisco, and Chas. E. Hobart, of Los Angeles, for appellant.

Foster C. Wright, of Los Angeles, for respondents.

LAWLOR, J. This is an appeal from the decree of distribution in the matter of the estate of David S. McClelland, deceased, entered by the superior court of Los Angeles county, in which Lettie J. McClelland, the widow of the deceased, was denied the right of inheritance on the ground that she was barred by a certain separation and settlement agreement entered into between the decedent and his wife on December 21, 1906.

It appears that decedent and Lettie J. McClelland intermarried in Los Angeles on August 21, 1906, and ever since up to the time of the death of the decedent, June 11, 1916, were husband and wife. At the time of the marriage Mrs. McClelland owned property of the value of about $10,000, and had cash on hand in the amount of $2,800, and a monthly income of $87 from her other property. Decedent at that time owned a one-half interest in a saloon in Los Angeles, as well as certain residential property also situated in that city, which was at that time being improved. It also appears that the decedent was rather heavily in debt, though the amount and nature of the indebtedness does not appear. Either at the time of their marriage or shortly before, appellant gave to the decedent the $2,800 cash which she had on hand. This, it is alleged, decedent used to pay his debts. The union proved to be an unhappy one, and on December 21, 1906, decedent and appellant agreed in writing to separate and live apart; the agreement being in terms as follows:

> "This agreement made this 21st day of December, 1906, between David S. McClelland, the party of the first part, and Lettie J. McClelland, wife of said David S. McClelland, the party of the second part, witnesseth:
>
> "That whereas the said first party and the said second party were legally and lawfully married on the 21st day of August, 1906, and are now and ever since said 21st day of August, 1906, have been husband and wife, and
>
> "Whereas, the said first party and the said

second party are mutually desirous of severing their marital relations without coercion or undue influence or fraud or misrepresentation of any kind whatever, and

"Whereas, there has been no community property acquired since the said marriage, and

"Whereas, there are certain articles of furniture, to wit, piano, draperies, bureau and dining room chairs, table and rugs and other furniture acquired by each contributing of their separate funds for the purchase of the same, exclusive of certain personal effects and wedding presents belonging to said first party which are herewith specifically exempt, and

"Whereas there will be some expenses, attorney's fees and incidental expenditures for the purpose of completing and ratifying and finally settling the proposed separation,

"Now therefore, in consideration of the premises and in consideration of the covenants hereinafter more specifically set out, the said first party and the said second party do, *and each of them does renounce any and all marital rights which each owes to the other, of any kind or nature, whether legal, moral or equitable, and each renounces, quit claims, and conveys any right or title to any of the estate now owned or possessed by the other or that may be hereafter acquired in any way by the other;* and the said second party hereby acknowledges receipt of three hundred ($300) dollars, from said first party, which said first party advances for the purpose of payment of attorney's fees, expenses and other incidental expenditures in connection with the separation hereto agreed; and the said first party likewise relinquishes and waives any right, title or interest he may have in the above mentioned furniture, to the said second party, and in consideration of the premises and covenants herein specified, the said second party specifically releases the said first party of any and all claims of alimony or support of any kind whatever, it being her desire and wish that on account of their unhappy relationship she should not feel under any financial obligation to said first party or allow financial considerations to enter into her determination to sever the said marital relationship.

"Each party to this agreement herewith solemnly and specifically avers that the foregoing agreement has been entered into without undue influence or fraud or coercion or misrepresentation or from any cause except as herein specified.

"In witness whereof the above parties hereto have hereunto set their hands and seals the day and year first above written.

"Signed in the presence of Blanche Maxwell.
"David S. McClelland. [Seal.]
"Lettie J. McClelland. [Seal.]"

(Italics ours.)

This agreement, at the request of the appellant, was recorded in Los Angeles county and also in Alameda county. Following the separation the appellant went to live in Berkeley. About ten years passed from the time of this separation until the death of the decedent, during which time the parties did not meet or correspond or in any way try to keep in touch with each other.

Decedent died possessed of an estate of more than $10,000, which he had disposed of by will, naming therein his brothers and sisters as legatees. The will was filed for probate on July 18, 1916, and letters testamentary were issued on August 9, 1916. It was on September 15, 1917, more than a year after decedent's death, before appellant learned of that fact. She at once instituted proceedings to establish herself as an heir at law of the decedent entitled to inherit one-half of his estate. On October 30, 1917, she filed a petition to set aside the probate of the will and made application for a monthly family allowance of $250. On November 17, 1917, she filed a petition under section 1664, Code of Civil Procedure, to determine heirship. On January 31, 1918, she filed an objection to the final account. The court ruled against the appellant on the petitions and the objection.

On the petition to determine heirship the court found in part as follows:

"(2) That the petitioner, Lettie J. McClelland, and the deceased, David S. McClelland, were legally and lawfully married on the 21st day of August, 1906, and were during all the time since respectively wife and husband.

"(3) * * *

"(4) That a written agreement was made, executed, and acknowledged by and between said Lettie J. McClelland and said David S. McClelland, on the 21st day of December, 1906, whereunder both parties thereto, and each of them, renounced any and all marital rights which each owed to the other, of any kind or nature, whether legal, moral, or equitable, and wherein each renounced, quitclaimed, and conveyed any right or title to any of the estate then owned or possessed by the other, or that might thereafter be acquired in any way by the other. That in said written agreement, it was further contracted that no community property had been acquired since the said marriage. That on the said 21st day of December, 1906, the said parties separated and have never since seen one another, corresponded, or had any relations of any kind whatsoever.

"And, after hearing the evidence and arguments of counsel, the court makes and renders judgment as follows, to wit:

"It is ordered, adjudged, and decreed by the court that David S. McClelland died testate on the 11th day of June, 1916, leaving surviving as his only heirs at law the persons whose names and relationships to said decedent are as follows, to wit:

"Jemima McClelland, a sister; Mrs. Elizabeth Savage, a sister; Mrs. Ann Jane Warnock, a sister; William McClelland, a brother; Mrs. Maria McCreary, a sister; Crozier McClelland, a brother; Robert George McClelland, a brother, and Lettie J. McClelland, wife.

"That said decedent left a will which has been duly admitted to probate herein, and that by the terms of said will the whole of the said estate is devised and bequeathed as follows: * * *

"That the petitioner herein, Lettie J. McClelland, is not entitled to any part of said estate and her said petition is hereby denied."

The decree of distribution entered on February 28, 1918, contains the following:

> "That at said hearing of said petition, Lettie J. McClelland, the widow of deceased, appeared with counsel in opposition to the petition herein for distribution. That testimony, oral and documentary, was received, and the court finds that said Lettie J. McClelland and the deceased separated as wife and husband, and settled and adjusted all property rights between them by a contract in writing bearing date the 21st day of December, 1906, and that said Lettie J. McClelland is not entitled to participate in the distribution of this estate."

The following statement appears in the "Minute Entry" made on April 16, 1918:

> "Petition to determine heirship denied on the ground that property settlement disposed of the widow to inherit."

No other mention was made of this matter by the court in its findings, orders, or decrees.

[1-3] Appellant contends, however, that—

> "There can be but very little doubt that the agreement of settlement was signed by the appellant under duress and undue influence. Practically the only point on which the case was decided by the trial court was the point of laches, and the trial court held that too much time had been allowed to escape before appellant did anything in the matter. Since this is the point on which the trial court decided the case, I will confine myself to a discussion of the question of laches."

We are unable to understand the position of appellant in this matter, for the record discloses no such finding as here attributed to the trial court. Indeed, such a finding would not have been responsive to any issue in the proceedings. The petition to set aside the probate of the will, the petition to determine heirship, and the objection to the final account—the only proceedings taken by appellant in the matter—did not in any sense bring into issue the question of the validity of the agreement of settlement. This point could have been raised only in a direct proceeding attacking the validity of the instrument. And although the court, in hearing the petitions, and the objection to the final account, admitted evidence to the effect that appellant had signed the settlement agreement under duress and undue influence, it is not to be deduced from the findings that the settlement agreement was obtained by duress or undue influence and that, as contended by appellant, "the trial court held that too much time had been allowed to escape, before the appellant did anything in the matter." So far as anything appears to the contrary, the court may not have believed this testimony. We think from the finding that the appellant was not entitled to any part of the estate the court must have reached the conclusion that the settlement agreement was valid—that it had not been obtained through duress or undue influence. Moreover, this conclusion finds direct support in the minute order entry:

> "Petition to determine heirship denied on the ground that property settlement disposed of the widow to inherit."

It is further contended by appellant:

> "That while a party may, by undue delay, lose his right to attack an instrument he signed under duress or undue influence, he never loses his right to defend himself against the instrument if the other party chooses to enforce the terms of said instrument."

In the absence of a specific finding that there was "duress or undue influence," this contention is without merit.

The decree is affirmed.

We concur: SHAW, J.; OLNEY, J.

181 Cal. 233

MAHANA et al. v. ECHO PUB. CO.

(L. A. 5231.)

(Supreme Court of California. Sept. 8, 1919.)

1. Estoppel 🔑110 — Defense Unavailing on Failure to Plead.

In an action for libel, defendant publishing company's failure to plead an estoppel against plaintiffs, because the false information had been obtained through their agent, rendered the defense unavailable.

2. Libel and Slander 🔑121(1)—Evidence of Injury to Business Insufficient to Sustain Verdict.

Verdict for $1,500, recovered by insurance agents for libel against a publishing company, though reduced by the trial court to $1,000, *held* grossly excessive; any injury to the agents' business having resulted more from the dishonesty of their local representative than from the libelous statement.

3. Libel and Slander 🔑9(9)—Statement as to an Insurance Business Not Libelous Per Se.

A statement of a publishing company in its newspaper that policy holders who had taken out policies through a firm of insurance brokers had been somewhat mystified by the receipt of cancellation notices for policies on the occasion of the disappearance of the broker's agent, when he was short in his accounts, *held* not libelous per se as to the brokers.

4. Libel and Slander 🔑86(4)—Unless Article Implied Dishonesty and Financial Irresponsibility, Innuendo Would Not Do So.

Unless an article published by defendant in its newspaper was of such a nature that, in view of extrinsic facts alleged and proved, it conveyed to readers charges of dishonesty and financial irresponsibility on the part of plaintiffs, the innuendo would not give it such sinister significance.

Department 2.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action for libel by George T. Mahana and Park A. Cooling, doing business under the firm name of Mahana & Cooling, against the Echo Publishing Company, a corporation. From a judgment for plaintiffs, defendant appeals. Reversed.

Wiley & Lambert, Kaye & Siemon, and W. W. Kaye, all of Bakersfield, for appellant.

Duke Stone, of Los Angeles, and Rowen Irwin, of Bakersfield, for respondents.

MELVIN, J. Plaintiffs, who are copartners, were awarded $1,500 damages for an alleged libel. This verdict was reduced by the court to $1,000. Defendant appeals from the judgment.

Mahana and Cooling were general agents for the Western Indemnity Company. The principal place of business of the copartnership was in Los Angeles. They had an agent at Bakersfield, one H. E. Weymouth. The defendant corporation publishes the Morning Echo, a newspaper of general circulation in Kern county and other counties in the state. On the morning of August 8, 1915, the following article, which is the basis of this suit, appeared in the said newspaper:

> "Notices Mystify Policy Holders.
>
> "Bakersfield policy holders of the Western Indemnity Company have been somewhat mystified during the past few days by the receipt of cancellation notices for paid for policies, indicating that some kind of a financial tangle has arisen whereby they will be the losers. The cancellation notices have been sent out by Mahana & Cooling, F. E. Sherk, agent, Los Angeles.
>
> "Col. H. E. Weymouth, who had charge of the Bakersfield office of the company, left the city several days ago, and it is reported that the insurance people have been endeavoring to locate him. It is said that premiums amounting to several hundred dollars, perhaps over $1,000.00, have been involved in the investigation of the special agents of the insurance company.
>
> "Colonel Weymouth, for several months in charge of the insurance department conducted by McManus & Son, real estate agents, opened an agency for himself in a location under the post office about six months ago. He was a hail-fellow-well-met and popular with the men about town."

That the part of the article following the first paragraph was substantially correct seems to be conceded by plaintiffs. Their representative had left the city a few days before the publication, and premiums amounting to several hundred dollars were involved in the investigation by special agents of the indemnity company, sent to learn the truth about Weymouth's peculations.

The part of the article, therefore, upon which the judgment must be supported, if at all, is that charging that plaintiffs had sent out cancellation notices for paid policies. It is admitted by appellant that at the time of the publication of the article no such notices had been sent out. Plaintiffs admit that—

> "In two or three instances *after* the publication of the article the plaintiffs did cancel policies on account of not having received the premium, and when they found that their agent had collected the premium, in every instance the policies were reinstated."

Appellant's first contention is that plaintiffs were estopped by the conduct of their agent from complaining of the publication of the supposed fact that cancellation notices had been sent out. There was testimony to the effect that one of defendant's reporters, who had a policy of insurance issued by the Western Indemnity Company, had received a notice a few days before the publication of the article in the Echo to the effect that if his premium should not be promptly paid his policy would be canceled. He showed this letter to Mr. Sinclair, a local agent, who had been representing plaintiffs after Weymouth's departure. According to the testimony of Mr. Gill, the reporter, Mr. Sinclair said:

> "There's a lot more of them have had their policies canceled, and will have them canceled."

[1] Mr. Sinclair denied any recollection of such a remark, but admitted that, when Mr. Gill spoke of the cancellation of his policy, a Miss Meyer, who was present, said: "Yes one of my policies has been canceled, too." He also said that neither he nor Miss Meyer explained that her policy had not been issued by the Western Indemnity Company. Acting upon the information received from Mr. Sinclair and Miss Meyer, the reporter wrote that part of the article relating to cancellations, and appellant insists that, the false information having been obtained through the agent of respondents, or in his presence, the plaintiffs are estopped from asserting that they were injured by its publication. Respondents answer that estoppel was not pleaded, and deny that the introduction of the evidence at the trial waived such pleading, because the matter was properly introduced not to show estoppel but good faith on the part of the publisher. This position is well taken. The failure to plead estoppel makes that defense unavailable now.

[2] But the judgment must be reversed because the amount of damages is grossly excessive. If plaintiffs were injured in their business in and around Bakersfield, it is obvious that the dishonesty of their local representative must have done more to bring about that result than the mere erroneous statement that policies upon which the premiums

were paid had been canceled—a statement which would have been true if made a few days later. Therefore, the judgment, even if it have any basis in the false statement regarding the cancellation notices, is too large.

[3] When they became suspicious of Weymouth, plaintiffs sent to Bakersfield agents who interviewed many holders of policies issued by the Western Indemnity Company, so that they might learn the extent of Weymouth's embezzlements. They must have known that such a course would probably result in the publication of the story of his dishonesty. They must have been aware that such publication would result in temporary diminution of their local business; but they must have known, also, that the printing of the facts about Weymouth's crimes would not be libelous. The offense was one committed, not only against his employers, but against the people of the state; hence the publication was a matter of interest to every citizen. The false statement that policy holders had been "somewhat mystified" by the receipt of "cancellation notices for paid for policies" was not libelous per se, and the elaborate innuendo of the complaint does not make it a libel. An insurance company that has not received the premiums due on a policy may usually give notice that unless the amount due is promptly remitted the policy will be annulled, and there was nothing to show that the notices indicated by the article would be different from those ordinarily sent to delinquent policy holders. There was nothing in the published article which would convey to the reader the idea that plaintiffs intended to profit by the rascality of Weymouth by the actual cancellation of policies for which the holders had paid the premuims to him, unless such implication is to be found in the words "indicating that some kind of a financial tangle has arisen whereby they will be the losers." But these words do not necessarily imply either sinister motives of the agents or that the loss would be of the amount paid on the policies. A policy holder would be to some extent a loser, if compelled to go to the trouble and expense of proving that as matter of fact he had paid a premium which had been embezzled by the agent of the insuring company. A cancellation notice coming to a man who owed nothing to the insurance carrier would naturally mystify him, and would indicate that some kind of a financial tangle had arisen. The words are not libelous per se, and there is nothing in the record to indicate that by the printing of the article defendant conveyed to the public the idea that Western Indemnity Company and plaintiffs "were in bad financial condition, and were not responsible under their policies, and were dishonest in their dealings with policy holders, and in general were unreliable."

[4] Unless the article was of such a nature that in view of extrinsic facts alleged and proved it conveyed to the readers of the newspaper charges of dishonesty and financial irresponsibility of plaintiffs, of course the innuendo will not give it that sinister significance. Mellen v. Times-Mirror Co., 167 Cal. 587, 140 Pac. 277, Ann. Cas. 1915C, 766. We find nothing in the record which shows that the statements in the article were understood in any sense beyond their literal import.

We are of the opinion that the portion of the publication which was false is not libelous, and has no tendency to hold plaintiffs up to shame or to injure them in their business. In this connection it is to be noted that the insurance company is not a plaintiff. If any losses were to fall upon policy holders, the repudiation of liability would necessarily be that of the insurer. The insinuation that those receiving cancellation notices might be "losers" is, therefore, one which in the most serious aspect would be injurious to the insurer rather than to the agents.

The judgment is reversed.

We concur: WILBUR, J.; LENNON, J.

181 Cal. 238

POST v. CITY AND COUNTY BANK et al.
(L. A. 4884.)

(Supreme Court of California. Sept. 8, 1919. Rehearing Denied Oct. 6, 1919.)

1. Principal and Agent 🔑106—Authority to Pay Note Not Ostensible Authority to Receive Collateral.

Where stockholder, upon request of president of corporation, gave bank note to secure loan to corporation, the president was not stockholder's ostensible agent to receive the collateral upon payment of note, though president had theretofore made partial payment on note and secured extension thereof, since bank should have assumed that president, in making such payment, acted for himself and corporation and not for stockholder, and since authority to make partial payment, even if it did exist, did not, under Civ. Code, §§ 2300, 2317, create ostensible authority to receive the collateral.

2. Appeal and Error 🔑931(1)—Conflicts in Evidence Resolved in Favor of Findings.

In determining whether there is evidence to support findings, Supreme Court will resolve all conflicts in the evidence in favor of findings.

3. Principal and Agent 🔑106—Authority to Pay Note Not Ostensible Authority to Receive Collateral.

That one has been given authority to make payment on note does not, under Civ. Code, §§ 2300, 2317, make him the maker's ostensible agent to receive security deposited with payee.

4. PRINCIPAL AND AGENT 🔑99—PRESUMPTION OF AUTHORITY MUST BE BASED ON SIMILAR ACTS.

When authority is deduced from recognition of certain acts, it must be limited to the presumption of other acts of the same general kind, and cannot be extended to acts of a wholly different nature.

5. PRINCIPAL AND AGENT 🔑106 — PRINCIPAL LIABLE FOR WANT OF DUE CARE OF AGENT.

Where stockholder's note, given bank to secure loan to corporation, provided that the collateral should be returned to stockholder, bank, in delivering collateral to president of the corporation upon president's payment of note without a written order from stockholder, or communicating with stockholder before so doing, failed to exercise ordinary care within Civ. Code, § 2334, making principal bound by acts of agent under ostensible authority where person without want of ordinary care has incurred a liability, or parted with value upon faith thereof.

6. PRINCIPAL AND AGENT 🔑106—PAYEE ON PAYMENT BY AGENT OF MAKER'S NOTE LIABLE FOR DELIVERING COLLATERAL TO AGENT.

Where one who had previously made partial payment on note purported to be maker's agent, and in paying up note claimed to have authority to receive the collateral, payee, in reposing confidence in purported agent and in delivering collateral without ascertaining whether he in fact had authority, is liable for loss upon purported agent's conversion of collateral, under Civ. Code, § 3543.

Department 1.

Appeal from Superior Court, Los Angeles County; Stanley A. Smith, Judge.

Action by C. H. Post against the City and County Bank, Bank of Italy, Irving S. Metzler, J. B. Hedrick, and A. M. Allison. Judgment for plaintiff against last two named defendants, and for other defendants against plaintiff for costs, and from judgment and from order denying motion for new trial plaintiff appeals. Reversed, and new trial ordered.

John R. Weber and C. C. Mishler, both of Los Angeles (Julius V. Patrosso and J. F. Keogh, both of Los Angeles, of counsel), for appellant.

J. Wiseman Macdonald, of Los Angeles, for respondents.

LAWLOR, J. This is an action for damages for the conversion of two trust deed promissory notes of the United Oil Company, Nos. 706 and 707, owned by the plaintiff. He recovered judgment against defendants, J. B. Hedrick and A. M. Allison for the sum of $1,700. The defendants City and County Bank, Bank of Italy, and Irving S. Metzler, vice president and stockholder of the former bank, were given judgment against plaintiff for their costs. A motion for a new trial on behalf of plaintiff was interposed and denied. The appeal is from the judgment and order in favor of the defendant banks only.

Plaintiff was a stockholder in the Panama Oil Company, and on March 13, 1913, while in the office of that company, the president, J. B. Hedrick, asked plaintiff to lend the Panama Oil Company $1,000, offering the note of the company, indorsed by himself, for the amount. Post stated that he did not have the money to lend, whereupon Hedrick informed him that if he would execute and deliver a note for $1,000 to the City and County Bank, and deposit as collateral for the amount the two said trust deed promissory notes of the United Oil Company, the bank would make the loan. Post finally assented to the proposition. Accordingly, on March 13, 1913, Post executed and delivered to the bank his note for $1,000, due 30 days from date, and delivered the two said promissory notes to the bank as collateral security, the note containing the provision that on the payment thereof the security was to be returned to Post. The bank was instructed by Post to place the $1,000 to the credit of the Panama Oil Company. On the same day Post was given a note for $1,000 for the same period by the Panama Oil Company, indorsed by Hedrick, personally. Prior to this time, Hedrick had attempted to borrow $1,000 from the same bank, on behalf of the Panama Oil Company, but it had refused to lend the money without security, stating that if he could get collateral the loan would be made. The court stated in an opinion, which appears in the transcript, that Post borrowed the $1,000 at the instigation of Hedrick, and that there had been a close business intimacy between them for a considerable period prior to March 13, 1913.

There is a conflict in the evidence as to who accompanied Post to the bank to negotiate the loan. Post, Antonia C. Fritsch, stenographer, and C. F. Spillman, bookkeeper, of the Panama Oil Company, all testified that Spillman accompanied Post to the bank, while Hedrick and Irving S. Metzler testified that Hedrick accompanied Post. On this question of fact the court made no finding. Post, on being notified in writing by the bank when his note would fall due, went to the office of the Panama Oil Company, and demanded of Hedrick payment on the note which the company had executed and delivered to him. He was informed by Hedrick that the company could not at that time pay the note, but that it would pay the accrued interest.

Some time in April, 1913, the Panama Oil Company levied an assessment on its capital stock of 1½ cents per share. It was agreed that the assessment on Post's 20,000 shares, amounting to $300, should be credited on the note which he held against the company. The court found that prior to February 11, 1915, the Panama Oil Company paid Post $400 upon its promissory note to him for $1,000. Post was again notified in writing by the bank on June 6, 1913, that his note must be paid. He at once made demand on Hedrick that the Panama Oil Company's note be paid. At this time it was arranged between Post and Hedrick that $300 be raised as part payment on the note so as to secure an extension thereof. The partial payment was accordingly made by Hedrick. There is a conflict in the evidence as to how Hedrick came to make the payment, Hedrick testifying that he was directed to do so by Post, and the latter's version being that "it was by Mr. Hedrick's request that caused me to allow Mr. Hedrick to take my money to the bank." The court found that Hedrick was authorized by Post to make the payment, which was made up of Post's check for $140, a check of the Panama Oil Company for $100, and two interest coupons, amounting to $60, taken from the collateral at the bank. Hedrick returned to Post a receipt for $240, which contained the statement that the time of the note had been extended to June 20, 1913. Later, another extension was granted to Post until September 13th, following. Post testified that there were six or eight extensions in all.

On September 6, 1913, before the expiration of the last extension on the note, Hedrick, accompanied by A. L. Allison, a stockholder in the two oil companies who was known at the bank, went to the bank, and Allison, at the direction of Hedrick, paid the balance of $700 due upon the Post note. Upon the further direction of Hedrick the bank delivered the collateral to Allison. There is a sharp conflict in the testimony of Post and Hedrick as to whether the former knew in advance that this was to be done, but the court found that the $700 was paid and the collateral surrendered to Allison without the knowledge or consent of Post. The court found that neither Hedrick nor Allison ever had any authority from Post to make the payment or receive the security. Metzler represented the bank in this transaction. He testified that Hedrick and Allison came into the bank and Hedrick said:

> "Mr. Post has authorized you to deliver—Mr. Post has authorized Mr. Allison to pay his note, and you are to deliver the collateral notes to Mr. Allison. * * * Mr. Post does not want the collateral delivered to me because he has more confidence in the financial responsibility of Mr. Allison."

Upon this representation being made Allison gave his check to the bank for $2,527, $700 being for the Post note and the balance on account of other business he had with the bank. Metzler testified further that on this occasion he requested Hedrick to get an order from Post authorizing the bank to surrender the collateral; but that he was satisfied to deliver it without written authorization because Hedrick had been handling the matter for Post. According to Hedrick's testimony Post first learned of the liquidation of the note and the surrender of the security and made demand on Hedrick and Allison for them on September 9, 1913, but Post and Metzler testified and the court found that Post went to the bank on January 10, 1914, and informed Metzler that he had come to take up the note. Metzler replied that the balance on the note had been paid by a check from Allison, and that the collateral had been surrendered to him at the direction of Hedrick. Post answered that he had given no authority to Hedrick or Allison to pay the note and receive the security. Metzler said that he would get in touch with Hedrick at once. Later Post made a formal tender to the bank of the balance of $700 due on the note, and demanded his collateral. On September 11, 1913, the bank was consolidated with the Bank of Italy, and upon the refusal of the latter bank and the other defendants to return the collateral to Post they were made parties defendant to this action.

The court found that Hedrick, "for and under the instructions of and as the agent and representative of plaintiff," was authorized on June 6, 1913, to pay the defendant City and County Bank, to apply on plaintiff's note, the sum of $300; that on September 6, 1913, J. B. Hedrick and A. M. Allison went to the City and County Bank, and J. B. Hedrick, acting as the ostensible agent of plaintiff, caused A. M. Allison to draw his check for the sum of $700 and deliver it to the said bank, and directed the said bank to deliver to A. M. Allison the said trust deed promissory notes, and the said bank thereupon so delivered said notes.

Thus, according to the findings, Hedrick, in making the partial payment of $300 on the note on June 6, 1913, was the actual agent of Post, and in causing Allison to draw his check for $700 on September 6, 1913, and in directing the bank to deliver over to Allison the collateral, he was the ostensible agent of Post. There are no findings on the evidence of extensions secured from the bank by Hedrick, the number of extensions not being definitely shown by the record, nor of the circumstances attending the negotiations for and the execution and delivery of the note by Post.

Appellant urges four grounds for a reversal of the judgment: (1) That the evidence shows that Hedrick was not the agent, actual or ostensible, of the appellant, and thus not authorized to receive appellant's collateral, and that appellant is not estopped to deny the authority of Hedrick to receive said securities from the bank; (2) that, considering Hedrick at one time possessed authority to deal with the bank in regard to the note, the bank had notice that said authority had ceased, and that neither Hedrick nor Allison were authorized to receive said securities; (3) conceding Hedrick to have been the agent of plaintiff for the purpose of obtaining and drawing the securities from the bank, Allison was not the agent for that or any other purpose, and Hedrick had no power, actual or implied, to delegate his authority to Allison or to any one else; (4) that in view of the undisputed evidence, the defendant City and County Bank, as pledgee, did not exercise reasonable care in delivering plaintiff's securities to Allison.

[1, 2] We are of the opinion that Hedrick was not the ostensible agent of Post for the purpose of directing the bank to give the collateral to Allison. As we have seen, there are only two findings of fact from which such authority could have been inferred, namely, the finding that on June 6, 1913, plaintiff authorized defendant Hedrick to make the $300 part payment on the note, and the further finding that on September 6, 1913, Hedrick, "acting as the ostensible agent of plaintiff, directed the City and County Bank to deliver to said A. M. Allison the said trust deed and promissory notes," and that thereupon the bank delivered to Allison the said notes. However, we will consider all of the evidence contained in the record having any tendency whatever to support the finding of ostensible agency, resolving all conflicts in the evidence in favor of the finding. It appears then that Hedrick accompanied Post to the bank and introduced him there at the time he secured the loan, which loan was placed to the credit of the Panama Oil Company at the direction of Post. It also appears that prior to this Hedrick had applied to the bank for a loan of $1,000 and had been refused because he had no collateral to offer, but was told that he could have the loan if he would furnish security. It also appears that at this time the Post securities were mentioned, and that Metzler told Hedrick that if he could induce Post to sign a note and put up the two $1,000 notes of the United Oil Company as collateral the bank would make the loan. It also appears that the bank sent notice to Post when the note was due, and later sent other urgent notices to him to pay the note, and that in response to such notices Hedrick applied to the bank for extensions, which were granted. It also appears that Hedrick paid $300 to the bank on June 6, 1913. From the foregoing we think it must be held that at the time Post applied for the loan and directed that it be placed to the credit of the Panama Oil Company, whether Hedrick was present or not, the bank knew that Post was accommodating the company and Hedrick. Hence, when Hedrick made the partial payment and secured the extensions the bank should have reasonably assumed that he was acting in behalf of himself and the company rather than as the representative of Post. So it seems to us that the only reasonable deduction that could have been made from these facts was that Hedrick was doing what he did, not because Post had made him his agent, but because he had induced Post to lend his credit to the company. But even if this be not a proper deduction, and the finding of the court that Hedrick was the agent of Post on June 6, 1913, is to be accepted as conclusive, yet we are convinced that the finding of ostensible agency in Hedrick to secure possession of the collateral cannot be supported upon any theory.

The Civil Code provides:

> "Sec. 2300. An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him."
>
> "Sec. 2317. Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess."

[3] Hedrick in directing that the bank deliver the security to Allison acted entirely outside of the scope of authority which the bank was justified in assuming that he possessed. The law on this point is stated in 2 Corpus Juris, page 464, as follows:

> "The person sought to be bound must, by his words or conduct, have represented that the person assuming to act for him had authority to do so. Accordingly, an estoppel does not arise from the mere fact that the agent has acted for the principal on one or more previous occasions, but not under appearance of a general authority so to act, nor does the rule in question apply to acts of the agent outside of the scope of authority which the principal has caused him to seem to possess."

[4] The other acts of Hedrick, even if acquiesced in by Post, were not of the same general nature as gaining possession of the collateral; hence Hedrick cannot be held to be the ostensible agent of Post for that purpose. As is said in Mechem on Agency (2d Ed.) vol. 1:

> "It must, moreover, be kept in mind that when authority is deduced from recognition of certain acts, it must be limited to the presumption of other acts of the same general kind, and cannot be extended to acts of a wholly different nature."

It is also declared in Story on Agency (8th Ed.) § 87, p. 110:

> "If the agency arises by implication by numerous acts done by the agent with the tacit consent or acquiescence of the principal, it is deemed to be limited to acts of the like nature."

See, also, Robinson v. Nevada Bank, 81 Cal. 106, 22 Pac. 478; Consolidated Bank v. Steamship Co., 95 Cal. 1, 30 Pac. 96, 29 Am. St. Rep. 85; Mitrovich v. Fresno, etc., Co., 123 Cal. 383, 55 Pac. 1064.

This act of Hedrick cannot be regarded as of the same general kind or nature as his other dealings with the bank in relation to the note. In other words, making a partial payment, securing extensions, and even causing the final payment to be made are very different transactions from that of directing the bank to surrender the security. Upon no conceivable hypothesis can a logical relation be established between these acts and the act of Hedrick in directing the surrender of the collateral to Allison.

[5] It is insisted on behalf of Post that when Hedrick directed the bank to deliver the collateral to Allison because Post had more confidence in the financial responsibility of Allison than he had in that of Hedrick, any authority theretofore vested in the latter was thereby terminated. It is further contended that this constituted an attempt to delegate delegated authority. But without regard to these contentions the finding of the court that the bank was justified in giving the security to Allison cannot be upheld. Section 2334 of the Civil Code reads:

> "A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value upon the faith thereof."

The good faith of the bank is not to be questioned, but there can be no escape from the conclusion that it did not exercise ordinary care in the premises. The truth is the bank was victimized by Hedrick and Allison, not because of the conduct of Post, but because of the negligence of the bank through Metzler. As already stated, the court found that what was done on September 6th was without the knowledge or consent of Post. The note contained the provision that the collateral was to be returned to him. This, in itself, it seems to us, imposed upon the bank, in the exercise of ordinary care, the duty of securing a written order from Post, or of communicating with him before delivering the security. In addition to this, it is to be borne in mind that the bank had refused to make the loan to Hedrick. A situation was thus presented to the bank which called for prudent and well-considered action, and consequently it was a further act of negligence on the part of the bank to indorse the collateral in blank instead of to the order of Post.

[6] But it is also urged that as Post had employed Hedrick as his agent, under the rule stated in section 3543 of the Civil Code, Post should be the sufferer. That section reads:

> "Where one of two innocent persons must suffer by the act of the third, he, by whose negligence it happened, must be the sufferer."

It is said in Mechem on Agency (2d Ed.) vol. 1, § 749, p. 531, that "he who reposed confidence in the wrongdoer must bear the loss." The bank reposed confidence in Hedrick, not, in our opinion, because of his previous dealings with the bank in relation to the note, but rather for the reason that Allison figured in the transaction. That was the genius of Hedrick's scheme. It is evident that Allison had financial responsibility, and in this connection it is to be remembered that he paid to the bank at the same time some $1,800 on account of other business he had with it. We think it altogether unlikely that the bank would have trusted the security to Hedrick. If it had been willing to do so, the security would have been indorsed to Post. In other words, the bank reposed confidence in Hedrick's representations as to the collateral, principally, or entirely, because it was to be given to Allison, and, of course, Post is not to be charged with Allison's connection with the fraudulent transaction. Because Metzler failed to do any one of three things the bank was negligent in surrendering the collateral—Hedrick's representations should have been verified, or if this was not done a written order should have been insisted upon, or if neither of these things was done the security should have been indorsed to Post. Under no conceivable theory can it be maintained that the bank through Metzler exercised ordinary care in parting with the collateral. It is plain that when Metzler first learned that the security had been obtained through fraud he realized that the bank was at fault, for he said to Post, according to the latter's version, which is not denied by Metzler:

> "Well, I will get busy. * * * Mr. Post, we will get right after this and see that it is fixed up."

Post replied:

> "All right, Mr. Metzler, I will depend upon you to do that."

For the foregoing reasons, we think the evidence does not justify the finding of the trial court that Hedrick was the ostensible agent of plaintiff for the purpose of withdrawing the security. The judgment and order are reversed, and a new trial ordered as to the defendant banks.

We concur: OLNEY, J.; SHAW, J.

181 Cal. 247

HOUSE v. PIERCY. (S. F. 8751.)

(Supreme Court of California. Sept. 11, 1919. Rehearing Denied Oct. 9, 1919.)

1. Pleading 🔑129(1) — Allegations in Complaint Admitted by Failure to Deny.

Allegation of complaint is admitted by defendant's failure to deny it in the answer.

2. Vendor and Purchaser 🔑3(1)—Measure of Damages on Breach of Contract to Sell Lands and Divide Proceeds Determined.

Contract whereby one party agreed to advance to other party who was owner of interest in land certain sum of money wherewith to buy other interests and discharge incumbrances, and second party agreed to repay advancement after selling property and divide remainder with first party, was not one for the conveyance of an estate in real property to which the special measure of damages for breach prescribed by Civ. Code, § 3306, would be applicable; but section 3300, as to damages from breach of contract, would apply.

3. Contracts 🔑324(1)—On Breach Party may Sue for Money Paid or for Damages.

Upon refusal of a party to perform a contract, the other party, who has paid money thereunder, may either treat contract as rescinded and sue to recover the money, or may elect not to acquiesce in rescission, and sue for damages for the breach, but cannot do both.

4. Contracts 🔑272 — Party on Breach Recovering Money Advanced Cannot Recover Damages.

Plaintiff, suing in one count for money advanced under a contract and in another count for damages for breach of contract, by accepting amount advanced with interest in full satisfaction of demand based on cause of action of first count exercised his right of rescission, and terminated the contract, and cannot thereafter recover on second count for breach thereof.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by A. E. House against Andrew J. Piercy. Judgment for defendant, and plaintiff appeals. Affirmed.

R. C. McComish, of San Jose, for appellant.

Perry Evans, of San Francisco, for respondent.

ANGELLOTTI, C. J. [1] In February, 1917, plaintiff's assignor, Will M. Beggs, and defendant, Andrew J. Piercy, entered into a written contract. This contract substantially provided that Beggs would advance to Piercy $25,000 for the purpose of buying the interests of the owners other than himself of a tract of land in Santa Clara county, known as the David J. Piercy ranch; that Piercy would use this sum for the purchase of such interests, and would purchase such interests and discharge all liens and incumbrances thereon, and "hold the same," together with his own interest therein, "for the joint benefit of himself and Will M. Beggs, and that Will M. Beggs and defendant were to have equal interests in and to the whole of said property." The said sum of $25,000 was to be repaid to Beggs "out of the first proceeds of any sale of said property, or any portion thereof, and the remainder was to belong to defendant and Will M. Beggs in equal shares." This was substantially the contract as alleged in the complaint, and admitted by failure to deny in the answer. The contract itself was not introduced in evidence. Beggs advanced to defendant on account of the $25,000 the sum of $1,070, and was at all times "ready, willing, and able to carry out all his part of the contract." Within two months of the entering into the contract defendant notified Beggs in writing that he refused and would refuse to perform his part of the contract, claiming that he was sick at the time he signed, and did not understand the terms. Beggs immediately assigned any right of action he had against Piercy to plaintiff, and this action was commenced April 11, 1917.

The complaint was in two counts. The first was for the sum of $1,070, alleged to have been received by defendant from Beggs "to and for the use of" Beggs, the return of which had been demanded by Beggs, and which still remained unpaid. The second count stated a cause of action for damages for breach of the contract, specifically alleging that the contract was entered into "as a part of the same transaction, wherein and from which defendant received the money mentioned in the first cause of action herein," and among other things alleged the advancement of said $1,070; that the real property, free and clear of incumbrances, was at all times of the value of $40,000, and that plaintiff and Beggs had been damaged by defendant's failure to perform in the sum of $7,500, for which amount judgment was claimed. The answer, filed October 26, 1917, by reason of failure to deny, admitted the allegations of the first count except the allegation of assignment, and all the allegations of the second count except those as to the value of the property, the damage suffered, and the assignment, all of which were effectively denied.

During the trial, which occurred in February, 1918, the court allowed defendant to file a supplemental answer, alleging the payment by defendant to plaintiff on November 26, 1917, of the $1,070 mentioned in the complaint, $55.25 interest on said sum from the time it was advanced by Beggs to defendant, and $20.50 as the amount claimed to have been expended by the plaintiff as his costs in the action. It was expressly stated by counsel for plaintiff that he had no objection to the filing of his answer in so far as it went only to the first cause of action. He did object to a further allegation contained therein to the effect that the amount was received by plaintiff "in satisfaction of all indebtedness of the defendant to the plaintiff," but there was no finding as to this, and our view of the case is such that the allegation may be entirely disregarded. At the opening of the trial plaintiff's counsel admitted the satisfaction of the first cause of action, as follows:

> "There are two causes of action, the first of which, by reason of the payment of the amount involved, has been settled, and we are not concerned with it here."

Upon the trial it was admitted by counsel for plaintiff that the $1,070 referred to in the second count was the same $1,070 referred to in the first count. Upon the trial proof of the payment was made as alleged.

The findings are in accord with the allegations of the second cause of action of the complaint, except that there is no finding as to the value of the property, and, fur- been damaged in any sum whatever by the ther, that neither plaintiff nor Beggs had form his part of the contract. The court failure and refusal of defendant to per- further found that the defendant on November 26, 1917, made the payment to plaintiff alleged in the supplemental answer. Upon these findings, judgment was given for defendant.

We have an appeal by plaintiff from this judgment.

Plaintiff claims that he was entitled to a judgment for the amount of profit he would have realized if the agreement had been performed, which he says is one-half of the difference between the $25,000 he was to pay and the actual value of the property, alleged to be $40,000. The failure of the court to find upon the issue of value of the property he assigns as prejudicial error. Defendant's position appears to be that the contract here was one for the conveyance of an estate in real property within the meaning of section 3306, Civil Code, and that the special measure of damage prescribed by that section is applicable here. That section declares:

> "The detriment caused by the breach of an agreement to convey an estate in real property is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land."

[2] Defendant says that bad faith was neither alleged nor proven here, and that, consequently, the value of the land is an immaterial matter, and the lack of finding without prejudice. Consideration of the contract as alleged forces us to the conclusion that the agreement was not one for the conveyance of real property to Beggs. The reasonable construction is that there was not to be any conveyance to Beggs, but that Piercy, holding all of the same for the joint benefit of both, each having an equal beneficial interest therein, the same was to be sold, Beggs was to be repaid $25,000 out of the first proceeds, and the remainder of the proceeds was to be divided equally between the parties. Section 3306, Civil Code, we think, has no application. If this be so, section 3300, Civil Code, prescribes the measure of damage applicable, which would in his action for damages for breach of contract entitle plaintiff to the profit he would have realized.

[3, 4] Notwithstanding all this, it is entirely clear, in view of the record, that plaintiff was not entitled to recover. The record demonstrates that the $1,070, referred to in the statement of the second cause of action as advanced by Beggs to defendant on the contract is the same $1,070 sought to be recovered as money had and received by the first cause of action. The two causes of action rest upon different and inconsistent theories: The first upon the theory that the contract between the parties is terminated, the plaintiff electing upon defendant's repudiation to treat the contract as rescinded and to bring action for the money he has advanced as being money for which he has received no consideration; the second, upon the theory that the contract is still in force, the plaintiff electing not to acquiesce in a rescission and to maintain an action on the contract for damages for the breach. It is thoroughly settled in this state that a party to a contract may pursue either of these courses, but that he may not recover on both. This whole matter has been so recently discussed by this court in the opinions filed in Lemle v. Barry, Sac. No. 2751, 183 Pac. 150, as to render extended discussion unnecessary here. See, in addition to cases cited in these opinions, Walsh v. Standart, 174 Cal. 810, 164 Pac. 795; McConnell v. Corona City Water Co., 149 Cal. 60, 64, 85 Pac. 929, 8 L. R. A. (N. S.) 1171; Alderson v. Houston, 154 Cal. 10, 96 Pac. 884; Fountain v. Semi-Tropic L. & W. Co., 99 Cal. 677, 681, 34 Pac. 497. In the case at bar the plaintiff stated these two inconsistent causes of action in one complaint, and, of course, there was nothing in the nature of an election of remedies apparent from the complaint. But when, some time prior to the trial, he accepted full satisfaction of the demand based on the first cause of action, he effectually and finally exercised his right of

rescission and terminated the contract for all purposes. The situation was not materially different from the situation that would have existed had he brought two separate actions, instead of stating the two causes of action in one complaint and had carried the one based on the rescission theory to judgment. As said by Mr. Justice Shaw in his concurring opinion in Lemle v. Barry, supra:

> "But if the facts exist which justify a rescission by one party, and he exercises his right and declares a rescission in some effectual manner, he terminates the contract, and it cannot thereafter be made the basis of an action for damages caused by a breach of its covenants."

The whole basis of the action, in so far as it was one on the contract for damages for the breach, was destroyed by the enforcement of the claim based on the first cause of action, and thenceforth there could be no recovery on the contract. Unlike the case of Lemle v. Barry, supra, the record here does fully show the facts material to this question. Indeed, all that is necessary is shown by the pleadings and the findings of the trial court. In view of the condition of the pleadings and the findings as to the payment, the judgment for defendant was the only judgment that might properly be given, even though perchance it may have been given upon some other theory than the one we have discussed.

The judgment is affirmed.

We concur: OLNEY, J.; SHAW, J.; MELVIN, J.; WILBUR, J.; LAWLOR, J.; LENNON, J.

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181 Cal. 212

ANAHEIM SUGAR CO. v. ORANGE COUNTY et al. (L. A. 4594.)

(Supreme Court of California. Sept. 3, 1919.)

1. Highways 🔑121—Under Statute, Tax for Road Improvement for Permanent Road Divisions General Tax.

Intent to make the tax for a road improvement provided for in Pol. Code, §§ 2745–2773, as to permanent road divisions, a general tax, *held* clear; the burden being imposed on all property, real and personal, in the district, according to its value, whereas special assessments can be levied only on the specific property benefited, and on the basis of special benefit.

2. Highways 🔑121—Legislative Intent That Tax for Road Improvement Shall be General Tax Controls.

The legislative intent that the tax provided for in Pol. Code, §§ 2745–2773, as to permanent road divisions, on the property in such a division, for highway improvements therein, shall be a general tax, rather than a special assessment, controls.

3. Constitutional Law 🔑283—Highways 🔑122—General Tax for Road Improvements Not Taking of Property Without Due Process.

The tax under Pol. Code, §§ 2745–2773, as to permanent road divisions, on the property in a division, for highway improvements therein, being a general tax, does not amount to a taking of property without due process, because not in proportion to benefits.

4. Highways 🔑90—County Officials, for Levying Tax for Highway Improvements, Act in Their Capacities as Such.

In levying, collecting, and holding a tax for highway improvement under Pol. Code, §§ 2745–2773, as to permanent road divisions, county officials act in their capacities as such, and not as ex officio officers of a corporate entity separate from the county; there being no provision that road divisions shall have corporate existence, and no necessity for implying such existence, the whole tenor of the act indicating that a road division was regarded merely as a territorial subdivision of the county for purpose of a county tax for road improvements in the district.

5. Highways 🔑128—County Only Proper Defendant to Recover Highway Tax Paid Under Protest.

The tax under Pol. Code, §§ 2745–2773, as to permanent road divisions, being essentially a county tax for a special purpose, the county is the only proper defendant to action to recover such a tax paid under protest.

6. Counties 🔑57 — Action of County Board Collaterally Attacked Only for Excess of Jurisdiction.

Action of a county board of a judicial or quasi judicial nature may be collaterally attacked only on the ground of excess of jurisdiction.

7. Highways 🔑90—Publication of Landowners' Petition for Road Division Necessary to Action by County Board.

Under Pol. Code, §§ 2745–2773, as to permanent road divisions, presentation and publication of a sufficient petition prepared by landowners in the proposed division, giving its boundaries, so that it may be determined therefrom what lands are included, is indispensable to hearing and action thereon by the county board of supervisors.

8. Highways 🔑90—In Petition for Road Division, Words "East" and "West" Mean Due East and Due West.

In the absence of other words qualifying their meaning, the words "east" and "west," in a petition under Pol. Code, §§ 2745–2773, for formation of a permanent road division, describing boundaries by courses and distances, mean due east and due west.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, East; West.]

9. Highways 🔑90 —Map Attached to Petition for Road Division Controls as to Boundaries.

The description by courses and distances in a petition under Pol. Code, §§ 2745–2773, of the boundaries of a proposed permanent road division, being followed by statement that the boundaries are more particularly shown by an attached map, to which reference is hereby made, and such map deviating materially from the description by courses and distances, the map under Code Civ. Proc. § 2077, controls, so that, neither it nor the courses or distances indicated therein being published with the petition, publication was insufficient to give the county board of supervisors jurisdiction.

10. HIGHWAYS 🔑90—PUBLICATION OF PETITION FOR ROAD DIVISION INSUFFICIENT.

There was not the necessary publication of the petition for establishment of a permanent road division, under Pol. Code, §§ 2745–2773, to give the board of county supervisors jurisdiction to act thereon, where the attached map containing the controlling showing of boundaries was not published, and thereafter there was published merely a notice that a petition, with incorrect statement of boundaries, had been presented, and that description in the notice was correct.

11. HIGHWAYS 🔑90—TAX INVALID WHERE DESCRIPTION IN SUPERVISORS' RECORD VARIES FROM THEIR FINAL ORDER.

The record of the board of county supervisors on the final hearing for establishment of a road division, required by Pol. Code, § 4039, to be made, having contained a description of an altogether different parcel of land from that included in the division by the board's final order, such error was fatal to the tax voted by the electors; they having a right to rely on the record, and not being bound to corroborate it by examination of the board's files.

12. HIGHWAYS 🔑127(1)—ON ELECTION ON SPECIAL TAX FOR IMPROVEMENTS, PRECINCTS NEED NOT BE ESTABLISHED NINETY DAYS PRIOR THERETO.

Pol. Code, § 2756, providing that elections to vote on a special tax for highway improvements in a road division shall be held in all respects as nearly as practicable in conformity with the general election laws, *held* not to require that election precincts be established 90 days before the election, as required by section 4041, subd. 3, in case of a general election.

13. HIGHWAYS 🔑127(1) — NOTICE FOR SPECIAL TAX ELECTION FOR IMPROVEMENTS SUFFICIENT.

It appearing from the notice of election, stating purpose of election to be to determine whether a special tax should be levied to be raised in one, two, and three successive years, that the election was to be held under the Road Division Act, omission to state what proportion was to be raised in any given year was immaterial; Pol. Code, § 2754, providing the proportion to be raised in each year.

14. HIGHWAYS 🔑127(1)—FAILURE TO KEEP POLLS OPEN STATUTORY TIME MUST BE SHOWN HARMLESS.

The polls for a special tax election for a road division, which Pol. Code, § 2756, requires to be held in all respects as nearly as practicable in conformity with the general election, having been kept open only from 8 a. m. to 4 p. m., while the requirements of section 1160, as to general elections, is from 6 a. m. to 7 p. m., the deviation is great, requiring one seeking to uphold the election to show affirmatively that the result was not affected thereby.

15. HIGHWAYS 🔑128—GENERAL SCHEME FOR RECOVERY OF TAXES PAID UNDER PROTEST APPLIES TO SPECIAL HIGHWAY TAX.

Pol. Code, § 2759, providing that the special tax for improvement of highways in a road division shall be computed and collected in the same manner as state and county taxes, incorporates into the Road Division Act the provisions of section 3819, part of the general scheme for collection of taxes, for payment under protest and recovery of an illegal tax.

In Bank.

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by the Anaheim Sugar Company against the County of Orange and its Treasurer. From an adverse judgment, plaintiff appeals. Reversed and remanded, with instructions.

Allen & Weyl, Gray, Barker & Bowen, and Donald Barker, all of Los Angeles, for appellant.

L. A. West, of Santa Ana, W. F. Menton, Walter Eden, A. E. Koepsel, and West, Koepsel & Eden, all of Santa Ana, for respondents.

LENNON, J. This action was brought by the plaintiff to recover money paid by it under protest to the tax collector of Orange county. The money was paid on a levy of taxes for the improvement of highways in the so-called Anaheim and Fullerton road division in that county. The complaint attacked the validity of the formation of the road division and of the proceedings for the levy of the tax. A general demurrer to the complaint was sustained by the trial court. The plaintiff having failed to amend, the court entered a judgment of dismissal in favor of the defendants. This appeal has been taken from that judgment.

The question of the sufficiency of the plaintiff's complaint to state a cause of action presents several problems for our consideration, the first of which is that of the constitutionality of the statute which authorizes the formation of road divisions. Pol. Code, §§ 2745–2773. If the statutory provisions are unconstitutional, the action of the county tax collector in demanding the money collected for the tax in question was wholly unwarranted, and it would follow that, if payment were properly protested under that section, the money so collected could be recovered pursuant to the provisions of section 3819 of the Political Code, which, as elsewhere stated in this opinion, was in effect incorporated into the Road Division Act by section 2759 of the Political Code.

Sections 2745–2773 of the Political Code provide, in effect, that the resident landowners of any portion of a county not already a part of a road division may petition the board of supervisors of the county to form thereof a permanent road division. Provision is made for a hearing upon due notice before the final action of the board, which may, in its discretion and upon a hearing after due notice, change the boundaries of the proposed division, either by exclusion or inclusion. At or after the formation of the division, 10 or more resident landowners may petition the board of supervisors for the construction of road improvements. The board must then have plans made, estimate the cost of the improvement, and set aside a certain amount of the money of the road districts in which the division may be situated to apply towards meeting the expense. It may in its discretion set aside other public moneys for the purpose. A special election to authorize the levy of taxes is then to be held on due notice, and if, at this election, a majority of the electors signify their approval of such levy, a tax is to be levied on all the property in the division. Such tax is to be computed and collected in the same manner as state and county taxes, and paid into the county treasury for the use of the division.

[1-3] The plaintiff does not indeed deny that the tax so provided for is for a public purpose. It does, however, most earnestly insist that the statute authorizes a taking of property without due process of law, because the tax is made to fall unequally upon those holding property in the taxing division by reason of the fact that no provision is made that the burden of taxation shall be in proportion to the benefits derived from the road improvement for which the tax is to be levied. It is conceded that it is not essential to the validity of a general tax that the burden be in proportion to the benefit derived. The contention of the plaintiff rests, therefore, upon the assumption that the tax provided for in the statute in question is a special assessment as distinguished from a general tax.

The legislative intent to make the tax here in question a general tax is unescapably clear. Special assessments can be levied only on the specific property benefited, and not on all the property in the district. Louisiana, etc., Co. v. Madere, 124 La. 635, 50 South. 609. The basis of the imposition of a special assessment is the benefit inuring to the property assessed. Doyle v. Austin, 47 Cal. 353. Where, as here, therefore, the burden is imposed upon *all* of the property in the district, real and personal, according to its value and not upon the basis of special benefit, it is clear that the Legislature regarded the burden as a general tax, and not as a special assessment. This is so, even though the tax be imposed for the purpose of constructing a public improvement which may confer greater benefits on one class of persons or property than on another. Williams v. Corcoran, 46 Cal. 553.

This being so, the question now presented for decision is the extent to which the legislative intent is controlling in the matter of determining whether a given tax is in fact a general tax or a special assessment. The plaintiff contends that, where the Legislature provides for the creation of a small subdivision within a county for the sole purpose of providing means for making highway improvements therein which will be largely beneficial to the property owners in such subdivision, a tax levied therein must be held to be a special assessment, even in the face of a contrary intent expressed by the Legislature. We do not so understand the law. It is well settled that it is purely a question for the Legislature to determine what shall be the territorial subdivisions of a state for taxing purposes, and that it is not within the province of the courts to hold that a tax amounts to a taking without due process of law, solely on the ground that the property or person taxed is in a position where a proportionately small or even minute amount of benefit may be received. Kelly v. Pittsburgh, 104 U. S. 78, 26 L. Ed. 658; Thomas v. Gay, 169 U. S. 264, 278, 18 Sup. Ct. 340, 42 L. Ed. 740; Williams v. Eggleston, 170 U. S. 304, 309 to 311, 18 Sup. Ct. 617, 42 L. Ed. 1047. We have no doubt that it was competent for the Legislature to create, or rather to provide for the creation, upon petition and after due hearing by the county supervisors of taxing districts for the construction of highway improvements and at the same time provide that the tax should be general, if it appeared that some benefit would accrue to the property taxed. Lent v. Tillson, 72 Cal. 404, 428, 14 Pac. 71; In re Madera Irrigation District, 92 Cal. 296, 326, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; Bliss v. Hamilton, 171 Cal. 123, 133, 152 Pac. 303. It follows, from the rules established by the cases cited, that the intent of the Legislature that a tax shall be a general tax is controlling, where it appears upon an analysis of the facts of the particular case that the tax is in fact for a public purpose and calculated to benefit the members of the taxing district in common with the public, and not merely as individual property owners. There being no question but that the tax provided for in the statute here in question is for a public purpose in the sense noted, it follows that the legislation in controversy is not in conflict with the provisions of the Constitution of this state, or of the United States, prohibiting the taking of private property without due process of law.

[4, 5] While the order sustaining the demurrer is general, nevertheless, it appears therefrom that the ruling of the lower court rested in part upon the assumption that in levying and collecting the tax and in holding the moneys so collected the county officials were acting, not in their respective capacities as county officers, but as ex officio officers of a corporate entity separate from the county, that is to say the Anaheim and Fullerton road division. This was error. The road divisions formed pursuant to the provisions of the Political Code have no corporate existence, de jure or de facto. It is not expressly provided in the Code that road divisions shall have corporate existence. The contention of the county in this behalf must therefore rest upon the theory that the road division is a corporation by implication. The doctrine of the creation of corporations by implication has been developed to save and make effective legislative acts which purport to confer powers which can only be exercised by a corporation upon bodies to which the Legislature has neglected to specifically grant corporate existence. The doctrine is thus a remedial doctrine, in that it is invoked to give effect and force to statutory provisions which would otherwise fail of accomplishing their purpose. Such being the nature of the doctrine, it should not be extended beyond those cases where that necessity appears to which the doctrine owes its origin and existence. If, therefore, in any given case, it appears that no express grant of corporate existence has been made, it should not be held that there is a grant of such existence by implication, in the absence of a clear and affirmative showing that the legislative intent cannot otherwise be fully and fairly accomplished. Stebbins v. Jennings, 10 Pick. (Mass.) 172, 188; Walsh v. New York & Brooklyn Bridge, 96 N. Y. 427; 1 Dillon on Municipal Corporations (5th Ed.) p. 121.

An analysis of the Code provisions relating to the forming of road divisions reveals the fact that not only is there no provision for the exercise of any of the well-recognized corporate facilities by the division, but there is no requirement that the division as such shall do any corporate act of any sort. Section 2745 of the Political Code does indeed provide that a road division, once formed, shall have "the powers" enumerated in the act. But no powers are enumerated or conferred therein, either expressly or by necessary implication. The first action contemplated by the statute after the formation of the division is the presenting of the petition for road construction. This is to be done by individual landowners resident in the division. Pol. Code, § 2751. All subsequent acts are to be done by the county officials, nor is there anything in the statute to indicate that in performing the several acts directed they are not to be considered as acting in their respective official capacities. Pol. Code, § 2752 et seq. Indeed, the supervisors are directed to set apart money from the general funds of the county to apply toward defraying the expenses of construction. Pol. Code, § 2753. This is obviously an act which could not be performed by them as officers of the road division, as a separate legal entity, but could be performed only in their official capacity as supervisors. It is true that the money collected by means of the tax provided for in the statute is to be paid into the county treasury "for the use" of the division. Pol. Code, § 2759. This, however, is nothing more than a provision that the money so paid shall constitute a special fund for a special purpose. The existence of such a fund does not necessarily imply the existence of a corporate entity, separate and distinct from the county as beneficiary, nor does it necessarily imply that the county officers in dealing with the fund are not acting in their official capacities as county officers. Gill v. City of Oakland, 124 Cal. 335, 57 Pac. 150. It is true that bonds are, under some circumstances, to be issued to finance the construction work; but they are to bear the signature of the county clerk and of the chairman of the board of supervisors, and there is nothing to indicate that in so signing they are not acting in their official capacities as county officers. Pol. Code, § 2765. It is also true that the bonds are to be payable only out of the funds of the division. Pol. Code, § 2763. This fact, however, does not affect the question we are discussing. Hellman v. Shoulters, 114 Cal. 136, 145, 44 Pac. 915, 45 Pac. 1057. It is also significant that the expenses not only of the formation of the division, but also of all the elections provided for in the statute are to be paid out of the general funds of the county. Pol. Code, § 2772. The purpose of the statute is to provide an alternative method for road construction. Pol. Code, § 2773. The act is no doubt to be construed liberally to enable the accomplishment of that purpose, but in order to accomplish the end named we fail to see why it is necessary to imply the existence of a corporate entity not specifically granted corporate powers by the statute.

The cases cited on this point on behalf of the defendant have no application to the case at bar. For the most part they are cases involving a consideration of the corporate capacity of school districts. There is no doubt but that a school district is a corporate entity separate and distinct from the county. The county officers, as such, have no control over the funds of the school district. The power to make contracts payable out of the funds of the district is vested exclusively in the school board. The business of the district is managed independently of the board of supervisors by its own executive and administrative officials. Finally, school districts may sue and be sued separately. None of these undoubted attributes of corporate organization are granted to the road division by the statute here in controversy, either by express words or by implication.

There is nothing in this conclusion inconsistent with the decision in Dean v. Davis, 51 Cal. 406. The court was there construing chapter 293 of the Statutes of 1867-68, which provided for the formation of levee districts. The electors of the district were authorized by that statute to elect an assessor and tax collector. These officials were not to be in any sense officers of the county. They were solely the officers of the district, and if it were held that the district had no corporate existence separate from the county, the whole purpose of the act would fail of accomplishment. Again, it was provided that the county surveyor was to perform certain services, not in his official capacity as a county officer but, as expressly stated in the act, as ex officio engineer of the district. In fact, the whole tenor of the act indicated the intent of the Legislature that the levee districts should have a separate corporate existence. On the other hand, the whole tenor of the statute here in controversy indicates that the Legislature regarded the road division provided for therein as nothing more than a territorial subdivision of the county for the purpose of taxation for road improvements similar to improvement areas within municipalities such as those discussed in Gill v. City of Oakland, supra, and in Pasadena, etc., Co. v. Lelande, 175 Cal. 511, 166 Pac. 341. It follows that the tax here in question was, if valid, essentially a county tax for a special purpose, and that, therefore, the county is the only proper party to an action such as that brought by the plaintiff herein.

[6, 7] It is insisted on behalf of the defendant that the action of the board of supervisors of Orange county in forming the road division cannot be attacked collaterally, as is attempted here. In support of this contention defendant cites 11 Cyc. 405. The rule there stated, however, and the rule which we believe is unquestioned, is that the action of a county board of a judicial or quasi judicial nature is subject to collateral attack only on the ground of excess of jurisdiction. It is clear that when the board acts without jurisdiction its action may be collaterally attacked. Fremont County v. Brandon, 6 Idaho, 482, 56 Pac. 264. It may be conceded that the determination of a board of supervisors on a petition for the formation of a road division is of a judicial or quasi judicial nature. Imperial Water Co. v. Supervisors, 162 Cal. 14, 120 Pac. 780. The attack here made, however, is directed against the jurisdiction of the board of supervisors. It is contended on behalf of appellant that, by reason of alleged defects in the description of the boundaries of the proposed division as set forth in the petition as originally filed and published by the persons interested in the formation of the division, the board of supervisors never gained jurisdiction to proceed in the matter, and that therefore the complaint states a good cause of action. This contention must be sustained. Upon a careful analysis of the statute, we are convinced that the presentation and publication of a sufficient petition prepared by landowners resident within the proposed division was contemplated by the Legislature as an indispensable prerequisite to any action taken by the board of supervisors. The hearing prescribed by the statute would be no more than an idle ceremony, if definite boundaries of the proposed division were not to be so published prior to the hearing as to enable all landowners within such division to ascertain whether or not their property was included within the proposed boundaries. The statute, on the one hand, expressly makes it the duty of the majority of the landowners residing within the proposed division to prepare a petition containing the boundaries of the division, while, on the other hand, it does not authorize the board of supervisors to perform a single act until after the presentation and publication of the petition. It follows that if the petition, as originally presented and published, was vitally defective in its description of the boundaries of the proposed division, the board of supervisors was without jurisdiction to consider the merits of the petition.

[8, 9] Confining our attention, therefore, to the petition as alleged to have been originally published, we are constrained to hold that the description contained therein was such as to render the petition vitally defective. The description set forth by courses and distances in the petition assumed to fix the eastern and western boundaries of the proposed division as lines respectively one-quarter of a mile east and one-quarter of a mile west of the middle line of a certain highway and parallel to such middle line. Appellant contends that this description is ambiguous for the reason that the highway in question does not form a straight line between the proposed northern and southern boundaries of the division, but runs for a portion of the distance from north to south and for a portion of the distance from northwest to southeast, and that it is impossible to tell whether the lines were drawn parallel to the line of center measuring at right angles to such line of center and in an easterly and westerly direction, or whether they were to be drawn parallel to the line of center measuring due east and due west. This contention cannot be sustained. In the absence of other words qualifying their meaning, the words east and west, as used in the petition must be construed as meaning due east and due west. Bosworth

v. Danzien, 25 Cal. 296; Fratt v. Woodward, 32 Cal. 219, 91 Am. Dec. 573; Jackson v. Reeves, 3 Caines (N. Y.) 293; Brandt v. Ogden, 1 Johns. (N. Y.) 156. Cf. Cal. Pol. Code. § 3903. The description of the boundaries of the proposed division by courses and distances is, however, followed by the statement that "the boundaries of the said division are also more particularly shown by a plat or map of said division, attached hereto, to which reference is hereby made." This map, while in general following the initial description by courses and distances, deviates materially therefrom in many important particulars. Thus, with relation to the land of the appellant, the deviation is very substantial, a much larger portion of its land being included in the proposed division as indicated in the map than would be included under the initial description by courses and distances. From the intent of the petitioners themselves as indicated by the words "more particularly shown," and also by the application of general rules of construction, it is clear that the description by courses and distances is governed and controlled by the description as set forth in the map. Code Civ. Proc. § 2077; 5 Cyc. 524, 525; Vance v. Fore, 24 Cal. 435. If, then the map, or a description by courses and distances of the boundaries as indicated therein, had been published as part of the petition, it cannot be doubted but that the board of supervisors would have had jurisdiction to proceed in the matter. It sufficiently appears from the complaint, however, that the only description published was that by the courses and distances of the initial description. The complaint therefore, in effect, alleges that the petition, as published, contained a description differing essentially from that contained in the petition as originally filed and presented. While the petition, as published, contained a clear and definite description of the boundaries of the proposed division it was a description wholly incorrect and misleading, which in no sense satisfied the statutory requirement that the petition, as published, should contain the true boundaries. The original publication was therefore wholly nugatory.

[10] Clearly, then, the complaint alleges facts which show that the board of supervisors was without jurisdiction to consider the petition at the date originally set for the hearing. It appears from the complaint, however, that on that date the board directed the county surveyor to draft a description by courses and distances, designating the boundaries delineated on the map, and ordered a publication of that description embodied in a notice to the effect that a petition for the formation of a road division had been presented, that the boundaries of the proposed division were incorrectly stated therein, that the then published description stated the boundaries correctly and that the board would hear the petition on a certain date. This obviously was wholly insufficient as a publication or republication of the petition. The original publication having been wholly nugatory, and the petition never having been republished, is follows that the board of supervisors never acquired jurisdiction to pass upon the merits of the petition.

[11] Appellant claims that a further defect in the proceedings affecting the validity of the tax appears from the facts alleged in the complaint. In this behalf it is alleged that the minute record of the board of supervisors upon the final hearing of the petition contained a description of an altogether different parcel of land from that included within the division by the final order of the board and that this description remained upon the minutes until after the election held to authorize the levy of the tax. The making of such a record is expressly required by statute. Pol. Code, § 4039. No other record of the action of the board of supervisors in establishing a road division is provided for. Inasmuch as an election whereby property may be made subject to sale for taxes would be confiscatory, were no means provided whereby it could be definitely determined in advance of the election what property would be affected by the election, it follows that the making of a public record of the action of the board in establishing the boundaries of the division was not only expressly required by the Legislature, but was also essential to due process of law. The facts alleged in the complaint, therefore, present a situation where a record required by statute and essential to due process of law was wholly incorrect and misleading, and so remained at all times prior to the election. It is contended on behalf of respondent that, because the files contained papers setting forth the accurate description of the division as finally formed by the order of the board, the burden is upon appellant to show that the error in the record actually misled some of the electors. This contention is without merit. The electors had a right to rely upon the record. They were not bound to corroborate its statements by an examination of the files. "The law requires a record, to the end that those who may be called to act under it may have no occasion to look beyond it." Sawyer v. Manchester, etc., R. R. Co., 62 N. H. 135, 13 Am. St. Rep. 541.

[12] It appears from the complaint that the order of the board establishing the Anaheim and Fullerton road division as an election precinct was made on November 18th, and that the election was held on December 27th. Since it appears that section 2756 of the Political Code provides that such elections shall be held in all respects as nearly as practicable in conformity with the general

election laws, by which it is required that election precincts be established 90 days prior to the election (Pol. Code, § 4041, subd. 3), it is contended that the election here in question was void by reason of the fact that the precinct was established less than 90 days prior to the election. The same contention was made under similar circumstances in Irrigation District v. De Lappe, 79 Cal. 351, 362, 21 Pac. 825, and was there held to be without merit. That decision is directly in point, and fully disposes of the contention of the plaintiff in the instant case.

[13] It appears from the complaint that the notice of election stated that the purpose of the election was to determine whether a special tax should be levied, to be raised in one, two, and three successive years; but it was not stated what proportion of the whole was to be raised in any given year. This omission was immaterial, if it appeared from the notice that the election was to be held under the Road Division Act, for the act itself provides the proportion to be raised in each year where a three-year period for raising the tax is adopted. Pol. Code, § 2754. It is contended, however, that it did not appear in the notice of election under what one of three possible road improvement acts the election was to be held. Upon an examination of the notice, which is appended to the complaint as Exhibit D, we are constrained to hold that the contention is without merit.

[14] The complaint alleged, in effect, that the election in question was void because of a failure to observe the requirement of the general election law relative to the time of opening and keeping open the polls. Pol. Code, § 1160. The defendant concedes, as indeed it must be conceded, that the Road Division Act required that the election in question should "be held in all respects as nearly as practicable in conformity with the general election law." Pol. Code, § 2756. The general election law required the polls to be open from 6 a. m. to 7 p. m. Pol. Code, § 1160. The notice of election in the present case—evidently inadvertently prepared pursuant to subdivision 3 of section 2761 of the Political Code—as set forth in Exhibit D of the complaint, shows that the supervisors ordered the polls to be kept open from 8 a. m. to 4 p. m., and it appears from the allegations of the complaint that they were so kept open, and not otherwise. The contention made upon behalf of the defendant in support of the validity of the election is that, notwithstanding the departure from the requirement of the general law, the keeping of the polls open for eight hours in the middle of the day was a substantial compliance with the law. This contention cannot be maintained, for the reasons stated in the case of People v. Town of Larkspur, 16 Cal. App. 169, 177, 116 Pac. 702, 706, where it is said:

"We think the principles enunciated in the well-considered case of Kenworthy v. Mast, 141 Cal. 268, 74 Pac. 841, are decisive of the question. The general rule laid down in McCrary on Elections, § 165, is quoted approvingly, namely, that where there is no statutory provision expressly declaring that a failure, in the respect now being considered, shall render the election void, it will be regarded as directory only, and that, unless the deviation from the legal hours has affected the result, it will be disregarded, but that if such deviation is great, or even considerable, the presumption will be that it has affected the result, and the burden will be upon him who seeks to uphold the election to show affirmatively that it has not."

Obviously the deviation pleaded in the present case was great and consequently, applying the rule above quoted, the complaint, in that particular, stated a cause of action.

[15] It is finally urged, however, on behalf of the defendant, that, even if the complaint does state a cause of action in the particulars stated, it affirmatively appears that the tax was paid before it became delinquent, and that there was no threat shown, and no power existent on the part of the tax collector to enforce the collection at that time, wherefore the payment must be considered as having been made voluntarily. The complaint alleges that the payment of the tax was protested under the provisions of section 3819 of the Political Code. If the tax provided for in the Road Division Act may be so protested, the payment cannot be considered voluntary. We are of the opinion that the tax may be so protested. It is true that it is nowhere expressly provided in the act that the provisions of section 3819 shall be held to apply. It is, however, provided that the tax shall be computed and collected in the same manner as state and county taxes. Pol. Code, § 2759. The provisions of section 3819 for the payment of void taxes under protest are a part of the general scheme for the collection of taxes. It follows that section 2759 of the Political Code amounts to an incorporation of these provisions into the Road Division Act, so that an action can be maintained against the county to recover illegal taxes assumed to have been collected pursuant to the act and protested under the provisions of section 3819. Hellman v. City of Los Angeles, 147 Cal. 654, 82 Pac. 313.

The judgment is reversed, and the cause remanded, with instructions to the lower court to overrule the demurrer, with leave to the defendant to answer within a specified time.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SHAW, J.; MELVIN, J.; LAWLOR, J.; OLNEY, J.

42 Cal. App. 372

WATTERSON v. OWENS RIVER CANAL CO. (Civ. 2733.)

(District Court of Appeal, Second District, Division 1, California. July 24, 1919. Rehearing Denied by Supreme Court Sept. 22, 1919.)

1. Pleading 🔑236(4) — Refusal of Amendment to Complaint for Delay Not Abuse of Discretion.

In an action against a canal company for the cost of completing its canal brought by the surety for the contractor on an express contract, the trial court's refusal to allow a proposed amended complaint declaring on an implied contract was not an abuse of discretion, where the case was pending 10 months before trial, and the lower court's decision was not made for more than a year thereafter, and 5 months passed after remand of the case by the appellate court before plaintiff asked leave to amend.

2. Canals 🔑15—Evidence Insufficient to Show New Contract by Surety of Defaulting Contractor with Canal Company.

In an action against a canal company for the cost of completing its canal, brought as on a new contract by the surety for the contractor, evidence *held* insufficient to show the existence or making of another contract between plaintiff and the canal company, as alleged in plaintiff's complaint, and on which his cause of action was based.

3. Canals 🔑15 — Money Expended by Surety of Defaulting Contractor under Original Contract.

In an action against a canal company for the cost of completing its canal, brought as on a new contract by the surety for the contractor, evidence *held* to show that any money expended by plaintiff or work performed by him was furnished and performed as part of the canal company's original contract with the contractor for construction of the canal.

4. Evidence 🔑317(4)—Hearsay Evidence Properly Stricken.

In an action against a canal company for the cost of completing its canal, brought as on a new contract by the surety for the contractor, testimony that the witnesses had heard a director of the canal company say that he had seen a third person interested in companies having business relations with the canal company, and that such person had stated he was glad plaintiff had gone on with the work, etc., *held* properly stricken as hearsay.

5. Appeal and Error 🔑1050(1)—Striking Evidence was Harmless where Similar Testimony was Admitted.

The improper striking of testimony as hearsay was harmless to the party aggrieved, where a letter embodying the same matter was in evidence.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by T. G. Watterson against the Owens River Canal Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Richard S. Miner and P. W. Forbes, of Independence, for appellant.

L. C. Hall, of Bishop, for respondent.

CONREY, P. J. After the first trial of this action, wherein a judgment had been rendered in favor of the plaintiff, that judgment was reversed by this court. 25 Cal. App. 247, 143 Pac. 90. On the second trial the court granted defendant's motion for a nonsuit, and judgment was entered in favor of the defendant. From this judgment the plaintiff now appeals.

The complaint upon which the case was first tried was framed to state a cause of action for the foreclosure of a lien claimed by the plaintiff on real property, known as the Owens River Canal, for labor and materials furnished by the plaintiff of the alleged reasonable value of $20,189.54, which said amount was also alleged to be the whole amount of the contract price. It was alleged that on or about the 16th day of February, 1909, plaintiff and defendant entered into an agreement under which the plaintiff was to perform labor and furnish materials to be used in the construction, alteration, addition to, and repair of said Owens River Canal. The complaint described the labor and materials furnished, and alleged that the contract had been fully performed by the plaintiff, and the same was completed and said work finished and said materials furnished and used on the 16th day of April, 1909, and that on the same date the construction, alteration, addition to, and repair of the canal was finished. It was further alleged that said labor and materials were furnished and used in said work on said canal at the personal instance and request of the defendant Owens River Canal Company; that no part of the contract price for said work and labor furnished had been paid; and that the whole of the sum stated was still due, owing and unpaid to plaintiff. Other allegations were made showing the due filing and recording of a notice of claim of lien.

The answer of the defendant to that complaint contained denials covering the principal allegations of the complaint. The answer contained a further affirmative defense, showing that the original contract for the work in question was a written contract, dated November 30, 1908, made with one P. N. Snyder, under which the contract price was to be $19,000; that at the time of the execution of that contract the plaintiff Watterson executed to the defendant an undertaking in the sum of $5,000, conditioned upon due performance of the contract by the contractor. Without making here a long statement of the case, suffice it to say that the defendant claims that when, on the 16th day of February, 1909, the plaintiff took charge of the work which he afterwards conducted to completion, he did so on behalf of Snyder for the purpose of preventing default on the contract and to save and keep himself harmless from the penalties provided in his bond; and that no contract relation whatever, except by reason of said bond, existed between the defendant and the plaintiff.

It was established at the former trial, and likewise at the later trial, that no written contract has ever been made between the plaintiff and the defendant, that the Snyder contract was not recorded before the commencement of the work, and that the defendant has paid the full amount of the contract price named in the Snyder contract.

Upon the evidence shown by the record before us on the former appeal we held that the plaintiff could not successfully maintain that changes were made in the work outside of the terms of the written contract or without the consent of Watterson, and that he had not been thereby released from his liability on the bond. We further held that when Snyder told Watterson to go ahead and finish the work of the contract and Watterson consented and proceeded in accordance with that request, he was in the situation of a surety on a contractor's bond who undertakes to finish the contract work for his principal; therefore that he was not a person acting "at the personal instance of the owner," as described in section 1183 of the Code of Civil Procedure, or entitled to any lien for the value of anything furnished or done by him. The court further said in the opinion rendered:

> "His right of recovery, if any, for the value of the labor and materials furnished by him, was merely the right to recover a personal judgment therefor, under like limitations as were binding upon Snyder. As Mr. Watterson succeeded and in that way represented the contractor, it follows that Watterson would be limited in his recovery (as in like circumstances the contractor would have been) by the contract price named in the written contract, after adjustment of all additions and deductions due to changes in the work as it progressed, and also after allowance of the proper credits for payments made by the owner. Laidlaw v. Marye, 133 Cal. 170, 176, 65 Pac. 391; Condon v. Donohue, 160 Cal. 749, 754, 118 Pac. 113. In the trial of this action, however, this plaintiff not only attempted to assert a lien, but has obtained a decree affirming his claim without regard to the limitations above noted. With respect to the cause of action stated in plaintiff's complaint, his right to recover herein and to enforce the lien claimed by him depends primarily upon the allegation and finding that on or about the 16th day of February, 1909, plaintiff and defendant entered into an agreement, under which plaintiff was to furnish certain labor and materials, for the purposes named. There is no evidence of any such agreement, unless the fact could be derived from the circumstances to which we have referred. As these circumstances do not support the claim as to the alleged contract, the appeals must be sustained as to him."

The remittitur on the former appeal was filed with the clerk of the superior court on the 1st day of October, 1914. On March 13, 1915, pursuant to notice given, a motion was made by the plaintiff to file an amended complaint. The first ground of appeal argued by appellant is that the court erred in denying that motion. So far as necessary for consideration at this time, the differences between the former complaint and the proposed amended complaint are as follows: Paragraph 3 of the former complaint alleged that on or about the 16th day of February, 1909, plaintiff and defendant entered into an agreement and contract under and by which the plaintiff was to perform, furnish, and bestow certain labor in and upon the construction, alteration, addition to, and repair of said Owens River Canal, and to furnish certain materials, etc. The proposed amended complaint, in the corresponding paragraph thereof, alleges that between the 15th day of February, 1909, and the 17th day of April, 1909, at the special instance and request of the defendant, plaintiff, by and with the aid and means of a large force of men, etc., performed work and labor amounting to a stated number of days in and upon the construction, alteration, etc., of said canal. The former complaint alleged that in pursuance of said agreement and contract the plaintiff performed labor in connection with said work for a stated number of days at stated prices per day, amounting to a stated total sum; that he also furnished materials amounting to a stated sum of money in the prosecution of said work; that said contract has been fully performed on the part of the plaintiff, and the same was completed and the work finished on the 16th day of April, 1909, and the construction, alteration, etc., of the canal was finished on the 16th day of April, 1909. Paragraph 6 of the former complaint stated that the labor and materials so furnished were of a stated reasonable value, the total thereof amounting to the sum of $20,189.54. Paragraph 7 stated that the said labor furnished, performed, and bestowed as aforesaid, and the materials furnished and used in said work, were performed and furnished at the personal instance and request of the defendant, but it was not alleged that the defendant agreed to pay the "reasonable value" thereof. The proposed amended complaint omits the direct allegation that the parties on the 16th day of February, 1909, entered into a contract, and that the amount of the contract price therefor was a stated and fixed sum of money. It merely states, as above shown, that between said periods the work was done at the special instance and request of the defendant; that in consideration of the same the defendant undertook, promised, and agreed to pay plaintiff whatever said work and labor was reasonably worth, and that the work and labor so furnished was of the reasonable value of $21,136.10. In like form the proposed amended complaint states a cause of action for the sum of $312.85, the reasonable value of powder, fuse, and caps furnished in the doing of said work. For a third cause of action the proposed amended complaint alleges that between the said dates, at the special instance and request of the defendant, the plaintiff paid, laid out, and expended for the use and benefit and advantage of the defendant upon said canal in said work the sum of $18,490.73, and also for powder, fuse, and caps in the sum of $312.85; that in consideration thereof the defendant undertook, promised, and agreed to repay to the plaintiff the full amount thereof, and to pay plaintiff the sum of $18,490.73; that being the full amount so due as aforesaid, advanced and paid out by plaintiff for the use of defendant. The former complaint alleged that—

> "On the 16th day of February, 1909, a large portion of the said construction, alteration, addition to, and repair of said Owens River Canal had been done and made, by another person, under a pre-existing and invalid contract."

This allegation was omitted from the proposed amended complaint.

The motion as presented to the court on March 13, 1915, was made upon the papers, files, and records of the court, including the decision of the District Court of Appeal on the former appeal and the remittitur thereon. Plaintiff now claims, and the motion was made upon the ground, that the said proposed amended complaint is necessary and proper in order to rightfully and regularly present and prosecute his cause of action herein, and in order to have the complaint conform to the decision of the Court of Appeal and in accordance with the remittitur thereon, and upon the further ground that the proposed amendment is and will be in furtherance of justice. The motion so presented was denied.

On the 24th day of April, 1915, pursuant to notice duly given, the plaintiff moved to amend said former complaint by striking out certain portions thereof, and also moved for a jury trial of the case. This motion was granted, and a jury trial was allowed. The amendment consists in striking out those portions of the former complaint which set forth the filing of a notice of claim of lien and the payment of the necessary charge and expense for preparing and recording the same, and the prayer that said several sums claimed by the plaintiff be adjudged and decreed to be a lien upon and against the property described in the complaint. It was upon the complaint as thus amended that the action was tried a second time. It should also be noted that the proposed amended complaint which the court did not permit to be filed did not contain any reference to plaintiff's claim of lien, and prayed only for a money judgment.

[1] 1. The court did not commit any error or abuse of discretion in refusing to allow the filing of the proposed amended complaint. As stated by counsel for appellant, the substance of his application was for leave to change his complaint from one upon an express contract to one upon an implied contract. So far as appeared to the court upon the record before it, and so far as now appears, the plaintiff has known from the beginning of this litigation all of the facts necessary to enable him to properly state his cause of action. With that knowledge, in filing his original complaint, verified by his oath, he alleged that on or about the 16th day of February, 1909, plaintiff and defendant entered into a contract on which he based his claim in the action. Ten months intervened between the filing of that complaint and the commencement of the first trial. An additional period of more than one year expired before the decision was made by the lower court following upon that trial. About 5 months passed after the case was sent back to the court below before this application now under review was made. We recognize the rule which recommends liberality in the allowance of amendments to pleadings; nevertheless, within reasonable limits, the granting or denial of applications to amend remains within the discretion of the trial court. In exercising that discretion the court should take into consideration, not only the rights of the party seeking to amend, but also the rights of his opponents. It is not in every instance that the court is imperatively required to permit a plaintiff to substantially change the allegations of his complaint. That the plaintiff was not really entitled to thus change the statement of his cause of action, became apparent subsequently at the trial, as will be seen when we consider his own acts as shown by his testimony.

[2, 3] 2. On closing of the case as presented by the plaintiff's evidence defendant on various grounds moved for an order of nonsuit. This motion was granted, and judgment entered for the defendant. Appellant contends that the court erred in granting this motion. The grounds of the motion included among others, the following: (2) That the evidence introduced by plaintiff in support of his alleged cause of action wholly fails to prove the existence or making of any contract

by and between the plaintiff and this defendant, as alleged in plaintiff's complaint and upon which his cause of action is based. (4) On the ground that the evidence shows that any money, if any was expended by T. G. Watterson, or if any work was performed in the construction of said canal, the same was furnished and performed by him as a part of the contract of November 30, 1908, in evidence.

The granting of the motion is supported by both of the reasons stated. In our decision on the former appeal we made a statement of facts with respect to the Snyder contract and specifications and the undertaking given by Watterson in connection therewith and the consideration named in the contract and the failure to record the contract before commencement of the work and the circumstances which led to the substitution of Watterson for Snyder as the person in actual charge of the work of construction and the absence of any formal contract, either written or unwritten, between the plaintiff Watterson and the defendant by virtue of which Watterson undertook to complete the work. All of these facts appear on the record of the second trial to the same effect as before, and therefore we refer to our former statement of facts on these matters without repeating the statement here.

[4, 5] Appellant claims that on the second trial he has produced additional evidence tending to support his allegation that at the time when he took charge of the work, to wit, on or about the 16th day of February, 1909, an agreement for said work was entered into between himself and the defendant. We have examined this additional evidence, and are not able to agree that it strengthens the plaintiff's case. This evidence as discussed in the briefs of counsel for appellant refers especially to certain negotiations to which one Chappelle was a party. Chappelle was not a stockholder of the defendant corporation. He was interested in certain other corporations which had business relations with defendant corporation, and in that way he was interested in the successful completion of this canal work. For that reason he advanced some of the money paid by the defendant on account of the contract. On the 16th day of February, 1909, while the plaintiff was negotiating with Mr. Hall, a director of the defendant corporation, and with another director and with the corporation's engineer of the work, a request was made for an advancement on the Snyder contract, of some money necessary to enable the plaintiff to go on with the work; such money being not yet due. They found it necessary to consult with Mr. Chappelle, or report to him, concerning the situation. The plaintiff and Mr. Hall jointly prepared a telegram to Mr. Chappelle, which telegram was rewritten by the plaintiff, and by him was sent to Chappelle at Pasadena, Cal. This telegram was signed by Teel, president of the corporation, and Kevil, the engineer. It read as follows:

> "Snyder requires more money present needs. Watterson assumes charge and responsibility under same. We recommend advance of two thousand dollars on account. Wire answer."

On the next day Mr. Hall notified plaintiff that he would pay plaintif the $2,000 which had been O. K.'d by Mr. Chappelle. On the same day the plaintiff received this money, and he immediately proceeded with the work. The plaintiff, in his testimony, admitted that he never, before the time when he completed the work, asked or demanded of the defendant any money on work done under his supervision separate from the Collins and Snyder account, and that he never kept any account of the work under his supervision separate from the account that embraced the work from the beginning under the Snyder contract; that he never gave any notice to any officer of the corporation or to the corporation that he claimed to be working under a contract of his own, or that he was not completing it as Snyder's bondsman; that the defendant did not, nor did any of its officers, agree to pay him anything upon any basis separate or apart from the obligation under their contract with Snyder, "other than the understanding that when the job was completed I was to be paid for the extra work." But the Snyder contract and specifications themselves provided for payments for extra work. This "additional evidence" upon which appellant relies consisted principally of the testimony of certain witnesses to the effect that they had heard Director Smith of the defendant company say that he had seen Mr. Chappelle, and that Chappelle stated he was glad that Mr. Watterson had gone on with the work, and that when it was completed there would be no question of a right settlement. This really added nothing favorable to the plaintiff's contention herein. Complaint is now made that some of this testimony was stricken out by the court as hearsay. We think there was no error in this; but, even if it had been error, no harm was done, because there is in evidence a letter written by Chappelle to the plaintiff on February 24, 1909, in which Chappelle said that he was glad that Watterson had taken charge and would see the work finished, and that when it was completed he would feel like doing whatever was right and fair in making the final settlement. None of this evidence tends to show that these parties thought they were making a separate contract with Watterson. Watterson's receipt for the $2,000 paid to him on February 17, 1909, as well as the other receipts given by him, all referred to the payments mentioned therein as payments on account of the Snyder contract. The evidence drives straight to the conclusion that plaintiff's efforts to establish a separate new contract of defendant with himself is an attempt to avoid the limitations of the contract price as fixed by the Snyder contract. Unfortunately for the plaintiff, the facts do not support his theory of the case.

The evidence shows that the payments made by the defendant (including certain counterclaims to which it is admitted that defendant is entitled on account of payments made to subcontractors, etc., in order to relieve the canal property from liens) exceed the sum of $19,000, the price named in the Snyder contract. That price was subject to increase or decrease if changes in the work were made, increasing or decreasing the cost of the work as provided by the specifications. But the plaintiff, in order to establish any increase in the contract price above the stated price of $19,000, must have subjected his action to that contract as the measure and test of his right to recover. This necessity he refused to recognize. In the complaint on which the case was tried, and also in the complaint which the court refused to permit him to file, plaintiff has persistently ignored the price fixed by the Snyder contract, which limits any right which he may have had to recover any judgment against the defendant, and has insisted upon a separate contract between himself and the defendant, the existence of which he has failed to prove. The plaintiff elected to stand or fall upon the proposition stated in his counsel's reply brief:

> "Plaintiff has contended from the beginning, and still contends, that he never assumed to take up the work upon the canal under Snyder."

There are many exceptions noted, to rulings upon evidence. We have examined all of them. The rulings were free from any error which can be said to have prejudiced the plaintiff in his right to a full and fair presentation of his case.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

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39 Cal. App. 453

COOK v. REID, Auditor Riverside County.
(Civ. 2557.)

(District Court of Appeal, Second District, Division 1, California. January 23, 1919.)

1. Mandamus 🔑102(1)—Will Not Lie to Compel Allowance of Claim by County Auditor.

In view of Pol. Code, § 1543, as amended by Amendments to the Codes 1880, p. 31, St. 1905, p. 528, St. 1915, p. 746, and section 1700, a county auditor's duty, in relation to the allowance of an order for payment from the school fund of a district, signed by two trustees, is discretionary, and not merely ministerial, so that mandamus will not lie to compel him to draw warrant for payment unless an abuse of discretion is shown, the term "allow," as used in section 1543, as applied to a demand implying the right to examine the claim and in proper case to disallow.

[Ed. Note.—For other definitions, see Words and Phases, First and Second Series, Allow.]

2. Mandamus 🔑168(2)—Burden on Petitioner to Show Discretion of Public Officer Abused.

Where the official duty involved was discretionary, the burden is on petitioner for mandamus against the officer to prove that his refusal to act was unjustifiable.

Appeal from Superior Court, Riverside County; W. H. Thomas, Judge.

Petition for writ of mandate by W. H. Cook against Charles O. Reid, as auditor of the County of Riverside, State of California. From judgment denying the petition, petitioner appeals. Affirmed.

L. M. Chapman, of Los Angeles, and Adair & Winder, of Riverside, for appellant.

Sarau & Thompson, of Riverside, for respondent.

CONREY, P. J. The court below, having first sustained defendant's demurrer to the petition herein without leave to amend, entered judgment denying the plaintiff's petition for a writ of mandate. Plaintiff appeals from the judgment.

The facts set forth in the several counts of the petition are all alike, except that each cause of action is based upon a different demand. For the sake of brevity, we will discuss the case upon the first count alone as if it were all of the complaint.

In substance, the allegations are as follows: The plaintiff is, and at all times named in the complaint he was the owner and holder of a certain order and requisition of the Rannell's school district, county of Riverside, dated May 11, 1916, payable to W. H. Cook or order, for the sum of $75 from the school fund of said district, and signed by two trustees of said district, on that date. On June 30, 1916, the plaintiff presented said order to the superintendent of schools of the county of Riverside, who thereupon duly examined and approved the same in writing by indorsing upon said order, "Examined and approved, numbered as above, June 30, 1916," and affixed his signature thereto as county superintendent of schools and thereupon drew said requisition on said auditor as such. On the 6th day of September, 1916, the plaintiff presented said requisition to the defendant as auditor of said county at his office. Thereupon the defendant refused to allow and indorse the same and refused to draw his warrant in favor of the plaintiff for the amount stated in the order and requisition, although sufficient funds are available therefor.

The right claimed by plaintiff depends upon certain provisions of the Political Code. Section 1543 (as amended, Stats. 1915, p. 746):

> "It is the duty of the superintendent of schools of each county: * * * Third-a. On the order of the board of school trustees, * * * to draw his requisition upon the county auditor for all necessary expenses against the school fund of any district. * * * Each requisition must specify the purpose for which it is drawn, but no requisition shall be drawn upon the order of the board of school trustees * * * against the funds of any district except the teachers' or janitors' salaries, unless such order is accompanied by an itemized bill showing the separate items, and the price of each, in payment for which the order is drawn; nor shall any requisition for teachers' or janitors' salaries be drawn unless the order shall state the monthly salary of teacher or janitor, and name the months for which such salary is due. Upon the receipt of such requisition the auditor shall draw his warrant upon the county treasurer in favor of the parties for the amount stated in such requisition. The order of the board of school trustees, * * * when signed by at least two members of the board of trustees, * * * shall be transmitted to the superintendent, who shall, in case he approve said demand, indorse upon it, 'Examined and approved,' together with the number and date when approved, and shall, in attestation thereof, affix his signature thereto, and deliver the same to the claimant, or his order, who shall transmit the same to the auditor, who shall, in case he allows said demand, indorse upon it 'Allowed,' together with the number and date when allowed, and shall, in attestation thereof, affix his signature thereto, and deliver the same to the claimant and make a proper record thereof and charge against the particular fund of the particular district against which such demand was allowed; and said demand when so approved and signed by the superintendent, and when so allowed and signed by the auditor, shall constitute the requisition on the auditor, and the warrant on the treasury within the meaning of this act."

Section 1700:

> "No warrant must be drawn in favor of any teacher, unless the officer whose duty it is to draw such warrant is satisfied that the teacher has faithfully performed all the duties prescribed in section sixteen hundred and ninety-six."

Section 1543, when originally enacted in 1872, made it the duty of the superintendent of schools to draw the warrants. By amendment of section 1543, in the year 1880 (Amendments to the Codes, 1880, p. 31), it was provided that the auditor should draw the warrants. By amendent of 1905 (St. 1905, p. 528), the duty of the auditor with respect to such demands was, for the first time, qualified, by the clause, "in case he allows said demand." That clause has been retained in the subsequent amendments of the section. Section 1700 has not been amended since the year 1874.

In the argument, counsel have referred to section 4091 of the Political Code, which reads as follows:

> "The auditor must issue warrants as provided in section four thousand and seventy-six, on the treasurer, in favor of all persons entitled thereto, in payment of all claims and demands chargeable against the county, which have been legally examined, allowed, and ordered paid by the board of supervisors. The auditor must also issue warrants on the treasurer for all debts and demands against the county, when the amounts are fixed by law, or are authorized by law to be allowed by some person or tribunal other than the board of supervisors."

Under a statute substantially the same as section 4091, it has been determined that where a claim for services which, if performed, are a legal charge against the county, has been duly presented to the board of supervisors, regularly considered, allowed, and ordered paid, the auditor may not lawfully refuse to draw his warrant therefor upon the treasurer upon the ground that such services were never rendered. The duty of the auditor in such case is merely ministerial. But even there it was held that it is the privilege and duty of the auditor to refuse to draw his warrant upon the treasurer for claims which, although sanctioned and ordered paid by the board of supervisors, are void upon their face for want of jurisdiction in the board of supervisors, or showing an excess of jurisdiction or other plain and palpable violation of law. McFarland v. McCowen, 98 Cal. 329, 33 Pac. 113; Walton v. McPhetridge, 120 Cal. 440, 52 Pac. 731.

[1, 2] The provisions of section 1543 and section 1700 are in strong contrast with those of section 4091. The duty of the auditor to draw a warrant against the school funds of a district is limited to cases where "he allows said demand." When the Legislature amended section 1543 so that the duty of drawing the warrant was transferred from the superintendent of schools to the county auditor, and made the auditor one of the officers whose scrutiny the demand must pass, such amendment must be deemed to have been made with knowledge of the provisions contained in section 1700, and the two sections must be read together. The fact that the matter of allowance of the demand was referred to the auditor must be regarded as an intended safeguard to the treasury in addition to the allowance thereof by the superintendent of schools. The term "allows," as applied to a demand, implies the right to examine the claim and in a proper case to disallow the same. In other words, the duty of the auditor with respect

to this kind of a claim is discretionary and not merely ministerial. With respect to such a duty mandamus will not lie to compel the officer to draw the warrant unless an abuse of discretion has been shown. Williams v. Bagnelle, 138 Cal. 699, 72 Pac. 408, does not lend support to the plaintiff's argument. Section 1543, as then in force, directed the superintendent of schools to draw his requisition, on order of the board of schools trustees, and did not qualify that duty by the phrase "in case he approve said demand," or by any equivalent terms. The record in the action fully displayed the facts which, in the opinion of the court, did not justify the superintendent in his refusal to draw the requisition. Inglin v. Hoppin, 156 Cal. 483, 105 Pac. 582, also cited by appellant, rests upon the proposition that mandamus will lie to correct an abuse of discretion of a public officer, and will lie to enforce a particular action by him, when the law clearly establishes the petitioner's right to such action. But that case does not hold that the defendant officer must affirmatively allege and prove that his refusal to act was justifiable. In such cases, where the official duty is involved is discretionary, the burden is upon the petitioner. In the present action, petitioner's complaint does not show what service or other consideration is the foundation of his claim, and does not allege any fact from which an abuse of discretion can be inferred.

The judgment is affirmed.

We concur: JAMES, J.; MYERS, Judge pro tem.

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42 Cal. App. 479

COE v. CITY OF LOS ANGELES et al.

(Civ. 2546.)

(District Court of Appeal, Second District, Division 1, California. July 29, 1919. Rehearing Denied by Supreme Court Sept. 25, 1919.)

1. MUNICIPAL CORPORATIONS 🔑17, 18—CONSOLIDATION—"DE FACTO CORPORATION"—QUO WARRANTO.

Where there has been an attempt, under the Municipal Annexation Act of 1913 and amendments thereto, to annex one city to another, and where the authorities of former city have declared annexation to have been carried at an election held to decide the question, and where such city, as an incorporated city, has ceased to function, and the latter city has assumed jurisdiction over its territory and inhabitants, the latter city, as to such annexed territory, is a "de facto corporation," and any attack upon its exercise of the franchise must be by quo warranto proceedings at instance of the state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, De Facto Corporation.]

2. MUNICIPAL CORPORATIONS 🔑17 — DE FACTO CORPORATION—REQUISITES.

The requisites of a de facto corporation are a charter or general law under which such a corporation as it purports to be might lawfully be organized, an attempt to organize thereunder, and actual user of the corporate franchise.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Charles Coe against the City of Los Angeles and others. Judgment of dismissal, and plaintiff appeals. Affirmed.

Paul W. Schenck and Richard Kittrelle, both of Los Angeles, for appellant.

Albert Lee Stephens, City Atty., Charles Burnell, Asst. City Atty., and C. D. Ballard, all of Los Angeles, for respondents.

SHAW, J. In this action plaintiff attacks the proceedings had and taken under the provisions of the Municipal Annexation Act of 1913 (Stats. 1913, p. 577), and amendments thereto, for the annexation of certain territory, known as the city of Sawtelle, to the city of Los Angeles. To the complaint, which asks that the defendants be enjoined and restrained from further proceedings in the matter, that the election thereon be declared null and of no effect, and that the action of the city of Los Angeles, purporting to have been had pursuant to the provisions of said municipal act, be declared void and ineffectual for the purpose intended, defendants interposed a demurrer upon both general and special grounds. The demurrer was sustained, without leave to amend. Judgment of dismissal followed, from which plaintiff appeals.

[1] In our opinion, the complaint failed to state a cause of action, for want of jurisdiction. It appears therefrom that plaintiff sues as a citizen and taxpayer of the city of Sawtelle; that a petition in due form and signed by the requisite number of electors of Sawtelle was presented to its board of trustees, in pursuance of which an ordinance was regularly adopted in due form calling an election for the determination of the question, followed by the due publication of the notice thereof as required by law, which election was thereafter held in accordance with such notice; that as a result of the election so held the proposition was by the proper officers of the city of Sawtelle declared carried, and the legislative body of the city of Los Angeles, as the final step necessary to effect the consolidation, adopted an ordinance pursuant to the provisions of the "act to provide for the consolidation of municipal corporations, as amended in 1917." (St. 1917, p. 30. It is further alleged that by virtue of these proceedings the defendants assert and claim that said consolidation has been completed and fully consummated, and that the city of Sawtelle as an incorporated city has ceased to

exist, and is now a part of the city of Los Angeles. In other words, the city of Sawtelle as such has ceased to function, and the city of Los Angeles, in the exercise of a franchise (People v. City of Oakland, 92 Cal. 611, 28 Pac. 807), has by virtue of the proceedings assumed jurisdiction over its territory and inhabitants as a part of the city of Los Angeles, and is now exercising governmental control and municipal functions over the same. Upon this showing the city of Los Angeles, in the assumption of political functions over the annexed territory and its inhabitants, must be deemed at least a de facto corporation, the requisites of which, as stated in Tulare Irrigation District v. Shepard, 185 U. S. 1, 22 Sup. Ct. 531, 46 L. Ed. 773, are:

> "A charter or general law under which such a corporation as it purports to be might lawfully be organized; * * * an attempt to organize thereunder; and * * * actual user of the corporate franchise."

[2] As we have seen, there is a general law pursuant to which the consolidation might be effected. There was an attempt to consolidate the two cities thereunder, the success of which, in accordance with the statutory provisions, was, notwithstanding appellant's claim of irregularities in the election held, recognized and declared by the officers primarily charged with the duty of determining the result, and, upon the asserted claim and assumption that they have fully complied with all requirements of law, the city of Sawtelle has as an incorporated city ceased its functions, which, in the exercise of the franchise, the city of Los Angeles, as to such territory and its inhabitants, has assumed governmental control as a part of said last-named city. The question involved is one of a purely political nature (People v. City of Los Angeles, 154 Cal. 220, 97 Pac. 311), and not affecting the private rights of plaintiff, in which capacity he may not challenge the asserted right to exercise jurisdiction in the matter. If such a case can be maintained by a private citizen, it may be brought at any time within the statutory limitation, and must necessarily lead to uncertainty and interminable confusion. Many cases have arisen in this state involving the validity of proceedings for the organization of protective, reclamation, and irrigation districts, wherein, upon the ground that such organizations were at least de facto corporations, it was declared that inquiry into the validity of their organization was restricted to quo warranto at the suit of the state, and not subject to attack by private individuals. Keech v. Joplin, 157 Cal. 1, 106 Pac. 222; Jaques v. Board of Supervisors, 24 Cal. App. 381, 141 Pac. 404; Reclamation District No. 765 v. McPhee, 13 Cal. App. 383, 109 Pac. 1106; Williams v. Board of Supervisors, 65 Cal. 160, 3 Pac. 667. In the case of People ex rel. Warren v. York, 247 Ill. 591, 93 N. E. 400, it is said, quoting from the syllabus:

> "The legality of proceedings by which additional territory is added to a municipality cannot be inquired into, except upon a direct proceeding by quo warranto, and not upon a bill in equity or upon objections to a tax."

Numerous cases may be cited to the same effect. Our conclusion is that, conceding, as claimed by appellant, illegal ballots were cast and counted at the election, without which the consolidation would not have been effected, nevertheless, since it appears that the city of Los Angeles, as to the annexed territory, is a de facto corporation, any attack upon its exercise of the franchise must be by quo warranto proceedings at the instance of the state.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

42 Cal. App. 496

NOBLE v. MANATT. (Civ. 2989.)

(District Court of Appeal, Second District, Division 1, California. July 29, 1919.)

JOINT TENANCY ⟹10—TENANCY IN COMMON ⟹38(13)—RELIEF OF COTENANT ON EJECTION LIMITED TO REINSTATEMENT IN COMMON POSSESSION.

Though a joint tenant or tenant in common may maintain an action of forcible entry and detainer against a cotenant who has ejected him, his right to restitution is restricted to his right of reinstatement to the common possession only.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by D. L. Noble against Samuel Manatt. From judgment for plaintiff, defendant appeals. Reversed.

Hamilton & Lindley, of San Diego, for appellant.

W. R. Andrews, of San Diego, for respondent.

SHAW, J. This is an appeal from a judgment in favor of plaintiff, rendered in an action of forcible entry and detainer. The premises, the possession of which is involved in the controversy, consist of a certain lot or tract of land and the dwelling house thereon, of all of which, in accordance with the allegations of the complaint, the court found plaintiff was on June 18th in the quiet and peaceable possession, and that on said date defendant, with force and violence, entered said premises, by breaking open the doors to said dwelling house, and threw plaintiff's goods, clothing, and provisions into the street, and, as a conclusion of law, found that plaintiff was entitled to damages in the sum of

$61.60, which was trebled, and the restitution of possession of the whole of the premises described in the complaint.

Without regard to other alleged errors, the judgment must be reversed, for the reason that these findings are wholly without support of evidence. It appears without controversy that on March 3d defendant, as owner of the property, which was then unoccupied, together with plaintiff and J. H. Howell, moved into and took possession thereof under an agreement that they would occupy the same jointly, each contributing his own belongings and, in a way, sharing the living expenses, in accordance with which arrangement they lived until the acts of defendant complained of. That at most plaintiff's possession was a joint possession in conjunction with Howell and defendant, all having equal possession and right of egress and ingress to the house, to which defendant had a key, clearly appears. While a joint tenant or tenant in common may maintain an action of this character against a cotenant, who has ejected him, his right to restitution is restricted to his right of reinstatement to the common possession only. 19 Cyc. 1141; Lick v. O'Donnell, 3 Cal. 59, 58 Am. Dec. 383. The effect of the findings and judgment based thereon is to oust defendant from the property in which his right to possession is at least equal to that of plaintiff, to whom the exclusive right to the possession of the property is adjudged. "All that plaintiff was entitled to, therefore, was to be let into possession with the defendant—to enjoy his moiety." Lee Chuck v. Quan Wo Chong & Co., 91 Cal. 593, 28 Pac. 45.

Our conclusion renders it unnecessary to discuss other alleged errors.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

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42 Cal. App. 555

ATCHISON, T. & S. F. RY. CO. v. SMITH et al. (Civ. 2924.)

(District Court of Appeal, Second District, Division 2, California. Aug. 5, 1919.)

1. Injunction 🔑26(1)—Alleged Debtor May Enjoin 648 Actions and Compel Single Action.

An alleged debtor may enjoin the prosecution of 648 separate actions and compel their litigation in a single action, all being between the same plaintiff and defendant on claims arising in the same manner, involving like or similar proof, if there is a conspiracy and combination between plaintiff and the justice of the peace to force a settlement and payment by reason of the prohibitive cost of defending them, since the remedy by change of venue would involve prepayment of costs (Code Civ. Proc. § 836), which would be greater than the total amount of claims, and still subject defendant to multiplicity of suits and indefinite future costs in another tribunal.

2. Justices of the Peace 🔑69—Cannot Consolidate 648 Actions and Try Them Together.

The justice court could not consolidate 648 actions on claims against the defendant railroad company for overcharges on freight shipments, under Const. art. 12, § 21, relating to long and short hauls, which claims had been assigned to plaintiff, and try them together.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Suit by the Atchison, Topeka & Santa Fé Railway Company against T. E. Smith and George Flournoy, a Justice of the Peace of the Sixth Judicial Township, Kern County, Cal. Judgment for defendants, and plaintiff appeals. Reversed, with directions.

Robert Brennan, U. T. Clotfelter, M. W. Reed, and E. W. Camp, all of Los Angeles, for appellant.

E. J. Emmons and H. E. Johnstone, both of Bakersfield, for respondents.

SLOANE, J. The plaintiff filed a complaint in equity to enjoin the prosecution of a large number of suits instituted against it by the defendant, and to compel their litigation in a single action. Demurrer to the complaint was sustained, and, the plaintiff refusing to amend, judgment was given for the defendant. This appeal is by the plaintiff from the judgment refusing the equitable relief prayed for and dismissing the action. The questions on appeal, therefore, go to the sufficiency of the complaint to entitle the plaintiff to relief.

The facts set out in the complaint, and as admitted under demurrer, so far as this appeal is concerned, are in substance as follows:

The plaintiff is a railway corporation, operating its lines of railroad from Chicago, Ill., to the Pacific Coast, in the state of California, with lines extending to various towns between Los Angeles and San Francisco. At various dates between October 1, 1911, and May, 1, 1912, said railway company transported and delivered shipments of freight to numerous consignees, located in the cities of Reedley, Dinuba, Visalia, Tulare, Corcoran, Wasco, and Bakersfield, charging and collecting therefor rates fixed by its regular tariff schedules, but which rates were in excess of the amount that it would be authorized to collect under the long and short-haul clause of section 21 of article 12 of the state Constitution. The defendant T. E. Smith, under alleged assignments of their claims for such excess charges from 648 of such consignees of freight, brought 648 separate suits thereon in the justice's court of the defendant George Flournoy, a justice of the peace of Kern county, against the railway company, the plaintiff here. These suits were for the respective amounts of each claim, as money had and received by the railroad corporation. The total amount of these claims is the aggregate sum of $6,015. It is alleged that each of 467 of these 648 claims amounts to less than the fees which the justice of the peace was entitled to demand and collect as costs before the action thereon could be tried; 107 others are for less than $15; and the remaining 74 are for amounts running from $15 to $229.92—by far the larger part being for sums between $25 and $30. It also appears that the minimum amount of court costs alone for the trial of these cases in the justice's court would exceed the total amount of the claims, and, if contested and witnesses subpœnaed, would amount to several thousand dollars in excess of that sum, and that, if appeals were taken, the total amount would run up to $15,000 or $20,000.

It is further alleged that the defendants Smith, as plaintiff, Flournoy, the justice of the peace, and Emmons, Smith's attorney, have confederated and conspired together to maintain and prosecute these numerous separate actions, instead of consolidating them, in order to force the defendant, by the multiplicity of the suits and the excessive cost of litigating them separately, to a settlement without a contest on their merits; that Smith is financially irresponsible, and that this plaintiff, defendant in each of the justice court actions, in the event of successfully defending the suits, would be unable to collect any judgment for recovery of its costs against Smith; and that Smith himself is involved in no financial outlay or risk in the matter, by reason of an agreement between him and the justice of the peace that the latter will look to a recovery against the defendant railway company to collect his fees. It is further alleged that the railway company has a good and meritorious defense to all of these claims; that the rates charged were valid and reasonable; that they were in each instance voluntarily paid by the respective consignees without compulsion, and after delivery of the various consignments had been made; and that section 21 of article 12 of the Constitution of the state of California is void, because in conflict with the commerce clause of the federal Constitution.

The complaint here asks, as permanent relief, that the defendants Smith and Flournoy, as justice of the peace, be perpetually enjoined from maintaining or prosecuting said 648 actions, or any of them, that the defendant Smith be required to set up and litigate in the present action all his claims involved in the 648 separate suits in the justice's court, and that the rights of the plaintiff and defendant in said justice's court actions be required to be set up and determined in this action, so as to avoid a multiplicity of actions and a flagrant abuse of the legal processes of the state of California, and for general relief.

[1] Assuming the facts as pleaded to be true, as we must for the purposes of this appeal, there are two aspects of this case that ought to entitle plaintiff to relief: First, if a conspiracy and combination have been entered into between the respondents, Smith as plaintiff in the numerous suits, and the justice of the peace before whom they are pending, to force a settlement and payment of these claims by reason of the prohibitive cost of defending them, it is such an abuse of the processes of the courts as should estop the plaintiff from prosecuting them and the justice from trying them. It may be suggested that a change of venue could be obtained. This would remove the element of a disqualified court, but it would involve the prepayment of costs (Code Civ. Proc. § 836) greater in amount than the total sum of the claims, and still subject the defendant there to the same multiplicity of suits and indefinite future costs in another tribunal.

If the fraud charged here were in the origin of the cause of action itself, it could clearly be reached by injunction, under the authority of Southern Pacific Co. v. Robinson, 132 Cal. 408, 64 Pac. 572, 12 L. R. A. (N. S.) 497. But the claim sued on in each of the 648 cases constitutes a bona fide cause of action for which the holder is entitled to maintain suit. In Southern Pacific Co. v. Robinson, above cited, the defendants assiduously worked up some 3,000 or more cases against the railway company, by procuring people to buy tickets between two stations on the line of the road, and then demanding stop-over checks at an intermediate point, knowing, and in fact desiring, that the request would be denied. These claims were based upon section 490 of the Civil Code, the validity of which was disputed by the railway company. The defendants in the Robinson Case brought separate suits in various justice's courts upon 674 of these claims; some 500 being involved in the proceeding to enjoin. An injunction against the prosecution of these cases was sustained by the Supreme Court, on the ground that the claims were fraudulent, that the claimants were not in good faith seeking stop-over privileges, but seeking to have this privilege denied, so as to sue the railway company for the penalty and damages, and that because of the multitude of actions there was no adequate remedy at law. Mr. Justice Garoutte says in the opinion:

"We leave this branch of the case with the declaration that this action is maintainable in a court of equity by reason of the claim of a confederacy and combination formed and existing between these appellants to create and prosecute the aforesaid 3,000 causes of action against the plaintiff, and upon the further ground that, in order to avoid a multiplicity of actions, equity will consolidate these 3,000 alleged causes of action into one action, and, thus having taken hold of the matter, will dispose of it in its entirety."

It may, however, be reasonably contended in this case that the principle involved is not different from that in the case just cited, as in each case the multiplicity of suits is resorted to as a means of extorting from the defendant a settlement which could not be had in a consolidated action without a full investigation on the merits. Whatever potential rights Smith, the defendant here, may have to recover on the 648 claims in which he has brought suit, the fact remains, under the allegations of the complaint here under consideration, that he is making use of the processes of the courts in the manner he has adopted, not to procure a judicial determination of his rights, but to prevent such a determination, and to force a settlement by piling up against the railway company of excessive and prohibitive costs.

[2] But in the second place, there is presented the question as to whether or not the nature of the numerous actions pending is not such—waiving the question of a fraudulent purpose and combination in bringing them—as to call for relief in equity by way of their consolidation. We have here 648 actions, brought by one plaintiff against one defendant, all arising out of the same general state of facts, and all dependent upon the determination of the same disputed issues of law. It is true that there are independent issues of fact which will call for separate proof on each claim, but to no greater extent than if the plaintiff were suing the defendant on an equal number of items in a store account. It may be conceded that equity will not ordinarily prevent numerous individual claimants, each having a separate cause of action against the same person, from maintaining separate actions at law, merely to prevent a multitude of suits, or to relieve from excessive costs, even where the right of recovery in each depends upon the same state of facts and the same principles of law. The result of a consolidation of such actions would be to subordinate the rights of the individual claimant to the convenience of the collective body. But here we have but one plaintiff and one defendant. By his allegation of the ownership of each of these claims the plaintiff has set up a common and collective interest in them. Presumptively only the plaintiff, Smith, is concerned in the prosecution of these claims. His interest in one is no different from his interest in all. He stands in the same relation to them, so far as his causes of action and the methods of prosecuting them are concerned, as though he were the original consignee of all the freight shipments involved. The allegations of the complaint, as well as the inference arising from the very fact of his having brought 648 separate actions, indicate some ulterior purpose; for no man, in his senses, having that number of claims which he could properly unite in one action, if what he was after was a fair and speedy trial on the merits, would resort to a multitude of separate actions, particularly if he had to subject himself to the ordinary expense incident alone to filing suit and serving process. Obviously, if the plaintiff is not seeking to abuse the processes of the law, his own interests, as well as those of the defendant, demand a consolidation of these actions. It would require two years of constant work of the justice's court, if each of these cases should be separately tried, before they would be disposed of; whereas they could be tried in a consolidated action in a few days at most. If equity cannot meet a situation like this, its powers should be enlarged.

Even where the right of action exists in numerous claimants, if the object of bringing a multitude of actions is to harass and oppress, equity will interfere. The Supreme Court of Alabama, in the case of Southern Steel Co. v. Hopkins, 174 Ala. 465, 57 South. 11, 40 L. R. A. (N. S.) 464, Ann. Cas. 1914B, 692—one of the decisions cited and relied on by respondent—while sustaining the right of numerous persons damaged by a single tort to maintain separate actions, says:

"But the mere fact that the defendant has committed a tort, by which he injured one or a hundred parties, cannot give him an equity to prevent each and every one of the parties so injured from maintaining an action against him to recover damages. If there had been a combination or conspiracy between such numerous parties to vex and harass the complainant by numerous suits, then he would have an equity to enjoin their prosecution."

In most of the cases we have examined, where equity has refused to enjoin the prosecution of numerous suits for actions arising out of the same cause, it has been upon the ground that there was not a community of interest in the parties against whom the equitable relief is sought. It has not been suggested in this case why the interests involved in each of these 648 actions have not been consolidated in the one plaintiff by virtue of the assignments.

We do not have to contemplate, in this proceeding, the confusion pointed out in the Alabama case above cited, involving—

"110 separate answers, and as many pleas and demurrers in one suit, and the innumerable issues of law and of fact that would be raised thereby, and the defense being conducted by 110 different attorneys, or the parties deprived of the right to have the counsel of their choice."

But, even so, equity might still take over the litigation. In Smyth v. Ames, 169 U. S. 466, 517, 18 Sup. Ct. 418, 422 (42 L. Ed. 819) the Supreme Court of the United States upholds the power of a court of equity to enjoin the bringing and maintaining of numerous actions to enforce the terms and penalties of an act regulating rates of transportation, which act, the petitioners claimed, was unconstitutional. After citing numerous cases upholding the doctrine contended for, the court says:

> "In these cases the plaintiffs, stockholders in the corporations named, ask a decree enjoining the enforcement of certain rates for transportation upon the ground that the statute prescribing them is repugnant to the Constitution of the United States. Under the principles which in the federal system distinguish cases in law from those in equity, the Circuit Court of the United States, sitting in equity, can make a comprehensive decree covering the whole ground in controversy and thus avoid a multiplicity of suits that would inevitably arise under the statute. The carrier is made liable, not only to individual persons for every act, matter or thing prohibited by the statute, and for every omission to do any act, matter or thing required to be done, but to a fine. * * * The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency and determine, once for all, and without a multiplicity of suits, matters that affect, not simply individuals, but the interests of the entire community."

The actions referred to were brought to enjoin the bringing of numerous suits. Can it be doubted if, as here, such suits had been actually begun, that equity would have extended its relief, by a requirement that all such be consolidated and tried in the equity proceeding? It will be observed that in the decision above cited the same issue was presented by the petitioners as in the cases before us—the determination by a court of equity of the validity of a rate schedule, in order to avoid a multitude of actions at law arising on the disputed validity of the rate.

The right of plaintiff, under circumstances such as are pleaded here, to resort to equity to prevent the prosecution of a multitude of actions finds further support in the following authorities: Pomeroy's Eq. (4th Ed.) §§ 243–276; Jordan v. Western Union Telegraph Co., 69 Kan. 140, 76 Pac. 396; Third Ave. R. R. Co. v. Mayor of New York et al., 54 N. Y. 159; Chicago Tel. Co. v. Illinois, etc., Association, 106 Ill. App. 54, 72; Chicago v. Collins, 175 Ill. 445, 51 N. E. 907, 49 L. R. A. 408, 67 Am. St. Rep. 224; Milwaukee Electric Ry. Co. v. Bradley, 108 Wis. 467, 84 N. W. 870; Liverpool & London, etc., Insurance Co. v. Clunie (C. C.) 88 Fed. 160.

Especially where law and equity jurisdiction is vested in the same tribunal, as in the state of California in a matter where equitable issues are presented, the court can take over the entire controversy and try all questions of law and fact. As to the plaintiff in the actions at law being deprived of the right of trial by jury, it is within the province of a court of equity to grant a trial by jury of any disputed issue of fact where the interests of justice demand it. If the justice's court where all these actions are pending could direct their consolidation into one action and try them together—as could be done if they were pending in a superior court—there might be no need of a resort to equity. But as no such power rests in the justice's court, equity seems to afford the only adequate relief from the abuse complained of.

We are of the opinion that the complaint was sufficient to entitle plaintiff to a trial of the issues presented and that the demurrer should have been overruled. On a proper joining of issues by answer, and proof of the pendency of numerous actions in the justice's court, under the conditions alleged in the complaint, plaintiff will be entitled to an order enjoining further prosecution of said justice's court actions, and requiring the plaintiff therein to set up his claims for relief in this action, and, to a complete determination of all the rights of the parties under the issues joined.

The judgment is reversed, with directions to the trial court to proceed as above indicated.

We concur: FINLAYSON, P. J.; THOMAS, J.

42 Cal. App. 453

PEOPLE v. CASTRO. (Cr. No. 672.)

(District Court of Appeal, Second District, Division 1, California. July 29, 1919.)

1. CRIMINAL LAW ⚷730(1)—ERROR IN LIMITATION OF ARGUMENT CURED.

Where the court trying a prosecution for murder erroneously limited defendant's two counsel to 2½ hours in their argument, in the absence of anything to show that the additional three-quarters of an hour actually allowed counsel was not ample, the error must be deemed to have been cured.

2. CRIMINAL LAW ⚷1130(2)—SPECIFICATION OF ERRORS IN INSTRUCTIONS INSUFFICIENT FOR REVIEW.

On appeal from conviction of murder, where the sole argument that the trial court erred in refusing instructions is the claim the refusal to give each and all of the instructions found in the clerk's transcript on pages of certain numbers was prejudicial error, and withdrew full consideration of the case from the jury, the appellate court will not trouble to examine such instructions to discover wherein they are erroneous.

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Bernardino Castro was convicted of murder in the second degree, and he appeals. Affirmed.

R. J. Adcock and M. G. Phillips, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

SHAW, J. Defendant was charged with the crime of murder. The trial commenced on April 14th and ended on April 17th, with a verdict convicting him of murder in the second degree.

At the close of the evidence the court, addressing counsel, asked how much time they desired in which to argue the case, to which Mr. Adcock, one of defendant's attorneys, replied that he would like 2 hours for himself, stating that they had been 3 days introducing the testimony, and Mr. Phillips, another attorney for defendant, replied that he took 2 hours at the last trial. Thereupon the court fixed 2½ hours as the time allotted to each side for argument, saying, "You can apportion it to suit yourselves." No objection other than as stated appears to have been made to the action of the court. Thereafter defendant moved for a new trial, and presented an affidavit to the effect that the action of the court in so limiting the time for argument was prejudicial to defendant in that the time was inadequate for defendant's counsel to fairly and properly review the evidence and present argument based thereon in his behalf, on account of which many important things were necessarily omitted which otherwise could have been presented. A counter-affidavit was filed by the district attorney to the effect that when the court fixed the time allotted for argument defendant's counsel announced they would like longer time, and thereupon the district attorney gave them one-half hour of his time, which, together with an additional 15 minutes they used, thus consuming in all a period of 3 hours and 15 minutes in the argument; and, further, that there is nothing in the cause which required a longer period for the proper presentation of the defense.

[1] Under this state of the record, even were it conceded that the limitation of 2½ hours so accorded defendant for arguing the case was an abuse of discretion on the part of the court, there is nothing in the record to show that the additional three-quarters of an hour was not ample and all required by counsel for the purpose of arguing the case; hence, if the court erred in fixing the time, such error must be deemed to have been cured by the fact that additional time was granted, and, as thus extended, it is not claimed or shown that the time actually accorded counsel for argument was inadequate.

[2] Another point urged by appellant for a reversal is the ruling of the court in refusing instructions requested by defendant. The sole argument upon the point is as follows:

> "We also urge the point, with emphasis, that the refusal of the court to give each and all of the instructions found in the clerk's transcript on pages 32, 33, 34, 35, 39, was prejudicial error and withdrew a full consideration of the case from the minds of the jury."

To determine whether or not there is any merit in appellant's contention would necessitate an independent examination and inquiry as to the correctness of the ruling, and this we do not feel inclined to make. People v. Woon Tuck Wo, 120 Cal. 297, 52 Pac. 833. A sufficient answer to the argument presented is to quote from People v. McLean, 135 Cal. 306, 67 Pac. 770, where it is said:

> "We again repeat what we have said before, that we will not examine alleged errors presented in this way. It is due to this court from the members of the bar to point out clearly and concisely the rulings complained of as erroneous and the reasons why they are so, with reference to authorities, if any. In case counsel will not take the trouble to do so, we shall deem the matter as of not sufficient importance to merit notice in an opinion."

To like effect is People v. Ruiz, 179 Pac. 691.

The judgment is affirmed.

We concur: CONREY, P. J; JAMES, J.

42 Cal. App. 527

COLLINS v. JOHN ROBERTS CO. et al.

(Civ. 2346.)

(District Court of Appeal, Second District, Division 1, California. July 31, 1919.)

Appeal and Error 🔑434, 773(4) — Judgment Affirmed for Want of Prosecution.

Where appellants filed no points and authorities in support of their appeal and did not appear at the calling of the calendar to make oral argument, the judgment should be affirmed.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by B. V. Collins against the John Roberts Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Jones & Weller, of Los Angeles, for appellants.

Kemp, Mitchell & Silverberg, of Los Angeles, for respondent.

PER CURIAM. In this case there was an appeal taken by the defendants from the judgment. A transcript was filed in this court in April, 1917. The appellants filed no points and authorities in support of their appeal, and did not appear at the calling of the calendar to make oral argument. No cause is therefore shown why the judgment appealed from should be held erroneous.

The judgment is affirmed.

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42 Cal. App. 462

PEOPLE v. BROWN. (Cr. No. 666.)

(District Court of Appeal, Second District, Division 1, California. July 29, 1919.)

1. **Assault and Battery 🔑78—Indictment for Assault Likely to Produce Great Injury Sufficient.**

Indictment, charging that defendant committed an assault by means and force likely to produce great bodily injury, in that he willfully, unlawfully, etc., made an assault on the person of another by such means and force in that he whipped, struck, beat, bruised, and cut such other with a rawhide whip on the naked body, *held* sufficient to charge the offense denounced by Pen. Code, § 245, in that it specified the manner of use of the whip.

2. **Criminal Law 🔑178—Dismissal of Misdemeanor Charge Not a Bar to Prosecution for Felony.**

Under Pen. Code, § 1387, providing dismissal of the action bars another prosecution for the same offense if a misdemeanor, but not if a felony, dismissal on motion of the district attorney of complaint in justice court, charging defendant with battery, a misdemeanor, *held* not a bar to prosecution of defendant for the felony of assault by means and force likely to produce great injury, denounced by section 245.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

H. W. Brown, Sr., was convicted of assault by means and force likely to produce great bodily injury, and he appeals. Affirmed.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

SHAW, J. Defendant by an indictment was charged with the crime of assault by means and force likely to produce great bodily injury, as provided in section 245 of the Penal Code. To this charge he entered three pleas; that of not guilty, once in jeopardy, and former acquittal. As to the two last pleas, the jury found for the people, and rendered a verdict that defendant was guilty of an assault. Judgment followed, from which this appeal is prosecuted.

[1] The charge in the indictment is that defendant committed an assault by means and force likely to produce great bodily injury, in "that the said H. W. Brown, Sr., * * * did willfully, unlawfully, feloniously, and forcibly make an assault upon the person of one Henry West Brown, Jr., by means and force likely to produce great bodily injury, in this, that he, the said H. W. Brown, Sr., did then and there whip, strike, beat, bruise, and cut the said Henry West Brown, Jr., with a rawhide whip upon the naked body of him, the said Henry West Brown, Jr., which said whipping, striking, beating, bruising, and cutting with said rawhide whip as aforesaid, upon the naked body of the said Henry West Brown, Jr., was likely to and did produce great bodily injury to and upon the said Henry West Brown, Jr." Appellant insists that the indictment is insufficient, and hence the court erred in overruling his demurrer. In support of his contention he cites the case of People v. Perales, 141 Cal. 581, 75 Pac. 170. In that case the charge was the commission of an assault "by means likely to produce great bodily injury, to wit, with a heavy wooden stick," the use of which language was held to be insufficient, for the reason that it was not stated how or in what manner the heavy wooden stick was used. The court there said, "The information should have specified the particular means used, which it is claimed constitute an offense within the general terms of the section," and further held "that the information shall contain a statement of the acts constituting the offense, and the particular circumstances of the offense charged, in such a manner as will enable a defendant to understand the nature of the accusation against him." In our opinion, the indictment fully complies with the rule announced in People v. Perales,

supra, as to the required averment in such cases; indeed, it is difficult to perceive that in the instant case language could have been selected better adapted for the purpose of acquainting defendant with the charge of which he was accused. The allegations as to the force with which the rawhide whip was used, together with the particular circumstances of the offense, clearly distinguishes this case from the charge in the Perales Case and brings it within the rule announced in that of People v. Emmons, 61 Cal. 487.

[2] It appears that before the indictment was returned against defendant a complaint, based upon the same assault, had been filed in the justices' court of Los Angeles township, charging him with battery. After the return of the indictment, the complaint was on motion of the district attorney, dismissed. Appellant contends that, since the charge alleged in the complaint was based upon the same acts constituting the offense for which he was indicted, the dismissal of the misdemeanor in the justices' court constituted a bar to the prosecution of the felony charge upon the indictment. This contention is based upon section 1387 of the Penal Code, which provides:

> "An order for the dismissal of the action, as provided in this chapter, is a bar to any other prosecution for the same offense, if it is a misdemeanor; * * * but an order for the dismissal of the action is not a bar if the offense is a felony."

In the justices' court defendant by the complaint was charged merely with the commission of a misdemeanor, namely, that of battery. Hence, under the plain reading of the statute, the dismissal would have barred further prosecution upon a new charge for the commission of such misdemeanor. But the indictment charged a felony, and, though based upon the acts which constituted the battery, other facts were alleged in connection therewith which made the offense a felony, in the prosecution for which it is expressly provided by the statute that such dismissal shall not constitute a bar to the prosecution of defendant for the felony charge. Not only, to our minds, is the statute perfectly clear, but the interpretation given is sustained by the opinion in the case of People v. Smith, 143 Cal. 597, 77 Pac. 449, where defendant was charged upon a complaint filed in a justices' court with petty larceny, which action was dismissed and defendant indicted for petty larceny and a prior conviction of burglary, constituting a felony, and it was there held that the dismissal of the charge of petty larceny on motion of the district attorney for the purpose of charging a felony for the same offense against the same defendant based upon a prior conviction of burglary, does not operate as a former acquittal or constitute jeopardy within the meaning of the statute. As said in the case cited:

> "It was never intended that the dismissal should be a bar to a prosecution for a felony. The defendant has never been in jeopardy for the felony, if the act charged against him be a felony."

By reason of defendant in that case having, prior to committing the crime of petty larceny, been convicted of burglary, the commission of petty larceny made the latter crime a felony. So here, by reason of the battery being accompanied by means and force likely to produce great bodily injury, the acts constituted a felony for which defendant was subject to prosecution.

Since the statute not only in its terms, but as interpreted by the Supreme Court in People v. Smith, supra, is perfectly clear, it is unnecessary to review authorities cited by defendant in support of his contention, from other jurisdictions.

We find no merit in the points urged for a reversal. The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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42 Cal. App. 520

AMERICAN STEEL PIPE & TANK CO. v. HUBBARD. (Civ. 2363.)

(District Court of Appeal, Second District, Division 1, California. July 31, 1919.)

1. SALES 🔑441(3)—EVIDENCE INSUFFICIENT TO SHOW DIFFERENCE IN GOODS DELIVERED FROM SAMPLE.

In an action for the price of oil orchard heaters, evidence *held* insufficient to sustain the defense urged, under Civ. Code, § 1766, that the goods delivered differed from the sample exhibited to defendant buyer when she gave plaintiff seller's agent the order.

2. SALES 🔑288(2)—DIFFERENCE IN GOODS DELIVERED FROM SAMPLE WAIVED BY ACCEPTANCE.

Where plaintiff seller of oil orchard heaters, purchased by sample, delivered to defendant buyer heaters differing from the sample, but the buyer, with opportunity to inspect, nevertheless accepted and used the heaters, she must be deemed to have waived any objection on account of their being otherwise than as represented.

3. SALES 🔑437(1)—IMPLIED WARRANTY WAIVED BY FAILURE TO PLEAD.

In an action for the price of oil orchard heaters, where defendant buyer did not plead as a defense violation of an implied warranty, under Civ. Code, § 1770, she could not rely upon such violation either in support of a cause of action or as defense.

4. SALES 🔑267—EXTENT OF WARRANTY ESTABLISHED BY WRITTEN CONTRACT.

Where a writing exists between the parties to a sale, the extent of a warranty made is limited to the language used, and parol evidence will not be admitted to extend, enlarge, or modify that which the writing specifies.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the American Steel Pipe & Tank Company against Ella P. Hubbard. From judgment for plaintiff, defendant appeals. Affirmed.

Haas & Dunnigan, of Los Angeles, for appellant.

Hanson, Hackler & Heath, of Los Angeles, for respondent.

SHAW, J. In this action plaintiff sought to recover for the price of a lot of oil orchard heaters sold and delivered to defendant upon her order in writing made therefor. Judgment went for plaintiff, from which defendant appeals.

The giving of the order is admitted in the answer, pursuant to which it is therein alleged "that said plaintiff did send certain heaters to the premises of this defendant, but denies that the same were of the class, character, or kind represented to this defendant or by her purchased." As to this allegation the court found "that it is not true, as alleged in defendant's answer, that the said heaters were not of the class, character, or kind represented to or purchased by the defendant," but, on the contrary, found that pursuant to the written contract plaintiff delivered the heaters so ordered to the defendant, who received, accepted, and used the same, for which she agreed to pay $916.65, no part of which was paid.

[1] Appellant attacks the finding of the court to the effect that the heaters delivered by plaintiff were of the class, character, and kind purchased by her. Her argument is based upon the claim that the order as given was based upon a sample of the heater exhibited to her by plaintiff's selling agent, compared with which the heaters delivered were mechanically different. Section 1766, Civil Code, provides that "one who sells or agrees to sell goods by sample, thereby warrants the bulk to be equal to the sample." While it appears from the evidence that a sample heater was exhibited to defendant at the time she gave the order, it fails to show wherein the heaters delivered differed from such sample. Not only was defendant uncertain as to the identity of the heater produced by her at the trial, but her meager testimony was flatly contradicted by plaintiff's selling agent and other witnesses, thus at least creating a conflict, in solving which the court found in favor of plaintiff. Hence, assuming that the heaters delivered differed from the one produced in court by defendant, it cannot be said that the goods delivered differed from the sample exhibited to defendant when she gave the order.

[2] Moreover, the written contract was made June 19, 1913, and called for "Coe Orchard Heaters of 5 gallons capacity," and contained a provision to the effect "that this paper, in writing and printing, contains the entire agreement between the parties hereto named and that no outside verbal understanding with any one will be of any force or effect." The heaters, some 1,400 in number, were delivered on November 23, 1913, and defendant, having full opportunity for examination of the same, accepted them, distributed them through her orchard, and used them during the winter of 1913–14. While the court, in our opinion, upon sufficient evidence, found the goods were of the class and kind purchased by defendant, nevertheless, having opportunity to inspect the same, even were they different from those contracted for, she, by accepting and using them, must be deemed to have waived any objection on account of the heaters being otherwise than as represented by the seller. Jackson v. Porter Land & W. Co., 151 Cal. 32, 90 Pac. 122; Treis v. Berlin Dye Works, etc., Co., 11 Cal. App. 421, 105 Pac. 275; Byron Jackson Machine Works v. Duff, 158 Cal. 47, 109 Pac. 616.

[3, 4] Appellant also insists that the heaters were constructed in a manner which permitted water to leak into them during rainstorms, which fact constituted a violation of an implied warranty under section 1770 of the Civil Code. As to this contention, it is sufficient to say that defendant's pleading contains no defense predicated upon a violation of an implied warranty. Code warranties which are not pleaded or proved cannot be relied upon, either in support of a cause of action or as a defense thereto. Kullman, Salz & Co. v. Sugar, etc., Co., 153 Cal. 725, 96 Pac. 369. Moreover, the contract was in writing, and the only warranty given by plaintiff was a written warranty under date of June 20, 1913, which is silent as to the matters upon which appellant bases her contention. Where a writing exists between the parties, the extent of a warranty made is limited to the language used therein. "Parol evidence will not be admitted to extend, enlarge, or modify that which the writing specifies." United Iron Works v. Outer Harbor D. & W. Co., 168 Cal. 81, 141 Pac. 917. Not only was there ample evidence to support the finding of which appellant complains, but, even were it otherwise, defendant is in no position to invoke such defense.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

42 Cal. App. 527

BURMESTER et ux. v. McNEAR et al.

(Civ. 2908.)

(District Court of Appeal, First District, Division 2, California. Aug. 4, 1919.)

1. **Appeal and Error** 🔑231(2) — **Specific Objection to Complaint Against Executor Essential to Review.**

In an action against executors, the objection in the trial court that no proper, or any, foundation has been laid, either for the suit, or the cause of action, or the testimony, or the evidence, is too general to require review of the objection that the complaint states no cause of action, because it does not allege compliance with Code Civ. Proc. § 1502, requiring proof of filing or presentation of claim.

2. **Appeal and Error** 🔑193(5)—**That Complaint against Executor was Defective Not Reviewable Without Objection Below.**

The objection that complaint against an executor states no cause of action, because not alleging presentation of claim against estate, as required by Code Civ. Proc. § 1502, cannot be made for the first time on appeal.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by Otto Burmester and wife against J. W. Horn, in which George P. McNear, as executor, and Louise W. Horn, as executrix, of the last will and testament of the defendant, J. W. Horn, were substituted as parties defendant. Judgment for plaintiffs, and defendants appeal. Affirmed.

F. A. Meyer, of Petaluma, for appellants.

Gil P. Hall, of Petaluma (E. J. Dole, of Petaluma, of counsel), for respondents.

LANGDON, P. J. This action was originally commenced against John W. Horn, defendants' testator. Plaintiffs sought to obtain a judgment for $1,646, the amount alleged to have been paid to Horn by them under a contract of purchase of real and personal property, the possession of which was later taken from plaintiffs in breach of their contract of purchase, and also for $1,000 damages suffered by them by reason of the breach of the said contract by Horn. Judgment was rendered by the superior court for the county of Sonoma against the plaintiffs herein, from which judgment an appeal was taken. Upon the appeal the judgment was reversed. In the meantime the defendant Horn had died, and the superior court, on February 18, 1918, made its order of substitution of parties defendant, ordering that the present defendants be substituted as executor and executrix, respectively, of the last will of J. W. Horn, deceased. Upon the retrial judgment was rendered for the plaintiff in the sum of $1,365.80.

[1] The defendant appeals, and presents but one question, namely: Does the amended complaint state a cause of action? The argument upon this point is that, as the amended complaint contains no allegation that plaintiffs, or either of them, has filed a claim with the clerk, or presented such a claim to the executors for allowance or rejection, it does not meet the requirements of section 1502, Code of Civil Procedure, declaring that "no recovery shall be had in the action unless proof be made of such filing or presentation." One of the cases relied upon by appellant is the case of Falkner v. Hendy, 107 Cal. 49, 40 Pac. 21, 386, but that case expressly states that a judgment would not be void, although the fact of presentation of the claim to the executor was neither alleged nor proven; that such judgment would merely be erroneous, and would not be reversed on appeal, unless the objection was first made in the trial court. To the same effect are the cases of Bank of Stockton v. Howland, 42 Cal. 129, 134; Drake v. Foster, 52 Cal. 225. In the case of Bank of Stockton v. Howland, supra, it is said that the purpose of the rule requiring objection to be made in the trial court is to give the claimant an opportunity of supplying the requisite pleading or proof, as the case may require.

The objection made by the appellant in the trial court, and which he relies upon now to meet this rule, was: "That no proper or any foundation has been laid either for the suit or the cause of action or the testimony or the evidence." While this broad general objection might include a number of specific objections, we think it was the duty of the defendants to have made their objection specific, so as to call to the attention of the plaintiffs the precise point upon which they are now relying on appeal. As was said in the case of Martin v. Travers, 12 Cal. 243–245: "The party should have laid as the authorities say, his finger on the point at the time." Mott v. Smith, 16 Cal. 533, 555. In the case of Cochran v. O'Keefe, 34 Cal. 554, 556, the court, in considering a similar objection that a proper foundation had not been laid for the introduction of a deed in evidence, said that such an objection failed to specify the point upon which it rests; that had the point been specified when objection was made on the trial, plaintiffs might have entirely obviated the objection by preliminary or subsequent evidence.

[2] So in the present case, if the objection had been specifically made so as to call the matter to the attention of the plaintiffs, presentation could have been made because the action was brought within the time allowed for presentation of claims, and a supplemental complaint could have been filed alleging presentation, which has been held to be the proper method of procedure. Falkner v. Hendy,

supra. We are therefore of the opinion that proper objection was not made in the trial court, and under the authorities herein cited such objection may not be made for the first time upon appeal.

The judgment is affirmed.

We concur: BRITTAIN, J.; HAVEN, J.

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42 Cal. App. 104

HALE v. PENDERGRAST et al.

(Civ. 2831. S. F. 8670.)

(District Court of Appeal, First District, Division 1, California. July 7, 1919. Opinion of Supreme Court Denying Rehearing, Sept. 4, 1919.)

1. Vendor and Purchaser 🔑231(13)—Instrument Unlawfully Recorded Not Constructive Notice.

An instrument not entitled to go upon record is not constructive notice, although recorded.

2. Vendor and Purchaser 🔑231(15)—Unacknowledged Agreement to Repurchase Cannot be Recorded.

An agreement to repurchase land on demand by the purchaser within a certain specified time is not entitled to be recorded unless it is acknowledged.

3. Vendor and Purchaser 🔑231(15)—Unacknowledged Agreement to Repurchase Not an "Instrument" to be Recorded.

An unacknowledged agreement to repurchase land, although physically attached to and by reference made a part of a purported notice signed and acknowledged by the purchaser of the land to the effect that the agreement was given in consideration of the sale of land, was not an "instrument" which could be recorded under Civ. Code, § 1158.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Instrument.]

4. Vendor and Purchaser 🔑84—Agreement to Repurchase Valid.

On sale of land, the vendor and purchaser may legally enter into an agreement whereby the purchaser may require the vendor to repurchase within a specified time.

5. Mortgages 🔑275—One Assuming Mortgage Debt Cannot Allege in Foreclosure that Nothing Was Due.

Where land was sold subject to the right of the purchaser to demand a repurchase by the vendor, and the vendor sold and assigned note and mortgage given on repurchase, being required by the purchaser, it mattered not to the vendor to whom the purchase money should be paid; and, if the purchaser was satisfied that she owed the assignee of the mortgage, the vendor, having assumed the indebtedness, cannot complain on foreclosure that nothing is due on the mortgage.

Opinion of Supreme Court Denying Rehearing.

6. Mortgages 🔑559(3)—Right of Purchaser to Compel Repurchase Defense to Purchase Money Mortgage.

Where purchaser of land has the right, under an agreement, to require vendor to repurchase within a specified time, the agreement, where the purchaser chooses to avail himself of it, is a good defense to claim for deficiency judgment in an action to foreclose a mortgage given in part payment of the purchase price.

7. Mortgages 🔑258—Where Mortgage Note was Not Negotiable, Any Defense was Good against Assignee of Mortgage.

Where a mortgage note was not negotiable where executed in an action to foreclose by assignee, the maker can set up defenses he has against the assignor.

8. Mortgages 🔑253—Assignor of Mortgage Estopped on Foreclosure to Deny Validity.

Where land was sold and a collateral agreement was entered into whereby purchaser could require vendor to repurchase within a specified time, and a mortgage, given for part of the purchase price, was assigned by the vendor, and thereafter the purchaser required the vendor to repurchase, transferring the property to him on return of the actual cash paid, the assignee of the mortgage is entitled to a judgment against the purchaser foreclosing him of any interest in the mortgage property and not to deficiency judgment; but, as far as the vendor is concerned, the latter is estopped, in view of his implied warranty of the validity of the mortgage, under Civ. Code, § 1774, from claiming that the mortgage was rendered ineffective by reason of the repurchase.

In Bank.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Thomas P. Hale against Lucy Pendergrast and another. Judgment for defendants reversed by the District Court of Appeal, and a rehearing denied by the Supreme Court.

Theodore Hale, of San Francisco (J. E. Pemberton, of San Francisco, of counsel), for appellant.

W. D. L. Held, of Ukiah, for respondent Pendergrast.

Mannon & Mannon, of Ukiah, for respondent Waldteufel.

WASTE, P. J. Plaintiff brought this action to foreclose a mortgage. Judgment was entered for the defendant, and plaintiff appeals.

The defendant and respondent Waldteufel was the owner of the lands and premises in Mendocino county, described in the mortgage sought to be foreclosed. He agreed, with the defendant and respondent Mrs. Pendergrast, that he would sell and convey the said lands and premises to her for the purchase price of $10,000, payable $2,000 in cash and $8,000 according to the terms of the promissory note and mortgage sued on in this action, and, as part of the same transaction, Waldteufel agreed with defendant Pendergrast that he would repurchase the said premises from her, for the sum of $10,000, at any time within one year from the date of the consummation of her purchase, if she should elect to so require.

Mrs. Pendergrast agreed with Waldteufel to purchase said premises from him on said terms, and on the 25th day of August, 1916, Waldteufel conveyed said premises to her by a grant, bargain, and sale deed, and she paid him therefor the sum of $2,000, and made, executed, and delivered to him the promissory note for $8,000 and mortgage which is sought to be foreclosed in this action. The note was payable in eight equal installments of $1,000 each, beginning one year after date, with interest from date at the rate of 6 per cent. per annum, payable semiannually.

As a part of the same transaction, defendant Waldteufel on the same day made, executed, and delivered to his codefendant the following receipt:

> "August 25, 1916. Received of Lucy Pendergrast the sum of two thousand dollars ($2,000) as first payment of the Waldteufel ranch in Redwood Valley, Mendocino county, California, consisting of 70 acres of the former 'Beasore ranch' (describing the boundaries thereof); also all personal property on said 70 acres (with certain exceptions), and growing crops; also all water and water rights. Balance of $8,000.00 to be paid at the rate of $1,000 per annum with interest on deferred payments at six per cent. per annum payable semiannually. Said J. A. Waldteufel agrees to buy said premises back from said Lucy Pendergrast at any time within one year for $10,000 if she so elects, but has no option to buy unless called upon to do so by her. [Signed] J. A. Waldteufel. I agree to the above contract. [Signed] Mrs. Lucy Pendergrast."

The lower court found that this receipt was duly acknowledged and entitled to record, and was duly recorded September 14, 1916. The manner of its recordation will be referred to presently.

On the 31st day of March, 1917, after the first installment of interest had been paid, defendant Waldteufel, for a good and valuable consideration, duly sold and assigned the note and mortgage of Mrs. Pendergrast to plaintiff, which assignment, the court found, was duly recorded in the office of the county recorder of Mendocino county. No actual notice to plaintiff of the collateral agreement to repurchase, made between the two defendants, is pleaded, or attempted to be proved. So far as the record discloses there was no notice, other than whatever constructive notice may be imputed to plaintiff, by the placing of record in the recorder's office of that document, in the manner hereinafter set forth. Waldteufel did not disclose to plaintiff the true situation until just before the foreclosure action was commenced.

On the 8th day of August, 1917, the defendant Pendergrast elected to, and did, require the repurchase of said premises by the defendant Waldteufel, under the terms of his agreement, and on said date Waldteufel accepted from Mrs. Pendergrast a deed of said premises, containing this clause:

> "This deed is made pursuant to instrument recorded in Book 147 of Deeds, page 292, records of said county, and the intention is to convey to the grantee all the property and right acquired by the grantors by that certain deed recorded in Book 146 of Deeds at page 90, records of said county. The grantee assumes all the incumbrances on said property subject to all the equities and defenses of the grantors."

The first installment of the principal, $1,000, was not paid when it became due, and plaintiff instituted this action. Upon these facts, which appear in the findings, the trial court made another finding to the effect that plaintiff, ever since the date of the assignment of the mortgage to plaintiff by Waldteufel, "has been and now is the true and lawful owner of said note and mortgage, subject to the rights and equities of the defendant Lucy Pendergrast," under and by virtue of her agreement of repurchase made and entered into with defendant Waldteufel, and that, notwithstanding the terms of said promissory note, there never has become due thereon the sum of $1,000, or any other sum, on account of principal thereof. Judgment was thereupon entered, in accordance with the findings, that plaintiff take nothing by the action.

From the testimony it appears that the recordation of the collateral agreement, or receipt, wherein Waldteufel agreed to repurchase the mortgaged land from Mrs. Pendergrast, was accomplished as follows: Some time after the closing of the transaction, and before the assignment by Waldteufel to the plaintiff, Mrs. Pendergrast caused to be prepared by her attorney a purported notice, written at the bottom of the repurchase agreement and on the same sheet of paper. This notice stated that—

> "The foregoing receipt was given on the sale of the said Waldteufel ranch, and that a promissory note and mortgage dated August 6, 1916, and recorded [setting out the record], was given in consideration of the sale of said ranch, and all and each of the terms of the above and foregoing receipt and agreement, and all assignees of said promissory note and mortgage are hereby notified accordingly, and they take said note and mortgage subject to my equity and defense as set forth in said receipt and agreement."

This notice was signed by Mrs. Pendergrast, acknowledged by her alone, and subsequently recorded in the book of deeds in the recorder's office.

[1-3] Appellant contends that the document did not affect title to the land, was not entitled to be recorded in the book of deeds, was acknowledged only by the obligee, not by the person to be bound, and was therefore never so recorded as to give constructive notice. An instrument, not entitled to go upon record, is not constructive notice, although recorded. Parkside Realty Co. v. MacDonald, 166 Cal. 426, 431, 137 Pac. 21. The repurchase agreement of August 25, 1916, was not acknowledged by either Waldteufel or Mrs. Pendergrast. Of itself, therefore, it was not entitled to be recorded. Neither does the fact that it was physically attached to, and by reference made a part of, the purported notice, signed and acknowledged by Mrs. Pendergrast add to its function as imputing notice. "Any instrument or judgment affecting the title to or possession of real property may be recorded under" chapter 4 of the Civil Code, relating to the recording of transfers. Civil Code, § 1158. By "instrument," as used in this section, is meant "some written paper or instrument signed and delivered by one person to another, transferring the title to or creating a lien on property, or giving a right to a debt or duty." Hoag v. Howard, 55 Cal. 564, 565. The Supreme Court, in that case, after a careful examination of the various sections of the Civil Code, included in the chapter on recording transfers, supra, continues:

> "Reference is particularly made to sections 1195 and 1215. Section 1195 relates to the proof of the execution of the instrument, and provides that it may be proved 'by the party executing it, or either of them.' Section 1215 defines the meaning of the term 'conveyance' as used in the two preceding sections, as embracing 'every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged or incumbered, or by which the title to real property may be affected, except wills.'" Hoag v. Howard, supra.

Measured by the foregoing test, the purported notice of Mrs. Pendergrast was not entitled to recordation, and imparted constructive notice to no one.

[4, 5] The repurchase agreement between Mrs. Pendergrast and Waldteufel was one which the parties had the right to make, and one which they did voluntarily and expressly enter into. Davis v. Davis, 19 Cal. App. 797, 800, 127 Pac. 1051. On the repurchase of the ranch being required by Mrs. Pendergrast it mattered not to Waldteufel to whom the purchase money should be paid. If Mrs. Pendergrast was satisfied that she owed plaintiff the $8,000 on the note and mortgage, Waldteufel cannot after agreeing to pay the indebtedness, claim that nothing is due. Washer v. Independent M. & D. Co. 142 Cal. 708, 76 Pac. 654. "An agreement on the part of a grantee to pay and discharge a mortgage debt upon the granted premises, for which his grantor is liable, renders the grantee liable to the mortgagee, and in an action for the foreclosure of the mortgage, if the mortgaged premises are insufficient to satisfy the mortgage debt, judgment may be rendered against him as well as against the mortgagor for the amount of such deficiency. This liability results from the familiar doctrine in equity that a creditor is entitled to the benefit of all securities or collateral obligations that his principal debtor may have given to the surety for the payment of the debt. By the conveyance of the mortgaged premises and the assumption of the mortgage debt by the grantee, the latter, as between him and his grantor, becomes primarily liable to the mortgagee, and his vendor becomes his surety. [After citing cases.] The argument of these cases is that a party who expressly agrees to pay a particular debt, which the person contracting with him admits that he owes to a third party cannot thereafter be heard to say that the debt is not owing." Davis v. Davis, supra.

That Waldteufel and Mrs. Pendergrast well understood the nature of the transaction relating to the repurchase of the land is indicated by the testimony of the latter. To do other than apply the law we have just quoted to the facts of this case would, for reasons which must be apparent to anyone, be most inequitable and unjust.

The claim of the respondent, based upon the collateral agreement to repurchase, is that the mortgage of Mrs. Pendergrast conferred upon its holder a right of foreclosure only in case she failed to demand repurchase, and repayment, within the year, and thereafter breached the conditions of the mortgage; that is, that plaintiff took only such rights as Waldteufel had under the original transaction. Almost the identical claim was made in the case of Merchants' Bank of Buffalo v. Weill, 163 N. Y. 486, 57 N. E. 749, 79 Am. St. Rep. 605. The facts of that case are so similar with those of the case at bar as to be "on all fours" with it, except that in that case no attempt was made to record the collateral agreement, while here the attempt failed. It was there said:

> "When this assignment was made, there was no defense to the mortgage. It was a subsisting and valid obligation for the amount expressed as owing by Weill, and his present defense to the enforcement of his liability arises from his exercising an option, conferred by an unrecorded and collateral agreement, to rescind the sale of the property, and thus be relieved from the obligation growing out of it. But this could not be said to have been a defense to the mortgage existing at the time of its assignment, for it was one which was brought into existence by the mortgagor at a time subsequent. Non constat that he would ever exercise his option to rescind under the collateral agreement, and whether he would do so would depend upon

events and considerations, subsequently occurring and influencing its exercise.

The court held that the plaintiff there, who was in the same position as the plaintiff here, was entitled to enforce the appellant's liability (the same as Mrs. Pendergrast here) for any deficiency arising from a sale of the mortgaged premises.

The judgment is reversed.

We concur: KERRIGAN, J.; RICHARDS, J.

Opinion of Supreme Court Denying Rehearing.

On application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division One.

PER CURIAM. [6-8] The opinion of the lower court discusses the recordability of the notice by the defendant Pendergrast. In this portion of the opinion we are not ready to concur without further consideration. It is immaterial, however, whether it was recordable or not. In any event the contract of repurchase between the defendant Waldteufel and Mrs. Pendergrast, if the latter chose to avail herself of it, would have been a good defense to an action by Waldteufel to foreclose the mortgage. Being a good defense against him, it would be a good defense against his assignee, the plaintiff, since the mortgage note was not negotiable under the law of this state at the time of the transactions here involved. The result, so far as the defendant Pendergrast is concerned, is that upon the facts found by the lower court the plaintiff is entitled to a judgment against her foreclosing any interest of hers in the mortgaged property, but not to a deficiency judgment. As to the defendant, Waldteufel, he warranted to the plaintiff the validity of the mortgage against the defense interposed in this case (section 1774, Civ. Code), and is estopped from making such defense.

The application for a rehearing is denied. All concur.

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42 Cal. App. 499

PEOPLE v. HOPPER. (Cr. 643.)

(District Court of Appeal, Second District, Division 1, California. July 30, 1919.)

1. Criminal Law 🔑1037(1)—Objection to Argument, Not Assigned at Time, Not Reviewable.

Where defendant did not assign misconduct of the prosecuting attorney in argument at the time when the objectionable statement was made to the jury, such objection will not be considered on appeal.

2. Criminal Law 🔑814(12) — Instruction as to Presumption of Good Reputation of Defendant Erroneous When Not in Issue.

In a prosecution for manslaughter, where no evidence was offered for or against defendant's reputation, an instruction that the law presumed defendant had a good reputation for truth, honesty, and integrity was properly refused, despite Code Civ. Proc. § 1847.

3. Criminal Law 🔑829(5)—Refusal of Instruction Covered by One Given Not Error.

In a prosecution for manslaughter, the court properly refused to instruct that defendant was entitled to act on the appearances as they presented themselves to him as a reasonable man, though it might subsequently turn out that decedent was unarmed, and there was no danger to defendant, where another instruction covered the same ground, without error of which defendant can complain.

4. Criminal Law 🔑829(11) — Instruction, Repetition of One Given, Properly Refused.

In a prosecution for manslaughter, where the court charged that the jury should consider with caution any testimony as to defendant's oral admissions, it did not err in refusing to instruct that declarations are weak and unsatisfactory in their nature as evidence, etc.

5. Criminal Law 🔑829(8) — Instruction, Repetition of One Given, Properly Refused.

In a prosecution for manslaughter, the trial court did not err in refusing to charge that evidence of decedent's bad character for peace and quiet could be considered by the jury, where the subject-matter was sufficiently covered by another instruction.

6. Homicide 🔑341 — On Conviction of Manslaughter Defendant Cannot Complain of Instruction as to Murder.

Where defendant was convicted of manslaughter only, he cannot complain of the court's act in omitting to give part of his requested instruction enumerating the facts on which a reasonable doubt should cause acquittal of murder.

7. Homicide 🔑199—Evidence of Drunkenness Goes Only to Degree of Crime.

In a prosecution for homicide, evidence of drunkenness can be considered only to determine the degree of the crime, the weight to be given which is a matter for the jury to determine in connection with all the other evidence and circumstances.

8. Homicide 🔑173 — In Determining Intent Jury can Consider Means Used.

In determining the intention, at the time of the killing, of defendant, charged with the homicide, the jury is entitled to consider the means used in making the fatal assault.

9. Homicide 🔑290 — Instruction to Consider Means of Killing in Determining Degree Proper.

In a prosecution for homicide, in defining murder of the first and second degrees and manslaughter, the trial court properly stated that in determining defendant's intention it was important to consider the means used to accomplish the killing.

10. Criminal Law 🔑922(16)—Instruction as to Necessity of Proof Beyond Reasonable Doubt Proper.

In a prosecution for manslaughter, when taken with the other instructions, a charge that, if the commission of the homicide by defendant is proved to a moral certainty and beyond a reasonable doubt, it devolves on defendant to prove circumstances of mitigation, etc., *held* not erroneous, as virtually instructing that defendant should prove mitigation or justification, and not that he might raise a reasonable doubt as to such defense.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

John Albert Hopper was convicted of manslaughter, and he appeals. Affirmed.

E. J. Emmons, of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

CONREY, P. J. The defendant appeals from a judgment rendered against him upon conviction of the crime of manslaughter.

[1] Appellant charges the district attorney with misconduct in making a certain statement in his argument to the jury. No assignment of such misconduct was made by defendant at the time when the statement was made to the jury, and the objection will not be considered now.

Appellant claims that the court erred in refusing the following instructions requested by him:

1. "You are instructed that the law presumes that the defendant has a good reputation for truth, honesty, and integrity."

2. "The defendant would be entitled to act upon the appearances as they presented themselves to him as a reasonable man, although it might subsequently turn out that Warn was unarmed, and in fact there was no danger to the defendant."

3. "You are instructed that declarations are very weak and unsatisfactory in their nature as evidence, and you are instructed that it is your duty to scrutinize closely any evidence of declarations owing to such fact. The extrajudicial statements of a prisoner, unaccompanied with other facts or circumstances, are not sufficient, and will not justify a conviction."

4. "Evidence of the bad character of the deceased for peace and quiet can be considered by you as having a tendency to show the purpose and intent at the time of the affray that actuated the deceased, and can be considered further by you for the purpose of arriving at the condition of the defendant's mind at the time of firing the fatal shot, if the defendant is shown by the evidence to have known the reputation of the deceased for peace and quiet."

5. "You are instructed that it is the duty of the prosecution to prove every material fact necessary to constitute the charge against the defendant beyond all reasonable doubt and to a moral certainty, and in this case among the material facts to be proven are, first, that the deceased was killed by the defendant; second, that the killing was done with malice aforethought and with premeditation. And if you have a reasonable doubt upon any one of these material facts, it is your duty to acquit the defendant of murder in the first degree."

[2] The court did not err in refusing any of these requested instructions. Under the first point, appellant relies upon section 1847 of the Code of Civil Procedure. The requested instruction does not conform to that section. Moreover, no evidence was offered in this case for or against the reputation of the defendant in any particular, and we are unable to see that appellant has been prejudiced by the absence of this instruction, even if appropriately it could have been given.

[3] The second point is sufficiently met by the fact that the court did give to the jury the following instruction:

"The jury are instructed that the defendant as a reasonable man, knowing what he knew and seeing what he saw, had a right to act upon the appearances as they presented themselves to him as a reasonable man, even if you find that Warn at the time was actually unarmed, and if the defendant as such reasonable man, knowing what he knew and seeing what he saw, had a right to believe and did believe from such appearances that he was about to suffer great bodily harm at the hands of Warn, and that if, acting alone upon such belief, he fired the shot at Warn, then I instruct you that the defendant is entitled to an acquittal at your hands."

Without saying that the instruction given is entirely correct, we do say that it is free from any error of which the defendant is entitled to complain. This instruction having been given, the defendant could not be prejudiced by the refusal of the court to instruct the jury in the language requested by him.

[4] In connection with point 3, it should be noted that the court instructed the jury that, "if there is any testimony as to the oral admissions alleged to have been made by the defendant, you are instructed that you are to receive the same and consider them with caution," and also fully charged the jury as to the necessity for proof of defendant's guilt beyond all reasonable doubt. From the defendant's own testimony it appears that he fired the shot by which Warn, the deceased, was killed. Aside from the extrajudicial admissions shown by the testimony, the evidence against the defendant is abundant and clear as to all matters connected with such extrajudicial statements or admissions by the defendant.

[5] Under point 4, we note that the court instructed the jury as follows:

> "You are instructed that the defendant had a right, at the time of firing the fatal shot, to consider fully all acts of violence that he had seen the deceased commit, all threats that he had heard the deceased make, together with the disposition of the deceased, as the defendant knew it, in order that the defendant might know or believe what the deceased meant or intended at the time that the fatal shot was fired."

There was no evidence of bad "reputation" of the deceased for peace and quiet, but the defendant testified concerning a quarrel which he had recently witnessed between the deceased and another person, in which the deceased used threatening language toward that other person. The subject-matter of the instruction refused by the court was sufficiently covered by the instruction given as above stated.

[6] Under the fifth point, it is admitted that the court gave all of the requested instruction except the last sentence thereof. In view of the fact that defendant was convicted of manslaughter only, he is in no position to complain of this modification of the instruction, and we need not discuss the merits of appellant's criticisms thereon.

[7] 6. Appellant objects to the closing sentence of the fourteenth instruction, which is as follows:

> "Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime, and the weight to be given it is a matter for the jury to determine in connection with all the other evidence and circumstances in proof in the case."

The language quoted is a correct statement of the law. People v. Keyes, 715 Pac. 6.

[8, 9] 7. Instruction No. 17 defines murder of the first and second degrees and manslaughter. In that instruction the court said:

> "In determining the intention of the defendant at the time of the transaction complained of it is important to consider the means used to accomplish the killing."

It is of this statement in the instruction that appellant complains. There is no doubt in our minds that the jury is entitled to consider the means used by one in making an assault as an element in the determination of his intention at the time. The statement quoted, especially in the connection in which it was used, is without error.

[10] 8. Instruction No. 21 reads as follows:

> "Upon a trial for murder, if the commission of the homicide by the defendant is proved to a moral certainty and beyond a reasonable doubt, then it devolves upon the defendant to prove circumstances of mitigation or that justify or excuse the act, unless the proof on the part of the prosecution tends to show that the crime only amounts to manslaughter, or that the defendant was justifiable or excusable."

Appellant's objection to this instruction is that—

> "It was virtually instructing the jury that the defendant should prove mitigation or justification, and not that he might raise a reasonable doubt as to these defenses."

We think that the instruction, when taken together with the other instructions given by the court to the jury, was without error. The jury was fully instructed that the burden was upon the prosecution to prove defendant's guilt beyond a reasonable doubt.

9. The last point insisted upon refers to an instruction concerning the right of self-defense. That the instruction correctly stated the law is not denied, but appellant claims that there was no evidence to which it could apply, and therefore that the instruction was confusing and misleading. There was evidence of circumstances to which the instruction reasonably might be applied.

Our examination of the case convinces us that the defendant had a fair trial, free from prejudicial error, and that he was fortunate to escape with a conviction which reduced his offense to manslaughter.

The judgment is affirmed.

We concur: SHAW, J; JAMES, J.

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42 Cal. App. 513

ANDREWS v. KARL. (Civ. 2928.)

(District Court of Appeal, Second District, Division 2, California. July 31, 1919.)

1. VENDOR AND PURCHASER ⚷93, 95(2), 187—WHERE TIME IS OF THE ESSENCE, FORFEITURE RESULTS ON BREACH OF CONTRACT.

Where time is made of the essence of a contract for the sale of land, terminating it on failure to comply strictly and punctually with conditions, the effect is to entail a forfeiture on the mere default of the purchaser by his failure to make payments when and as he obligated himself to do, if the vendor has not waived the default or forfeiture, as is within his right by express agreement or unequivocal acts or demeanor.

2. VENDOR AND PURCHASER ⚷95(2), 101—WAIVER SUSPENDS RIGHT OF FORFEITURE WHICH CAN BE REVIVED ONLY ON NOTICE.

Where the conduct of the vendor of land, or the entire course of business between him and the purchaser, amounts to a waiver of the clause in the contract making time of the essence, the waiver creates a temporary suspension of the right of forfeiture in the vendor for delay in payment by the purchaser, which can be revived only by giving definite and specific notice of the vendor's intention.

3. VENDOR AND PURCHASER 🔑95(2), 101—WAIVER OF FORFEITURE NOT REVIVED.

Where the vendor of land on maturity of the first annual installment stated that he did not need the money, but that instead the purchasers could continue to improve the property, increasing its value, and endeavor to resell it, the vendor thereby waived any forfeiture incurred by the purchasers through failure to make payment promptly on time, and, the vendor never having given notice of intention to restore the right, it was not revived.

4. VENDOR AND PURCHASER 🔑86, 191, 296—REFUSAL OF VENDEE TO PERFORM, ABANDONMENT OF CONTRACT.

Willful refusal by a vendee of land to perform his agreement amounts to an abandonment of the contract by him, and the repudiated contract is no protection to the vendee in possession against the legal title, but the vendor may recover possession in an action of ejectment.

Appeal from Superior Court, Orange County; Wm. D. Dehy, Judge.

Action by R. C. Andrews against A. Karl. From conditional judgment for plaintiff, he appeals. Affirmed.

Kendrick & Ardis, of Los Angeles, for appellant.

H. C. Head, of Santa Ana, for respondent.

FINLAYSON, P. J. This is an action in ejectment to recover possession of real property in Orange county. The judgment, after adjudging plaintiff to be the owner, directs defendant to deliver possession upon the payment to him by plaintiff of $1,000. Plaintiff, claiming that he is entitled to possession unconditionally, appeals from the judgment.

The outstanding facts, as shown by the findings, are substantially as follows: On November 7, 1913, plaintiff, being then the owner of the property, and defendant and one M. Neimark, executed a written contract whereby plaintiff, as the vendor, agreed to sell and convey the property to defendant and Neimark, as the vendees, for $21,350, payable, $2,000 at the date of the execution of the contract, and the balance in equal installments, the first installment, $1,000, to be paid on February 10, 1914, the second, $1,350, on January 1, 1915, and the remaining installments on the 1st day of January of each succeeding year to and including January 1, 1924, with interest on all deferred payments. The vendees likewise agreed to pay all state and county taxes and assessments. The vendees were to be entitled to all crops grown upon the land. Time was made of the essence of the contract. It also was provided that if the vendees failed to comply with the terms of the contract, they should forfeit all rights to the property and to any moneys paid by them. Upon the execution of the contract the vendees entered into possession thereunder. No part of the purchase price has been paid, except the $2,000 paid at the date of the execution of the contract. Nor have the vendees paid any part of the taxes for the year 1915. The action was commenced December 17, 1915. After the execution of the contract, but prior to February 10, 1914—on which date the first annual installment was payable by the vendees—plaintiff orally informed the vendees "that he did not need the money, and that it would be better for them to use the money in working and improving the land, and thereby increase the value thereof, and that after they had improved the land it could be sold and the plaintiff receive from the purchase price the amount due him under the terms of the contract; * * * that defendant had said M. Neimark would then be repaid the sum of $2,000 which they had paid on account of the purchase price of the land, * * * and that the balance obtained on the sale of said land could be divided equally between the plaintiff and defendant and said M. Neimark, and that the defendant and said M. Neimark could, in that way, make a good profit from their labor in working and improving the land." In May, 1915, defendant purchased all the interest of his covendee, Neimark. Ever since plaintiff informed the vendees that he did not need the money, and that it would be better for them to use the money in working and improving the land, etc., defendant has worked upon and improved the property in accordance with the proposal thus made to him and his covendee. Plaintiff purchased from the vendees for $1,000, the crop that was on the land at the time they took possession; and the court finds that, of the $2,000 paid to plaintiff at the date of the execution of the contract of sale, $1,000 was repaid to the vendees for the crop. Wherefore, the court finds that the vendees "received the benefit of the said crops so purchased by plaintiff, and plaintiff received the use and benefit of the other $1,000, and no more." Prior to the action, but how long prior thereto the court's findings do not state, plaintiff demanded possession, with which demand defendant refused and still refuses compliance. As a conclusion of law, the court found that—

> "Plaintiff is entitled to a judgment adjudging that he is the owner of all the real property described in plaintiff's complaint; and for a judgment that the defendant deliver possession thereof to the plaintiff upon the payment to defendant, A. Karl, by plaintiff, of the sum of one thousand dollars with interest at the rate of seven per cent. per annum from November 17, 1913."

For reasons presently to be stated, we think the facts found by the court show a waiver of the clause making time of the essence of the contract, and that plaintiff's right to a forfeiture of the vendees' rights under the contract was temporarily suspended—so temporarily suspended that his right to a forfeiture could be restored only by giving a definite and specific notice of his intention to exercise the right if the vendees should fail to pay, within a reasonable time, all sums due under the contract. If there was such a waiver and suspension of the right of forfeiture, then plaintiff is not in a position to complain of the judgment. For if there was such waiver and temporary suspension of the right of forfeiture—not restored by a sufficient notice of intention to revive the original contractual relations and obligations—then plaintiff was not entitled to the possession for failure of the vendees to make the payments at the times fixed therefor in the written contract. And if not entitled to a judgment awarding him possession, plaintiff cannot complain of a judgment that gives him the possession conditionally, i. e., possession conditioned upon his payment of the sum of $1,000.

It should be stated here that the facts found by the court, and which, for reasons presently to be given, were sufficient to establish a waiver of the stipulation making time of the essence, are fairly within the issues tendered by respondent's answer. Defendant, it is true, did not plead the written contract set forth in the findings. He did, however, plead a contract of purchase, made with plaintiff, under which he and his covendee took possession, though his answer does not attempt to set forth all the terms of the contract, nor does it specifically allege whether it was written or oral. But his answer does allege substantially all the facts found by the court respecting what plaintiff said to the vendees, some time prior to February 10, 1914, to the effect that he did not need the money, that it would be better for them to use it in improving the land, and that they could then sell, etc. That is, the answer alleges all the facts which constitute the waiver upon which defendant relies.

[1, 2] Thus, then, is presented the question of the correlative rights of the parties under the facts as found by the court. Where time is made of the essence of the contract, terminating it upon a failure to comply strictly and punctually with its conditions, its effect is to entail a forfeiture by sheer force of the contract itself, upon the mere default of the purchaser by his failure to make payments at the times and in the manner that he obligated himself to, provided, however, that the vendor has not waived the default or consequent forfeiture, which he has the right to do. This he may do by express agreement to that effect, or by unequivocal acts or demeanor affording reasonable inducement for the purchaser, in reliance thereon, to alter his course as to strict and punctual compliance with his contract, either in advance of or after the prescribed time. The stipulation that time shall be of the essence of the contract is made solely for the benefit of the vendor. The rule that the vendor, by his conduct, may waive strict performance and temporarily suspend his right of forfeiture is based on the doctrine that he should not be permitted to use a provision intended for his benefit as a means of intrapping the purchaser. And where the conduct of the vendor, or the entire course of business between the parties, amounts to a waiver of the clause in the contract making time of the essence, such waiver creates a temporary suspension of the right of forfeiture, which can only be revived by giving definite and specific notice of an intention to revive and enforce it. Stevinson v. Joy, 164 Cal. 279, 285, 128 Pac. 751; Boone v. Templeman, 158 Cal. 290, 297, 110 Pac. 947, 139 Am. St. Rep. 126; Myers v. Williams, 173 Cal. 304, 159 Pac. 982; Pearson v. Brown, 27 Cal. App. 125, 129, 148 Pac. 956; Burmester v. Horn, 35 Cal. App. 549, 170 Pac. 674; Gray v. Pelton, 67 Or. 239, 135 Pac. 755.

[3] The proposal made by plaintiff to defendant and his covendee, prior to the maturity of the first annual installment on February 10, 1914, could only have the effect to lull the vendees into a sense of security, and induce them to believe that no payments need be made at the times provided by their contract, but that, instead, they could continue to improve the property, thereby increasing its value, look for a purchaser, endeavor to sell the land, and, if they succeeded in finding a purchaser willing to buy for an adequate price, adjust, after such sale, all the financial matters between plaintiff and themselves growing out of their contract. And because the natural consequence of plaintiff's proposal was to lull the vendees into a sense of security and cause them to believe that no payments need be made until they succeeded in finding a purchaser for the land, his conduct was tantamount to a waiver of any default on the part of the vendees, not only as to the one payment, but as to all that they should have made, under the strict terms of their contract, prior to the action. It is a reasonable inference from the facts found by the court that defendant and his covendee had not succeeded in finding a purchaser before the action was begun. The court found that the plaintiff told the vendees, not only that he did not need the money, but that "it would be better for them to use the money in working and improving the land, * * * and that *after* they had improved the land it could be sold and the plaintiff receive from the purchase price the amount due him." Thus no definite time was fixed within which the vendees might sell the property. Unless notified by the plaintiff that he had changed his mind, the time within which they might find a satisfactory purchaser might run on indefinitely, so that no payment need be

made, under the terms of the written contract, unless and until plaintiff notified them of his intention to revive the original contractual obligations. And since plaintiff never gave defendant or his covendee definite and specific notice of an intention to restore the right of forfeiture, by giving notice to make the payments as provided by the contract, and a reasonable time thereafter within which to comply therewith, it follows that the right of forfeiture, temporarily suspended by plaintiff's conduct, was not revived before he began his action to recover possession.

[4] Appellant cites authorities to the effect that where the vendee refuses to perform the contract, the vendor, at his election, may treat the vendee as a trespasser or as a tenant at will, against whom ejectment will lie. Undoubtedly it is the rule that where a vendee in possession, neither performing nor willing to perform, has absolutely refused to complete the contract, he may be treated as one who has abandoned the contract under which he entered, and the vendor, by an action in ejectment, may recover the possession. The willful refusal of the vendee to perform his agreement amounts to an abandonment of the contract by him; and a repudiated contract is no protection to a vendee in possession against the legal title. Whittier v. Stege, 61 Cal. 238; Hicks v. Lovell, 64 Cal. 14, 27 Pac. 942, 49 Am. Rep. 679. While there can be no doubt of the existence of the rule invoked by appellant, the difficulty that confronts him is that the facts pleaded by respondent, and found by the court, do not show an abandonment of the contract on the part of the respondent, nor a refusal to perform. Instead, they show that respondent was relying upon appellant's statement that after the vendees "had improved the land"—an indefinite period of time—it could be sold, and then the sums due appellant, whatever they might be, could be paid. True, the oral proposal made by appellant to respondent and his covendee and acted upon by them, did not create an enforceable contract; but, under the doctrine of estoppel, it did effect a waiver of the time clause and a temporary suspension of appellant's right to a forfeiture—a temporary suspension that could be revived only by giving a definite and specific notice of an intention to that effect and a reasonable opportunity to the vendees to comply therewith. There is no pretense that appellant ever gave either of his vendees notice of his intention to revive the original contractual relations and obligations. It is true the complaint alleges, and the court finds, that "plaintiff has demanded of said defendant A. Karl the possession of said property." But a demand for possession is not the equivalent of a notice to the vendee to perform the covenants stipulated by him in his contract of purchase. Nor does it appear when the demand for possession was made. It may have been made on the very day the action was commenced. So that, even if a demand for possession could be deemed the equivalent of a "definite and specific notice of intention to enforce" the obligations of the contract, so as to revive the temporarily suspended right of forfeiture, it does not appear that the vendees were afforded a reasonable time before the action within which to perform the stipulations of their contract. Until appellant shall have given a definite and specific notice of his intention to restore the original contractual relations and obligations—waived by his oral proposal to the vendees—respondent need not show either a readiness or an ability to perform the strict letter of his written contract.

Judgment affirmed.

We concur: SLOANE, J.; THOMAS, J.

42 Cal. App. 563

BECHTOLD et al. v. CONEY. (Civ. 2802.)

(District Court of Appeal, First District, Division 2, California. Aug. 6, 1919. Rehearing Denied by Supreme Court Oct. 2, 1919.)

1. EVIDENCE 🔑434(11) — PAROL EVIDENCE OF MISREPRESENTATIONS INDUCING CONTRACT ADMISSIBLE.

In view of Civ. Code, §§ 1566, 1567, in an action for cancellation of a contract for the purchase by plaintiffs of territorial rights in a patent, plaintiffs, in attempting to show actual fraud, as defined by section 1572, and which is always a question of fact by section 1574, were entitled to show all the misrepresentations which were matters of inducement for entering into the written contract.

2. PATENTS 🔑215—CANCELLATION OF SALE OF PATENT FOR "ACTUAL FRAUD."

Purchasers of territorial rights in a patent were entitled to cancel the contract for either of two misrepresentations of the seller that he owned the patent, whereas he owned only an undivided sixth interest, and that he would furnish a machine as designated, together with specifications for manufacture, which he never intended to do; Civ. Code, § 1572, defining "actual fraud" to be a promise made without intention to perform.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Actual Fraud.]

3. PATENTS 🔑214—SUIT BY PURCHASER OF TERRITORIAL RIGHTS TO CANCEL SALE NOT BARRED BY LACHES.

In view of circumstances, purchasers of territorial rights in a patent *held* not barred by laches from maintaining their suit to cancel the contract as induced by fraud, because they did not formally rescind until June 1st, the contract having been made March 23d, after efforts to obtain repayment of money received by the seller.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by Harry Bechtold and another against K. Coney. From a judgment for plaintiffs, defendant appeals. Affirmed.

Edward E. Gehring and Burton Jackson Wyman, both of Oakland, for appellant.

M. J. Rutherford, of Oakland, and E. C. Miles, of San Francisco, for respondents.

LANGDON, P. J. This is an action for the cancellation of a certain contract for the sale and purchase by the plaintiffs of certain territorial rights in a United States patent covering a file-sharpening device, and the recovery of $250 paid by plaintiffs on account of the purchase price of such rights. Plaintiffs claim the right to rescind and cancel the contract because of certain alleged misrepresentations and fraud practiced upon them by the defendant, which induced them to enter into said contract. Judgment was for the plaintiffs, and the defendant appeals.

[1] The contract of sale was in writing and is in evidence. It provides for the sale to the plaintiffs of all the right, title, and interest of the defendant in and to a certain patent right, for the price of $500, $250 to be paid upon the signing of the agreement and the balance to be paid within 60 days, and also that the written assignment of such right was to be left with a bank in escrow, to be delivered to the purchasers upon payment of the second installment of the purchase price, and also provides for a forfeiture of all rights of the plaintiffs, provided payment was not made within the 60 days. Appellant contends that this written agreement superseded all previous negotiations, and such previous negotiations, representations, etc., were all merged in the contract, and may not be shown by the plaintiffs to vary the terms of the written contract. If this contention were true, it would never be possible to avoid a written contract for fraudulent misrepresentations, unless such misrepresentations were also in writing and made a part of the contract. This clearly is not the law. The Civil Code provides (section 1566) that a contract may be rescinded where the consent is not free, and in the following section it is provided that consent is not free when such consent is induced by fraud. Actual fraud is defined in section 1572, Civil Code. The plaintiffs, in attempting to show actual fraud, as defined by said last-mentioned section, were entitled to show all the matters of inducement for entering into the contract.

Actual fraud is always a question of fact (Civ. Code, § 1574), and the trial court has made very complete findings, covering numerous fraudulent misrepresentations by the defendant, any one of which is sufficient to warrant the relief granted to the plaintiffs. It is therefore not necessary for us to discuss each of said findings. The court found that before the signing of the contract defendants made statements and representations to the plaintiffs which were fraudulent, and that, among other things, said defendant represented that he was the exclusive owner of a certain United States patent right, the said patent number being 680,152, as said patent is filed of record in the Patent Office of the United States of America. The court further found that the plaintiffs believed and relied upon said representation and statement, and were induced and influenced thereby, and, while believing and relying upon such representation, made and entered into the contract in question; that said statement was false and untrue, and known by the defendant to be false and untrue, and that the defendant was not the exclusive owner of the said patent rights so designated, but that defendant is only the owner of a one-sixth undivided interest in said patent right; and that said one-sixth interest did not and does not entitle said defendant to the exclusive right in any territory in the state of California or any other state. This finding is sustained by the testimony of the plaintiff Bechtold, who testified that the defendant represented that he was the sole owner of the patent. The answer admits that the defendant was the owner only of a one-sixth interest in said patent.

[2] The court also found that the defendant represented to the plaintiffs that, upon the signing of the agreement and the payment of the first installment of the purchase price, he would furnish to said plaintiffs a machine for sharpening files, as said machine is set forth and designated in said patents, together with specifications for the manufacture of other machines. The plaintiff Bechtold testified positively that the defendant agreed to deliver such a machine to him upon the signing of the agreement, and that said machine was never delivered. The trial court found that the defendant never had any intention of delivering said machine, and this finding is of a fact fairly inferable from the entire evidence. This brings the case within the fourth subdivision of section 1572, Civil Code, defining actual fraud to be a promise made without any intention of performing it. Either of the findings discussed herein would support the judgment, and to such matters the doctrine of caveat emptor clearly has no application, and we think appellant's argument upon this doctrine needs no further discussion.

[3] Appellant also urges that the plaintiffs were guilty of laches in failing to rescind the contract earlier. The contract was entered into upon March 23, 1917. Plaintiffs allege that they did not discover the falsity of the

representations until about May 1, 1917, and at that time demanded a return of their money, and that they formally rescinded the contract upon June 1, 1917. The plaintiff Silva testified that about April 23, 1917, one month after the agreement was signed, he asked for a return of his money, which was two or three weeks after plaintiffs discovered that misrepresentations had been made. He testified that, when he received the information from Washington regarding the defendant's limited ownership of the patent right, he showed the papers and abstract to the defendant, and that the defendant promised to return his money when he succeeded in selling more territorial rights in the patent; that, because of this promise by the defendant, the plaintiff continued his visits and demands for his money, and discussed the matter with the defendant seven or eight times, relying upon defendant's promise from time to time that he would return the money; and that he (Silva) finally became tired of waiting, and formally rescinded the contract on June 1st, and brought suit on June 8th. Under such circumstances, we do not think there was any lack of diligence upon the part of the plaintiffs.

The judgment is affirmed.

We concur: BRITTAIN, J.; HAVEN, J.

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42 Cal. App. 474

SAYLOR v. TAYLOR. (Civ. 2357.)

(District Court of Appeal, Second District, Division 1, California. July 29, 1919.)

1. APPEAL AND ERROR 🔑110 — ORDER DENYING MOTION FOR NEW TRIAL NOT APPEALABLE.

An order denying motion for new trial made January 13, 1917, is not an appealable order in view of Code Civ. Proc. § 963, as amended by St. 1915, p. 209, and an appeal therefrom must be dismissed.

2. NEGLIGENCE 🔑111(1) — ALLEGATION IN GENERAL TERMS SUFFICIENT.

An allegation that defendant so carelessly and negligently drove and managed his automobile that it struck the automobile in which plaintiff was riding was sufficient, though in general terms.

3. MUNICIPAL CORPORATIONS 🔑706(7) — WHETHER DRIVER OF PLAINTIFF'S AUTOMOBILE WAS EXERCISING DUE CARE, FOR THE JURY.

In an action for personal injuries from an automobile collision, where defendant was on the wrong side of the street and the machine in which plaintiff was riding was on the right side, and its driver attempted to turn toward the center of the street and avoid defendant, and defendant turned in the same direction, causing the collision, it was a question for the jury whether the driver of plaintiff's automobile, as a reasonably prudent man in the exercise of due care, was justified in so turning his car.

4. MUNICIPAL CORPORATIONS 🔑706(5) — EVIDENCE JUSTIFYING VERDICT FOR PLAINTIFF FOR PERSONAL INJURIES IN AUTOMOBILE COLLISION.

In an action for personal injuries resulting from an automobile collision, evidence *held* sufficient to justify a verdict for plaintiff.

5. APPEAL AND ERROR 🔑1048(6) — ERROR IN CROSS-EXAMINATION, CLEARLY WITHOUT PREJUDICE, HARMLESS.

In an action for personal injuries resulting from an automobile collision, although cross-examination by plaintiff of defendant's witnesses as to radius in which it was possible to turn a car, of the make and manufacture of that driven by defendant, was erroneous, yet where it is apparent from the nature of the questions and answers thereto that it was without prejudice it must be considered harmless.

6. PLEADING 🔑122 — DENIAL OF ALLEGATION OF APPOINTMENT OF GUARDIAN AD LITEM UPON INFORMATION AND BELIEF INSUFFICIENT.

In a personal injury action by an infant by a guardian ad litem, defendant's denial of the appointment of such guardian upon information and belief is insufficient to require plaintiff to submit proof thereon; the order and records affording defendant ready means of ascertaining the truth of the allegation.

7. DAMAGES 🔑216(7)—INSTRUCTION AS TO COMPENSATION FOR FUTURE SUFFERING ERRONEOUS.

An instruction that if the jury believed plaintiff was "liable" to continual suffering and future mental anguish and bodily pain the verdict should be commensurate therewith was erroneous, since Civ. Code, § 3283, provides that "damages may be awarded in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future," and the word "liable" must be construed, not as referring to a detriment certain to result, but rather to a future possible or probable happening which may not actually occur.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Liable.]

8. APPEAL AND ERROR 🔑1170(9) — WHERE JUDGMENT IS FOR THE RIGHT PARTY IT WILL NOT BE REVERSED.

Although an instruction was erroneous where the appellate court is satisfied upon examination of the evidence that it did not result in miscarriage of justice, the verdict should not be set aside in view of Const. art. 6, § 4½.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Ruth Saylor, a minor, by Edgar F. Saylor, her guardian ad litem, against A. V. Taylor. From judgment for plaintiff and from order denying defendant's motion for a new trial, defendant appeals. Affirmed.

H. Scott Jacobs, of Hanford, for appellant.
R. Justin Miller, of Hanford, for respondent.

SHAW, J. Action to recover damages for injuries alleged to have been sustained as the result of defendant's negligent operation of an automobile. Judgment upon veruict in favor of plaintiff was entered for $450, from which and an order denying his motion for a new trial defendant appeals.

[1] The order denying the motion for new trial, made on January 13, 1917, is not an appealable order (section 963, Code Civ. Proc., as amended in 1915; Stats. 1915, p. 209), and the appeal therefrom is therefore dismissed.

[2] Upon the ground of uncertainty defendant interposed a demurrer to the complaint, which was overruled, and this ruling is assigned as error. His contention is that the allegation, to wit, "that defendant * * * so carelessly and negligently drove and managed his said automobile that by reason of his negligence the said automobile violently collided with and struck the automobile in which this plaintiff was riding, and that as a result of the said collision so caused as aforesaid, this plaintiff was" injured, was, in general terms and by reason thereof, insufficient. That the allegation was sufficient admits of no question. "It is well settled that negligence may be charged in general terms; that is, what was done being stated, it is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent." Smith v. Buttner, 90 Cal. 95, 27 Pac. 29; Champagne v. A. Hamburger & Sons, 169 Cal. 683, 147 Pac. 954.

[3, 4] At the close of plaintiff's evidence defendant moved for a nonsuit upon the ground that the evidence showed that plaintiff was guilty of contributory negligence, which motion was denied, and this ruling is assigned as error. The evidence clearly tended to show that the automobile in which plaintiff was riding was traveling westerly on the north side of the center of a street running east and west and near the curb line, at which time defendant was approaching from the opposite direction, driving his automobile on the same side of the street and also near the curb line, between which and defendant's automobile there was not room to pass; that when the driver of plaintiff's car reached a point less than 20 feet from defendant's car, which was still approaching, he, in order to avoid the threatened head-on collision, turned to the left, at which time defendant also turned in the same direction and the two cars collided. Admittedly defendant was on the wrong side of the street, and under the evidence it was a question for the determination of the jury as to whether, under the circumstances shown, the driver of plaintiff's automobile, as a reasonably prudent man and in the exercise of due care, was justified in turning his car to the left to avoid the collision threatened by the negligent act of defendant. Not only was there no error in the ruling of the court in denying the motion for nonsuit, but there is likewise no ground for appellant's contention that the evidence was insufficient to justify the verdict. Indeed, the testimony of plaintiff's witnesses is such that if the jury believed the truth of their statements it could not have arrived at a different verdict.

[5] Error is predicated upon the ruling of the court in permitting the cross-examination of two witnesses called by defendant and questioned as to the damage suffered by defendant as a result of injuries to his car in the collision. Thereupon, on cross-examination, plaintiff questioned them as to the radius within which it was possible to turn a car of the make and manufacture of that driven by defendant. The ruling of the court in permitting these questions was erroneous. Nevertheless, it is apparent from the nature of the questions and the answers thereto that such error was absolutely harmless and without prejudice.

[6] Plaintiff sued by her guardian ad litem, alleging that on July 22, 1914, Edgar F. Saylor was by an order of court appointed in such capacity. In his answer defendant, upon information and belief, denied the allegation. No proof was offered thereon, for which reason he claims the judgment should be reversed. The order was made in the case, the records of which afforded defendant a ready means of ascertaining the truth of the allegation, and hence it was not an allegation as to which issue could be joined by a denial for want of information and belief. Mulcahy v. Buckley, 100 Cal. 484, 35 Pac. 144; Mullally v. Townsend, 119 Cal. 47, 50 Pac. 1066.

[7] The court instructed the jury that plaintiff's right to recover was not limited to such damages as may have occurred up to the time of the filing of her complaint in the action, and further said, "But in case you find from the evidence, that plaintiff is liable to continual suffering, and is liable to future mental anguish and bodily pain, then your verdict should be commensurate to such subsequent suffering, mental anguish, and physical suffering as by the evidence she may reasonably suffer in the future, as well as for that suffered down to the time of the filing of her complaint, not exceeding the amount claimed" therein. We agree with appellant that the giving of this instruction was error, since under section 3283, Civil Code, "damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future." As used, the word "liable" must be construed, not as referring to a detriment certain to result, but to a future possible or probable happening which may not actually occur. Home Insurance Co. v. Peoria & P. U. Ry. Co., 178 Ill. 64, 52 N. E. 862. The jury,

notwithstanding an instruction later given by the court in the language of section 3283, might have considered the first one applicable to the facts established and, as claimed by appellant, indulged in the realm of speculation and conjecture as to the liability of future suffering and detriment. That it was error and not cured by the subsequent instruction with which it was in conflict, see Martin v. Southern Pacific Co., 130 Cal. 285, 62 Pac. 515, Melone v. Sierra Ry. Co., 151 Cal. 113, 91 Pac. 522, and Walker v. Southern Pacific Co., 162 Cal. 121, 121 Pac. 369.

[8] Nevertheless, and conceding the error, we are satisfied, upon an examination of the evidence, that it did not result in a miscarriage of justice, without which, as provided in section 4½ of article 6 of the Constitution, this court should not set aside the judgment rendered. It appears without contradiction that plaintiff was seriously, if not permanently, injured; that in addition to both limbs and an artery being badly cut, necessitating a number of stitches being taken to close the wounds, a ligament of the kneecap was almost severed, which likewise had to be drawn together by stitches; in addition to all of which her nervous system was more or less impaired. It further appeared that at the time of the trial, about a year after the accident, plaintiff's condition, as a result of the injuries, was such that she could not stand upon the limb affected by the severed ligament without suffering pain. Hence conceding the jury, as claimed by appellant, might have indulged in speculation and conjecture, it is apparent, when considering the amount of the verdict as compared with the serious injuries sustained by plaintiff, that if they did enter into the realm of speculation the voyage therein was of exceedingly short duration and not to an extent that affected the verdict.

An examination of other alleged errors predicated upon the giving and the refusing to give instructions discloses no merit in appellant's contentions based thereon.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

42 Cal. App. 800

SAYLOR v. TAYLOR. (Civ. 2356.)

(District Court of Appeal, Second District, Division 1, California. July 29, 1919.)

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Edgar F. Saylor against A. V. Taylor. From judgment for plaintiff, defendant appeals. Affirmed.

H. Scott Jacobs, of Hanford, for appellant.
R. Justin Miller, of Hanford, for respondent.

PER CURIAM. This is an appeal from a judgment entered on the verdict of a jury, wherein the plaintiff recovered damages for injuries and loss occasioned by defendant's negligent driving and management of an automobile, whereby said automobile was caused to collide with an automobile of the plaintiff.

This case was tried with the action of Ruth Saylor, a minor, against A. V. Taylor, defendant (Civil No. 2357 of this court, 183 Pac. 843), wherein the minor sued for damages for personal injuries received by her in the same collision. All of the points relied upon by counsel for appellant in support of the appeal herein are included among those presented and considered in the appeal in said case No. 2357, in which the decision is this day filed. The arguments made in support of the points presented in this case are identical with the arguments made upon the same proposition in the other case. The judgment in that case having been affirmed, this appeal should take the same course.

The judgment is affirmed.

42 Cal. App. 411

PEOPLE v. CAMP. (Cr. 471.)

(District Court of Appeal, Third District, California. July 28, 1919.)

1. STATUTES 🔑285—WHEN DULY CERTIFIED, CANNOT BE IMPEACHED BY LEGISLATIVE JOURNALS.

The validity of a statute, which has been duly certified, enrolled and approved, and deposited in the office of the secretary of state, cannot be impeached by a resort to the journals of the Legislature, or by extrinsic evidence of any character.

2. STATUTES 🔑118(6)—TITLE OF STATUTE AS TO CRIMES AGAINST CHILDREN SUFFICIENT.

Pen. Code, § 288, prohibiting any lewd or lascivious act upon a child under the age of 14, etc., entitled, as enacted by St. 1901, p. 630, "An act to amend the Penal Code by adding a new section thereto to be numbered," etc., "relating to crimes against children," *held* not in violation of Const. art. 4, § 24, requiring expression of the subject of an act in the title.

3. STATUTES 🔑118(6) — ACT AS TO CRIMES AGAINST CHILDREN NOT CONTRADICTORY TO ITS TITLE.

Pen. Code, § 288, prohibiting any lewd or lascivious act upon or with a child under 14, etc., entitled, as enacted by St. 1901, p. 630, "An act to amend the Penal Code by adding a new section thereto to be numbered," etc., "relating to crimes against children," *held* not violative of Const. art. 4, § 24, as explicitly negativing and contradicting the subject expressed in the title; it not being misleading or calculated to deceive.

4. STATUTES 🔑86 — ACT AS TO CRIMES AGAINST CHILDREN NOT CLASS LEGISLATION.

Pen. Code, § 288, prohibiting any lewd or lascivious act upon or with a child under 14, *held* not to involve special legislation, within the meaning and contemplation of Const. art. 4, § 25, subd. 2, applying, as it does, to all children under 14 years of age and to all of a class.

5. CONSTITUTIONAL LAW 🔑250, 258—INFANTS 🔑12—ACT AS TO CRIMES AGAINST CHILDREN NOT A VIOLATION OF FEDERAL CONSTITUTION.

Pen. Code, § 288, prohibiting any lewd or lascivious act upon or with a child under 14, *held* not to deny to persons prosecuted under its provisions the equal protection of the laws, or to deprive them of liberty without due process, contrary to Const. U. S. Amend. 14, § 1, though other sections of the Penal Code relating to crimes against children, such as sections 272, 273, 273g, and 650½, made the condemned acts misdemeanors only.

6. CRIMINAL LAW 🔑1213—PUNISHMENT IN STATUTE AS TO CRIMES AGAINST CHILDREN NOT UNUSUAL.

Pen. Code, § 288, prohibiting any lewd or lascivious act upon or with a child under 14, *held* not to authorize the infliction of unusual punishment, within the meaning of the inhibition of Const. Cal. art. 1, § 6.

7. STATUTES 🔑183—WHEN LITERAL MEANING OF TERMS ABSURD, MEANING CONSISTENT WITH CONTEXT FOLLOWED.

A cardinal rule of statutory construction is that, if giving a word or phrase its literal meaning would result absurdly, such meaning must be disregarded, and a meaning ascribed consistent with the context and evident object of the act, that would render it not only consistent, but reasonable in effect, and therefore effectual.

8. CRIMINAL LAW 🔑13—CLERICAL ERROR IN STATUTE INSUFFICIENT TO RENDER IT UNCERTAIN.

Pen. Code, § 288, prohibiting any lewd or lascivious act upon or with a child under 14, is not rendered incurably uncertain, vague, and unintelligible, in that it cannot be ascertained what lewd and lascivious acts are prohibited, because the section, by clerical error or otherwise, refers to Pen. Code, pt. 2, relating solely to criminal procedure, instead of part 1.

9. INFANTS 🔑20—VERDICT IN PROSECUTION FOR CRIME AGAINST CHILD SUFFICIENT.

Verdict that defendant was guilty of the crime of lewd and lascivious conduct with a male child under the age of 14 years, a felony, as charged in the indictment, which must be presumed on collateral attack to have sufficiently stated the offense as defined by Pen. Code, § 288, by following substantially the language of the statute, *held* sufficiently to have found that the crime was committed upon or with the body of a child, as prohibited by the statute and as charged by the indictment.

10. CRIMINAL LAW 🔑1088(1)—WHAT PAPERS INCLUDED IN RECORD OF CRIMINAL TRIAL.

The record of a criminal action consists of, first, the indictment or information and a copy of the minutes of the plea or demurrer; second, a copy of the minutes of the trial; third, the written instructions, etc.; and, fourth, a copy of the judgment.

11. INFANTS 🔑20—STATUTE RELATING TO CRIMES AGAINST CHILDREN NOT REPEALED.

Pen. Code, § 288, prohibiting any lewd or lascivious act upon or with a child under 14, *held* not impliedly repealed by Juvenile Court Law, § 28; there being no inconsistency between them.

12. INFANTS 🔑20—LENGTH OF SENTENCE ON PROSECUTION FOR CRIME AGAINST CHILD AUTHORIZED.

In view of Pen. Code, § 671, despite section 18, the court had jurisdiction to sentence to imprisonment for more than five years defendant, convicted of lewd and lascivious conduct upon a child under 14, in violation of section 288.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Charles Camp was convicted of lewd and lascivious conduct with and upon the body of a male child under the age of 14 years. From an order denying his motion for order vacating and setting aside the conviction and judgment for want of jurisdiction, he appeals. Affirmed.

George D. Collins, Jr., of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. On the 16th of October, 1914, defendant, having been convicted by a jury of the crime of "lewd and lascivious conduct with and upon the body of a male child under the age of 14 years," was sentenced by the superior court of the county of Sacramento to imprisonment in the state prison for the term of 15 years. On the 21st day of January, 1919, defendant made a motion "that an order be made and entered herein vacating and setting aside the conviction and judgment for want of jurisdiction in said court." An order to show cause was issued and, after a hearing, the motion was by the court denied, and the defendant remanded to the custody of the warden of the state prison. The appeal is by the defendant from the order denying said motion.

It is stated in the grounds of appeal that said order is "contrary to law, and that said conviction and judgment are void on the face of the record, for want of jurisdiction in said superior court over the subject-matter of the action, and that said judgment in said action is also void, because in excess of the authority of said superior court to the extent that the sentence therein specified exceeds the term of 5 years." Defendant was tried and convicted under the provisions of section 288 of the Penal Code, which reads as follows:

"Any person who shall willfully and lewdly commit any lewd or lascivious act, other than the acts constituting other crimes provided for in part two of this Code, upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person, or of such child, shall be guilty of a felony, and shall be imprisoned in the state prison not less than one year."

Appellant urges the following points as grounds for reversal of said order: That said section 288 is void for the following reasons: (1) That the same, after being amended in the senate, was not read at length in the assembly; (2) that it is in violation of section 24 of article 4 of the Constitution, in that the subject of the act is not expressed in the title, but, on the contrary the act itself explicitly negatives and contradicts the subject expressed in the title; (3) that it is in violation of subdivisions 2 and 33 of section 25, article 4, of the Constitution; (4) that it operates to deny to the defendant the equal protection of the laws guaranteed him by the Fourteenth Amendment of the Constitution of the United States; (5) that it operates to deprive defendant of his liberty without due process of law in violation of the Fourteenth Amendment; (6) that the act is incurably uncertain, vague, and unintelligible, in that it cannot be ascertained what lewd and lascivious acts are prohibited, as the statute refers to part 2 of the Penal Code, which relates solely to criminal procedure, and that the courts are denied the power to strike out from said section "part 2" and substitute "part 1"; that so to amend the section is to deprive defendant of his liberty without due process of law, in violation of said Fourteenth Amendment; (7) that said section and said judgment are in violation of article 1, section 6, of the Constitution, in that they inflict unusual punishment; (8) that the conduct of which defendant has been convicted is made a misdemeanor by sections 273 and 273g of the Penal Code, and is therefore expressly excluded from section 288; (9) that section 288 has been repealed by section 28 of the juvenile court law of 1913; (10) that by section 18 of the Penal Code the maximum penalty for a violation of section 288 is 5 years, which the defendant has served.

Most, if, indeed, not all of the objections to section 288 of the Penal Code urged here on constitutional grounds have been decided adversely to the position of the appellant by the courts. The objections will nevertheless, be given some notice.

[1] 1. It has been so often held in this state that it is no longer an open question that the validity of a statute, which had been duly certified, enrolled and approved, and deposited in the office of the secretary of state, cannot be impeached by a resort to the journals of the Legislature, or by extrinsic evidence of any character. Sherman v. Story, 30 Cal. 253, 89 Am. Dec. 93; County of Yolo v. Colgan, 132 Cal. 265, 64 Pac. 403, 84 Am. St. Rep. 41; Kingsbury v. Nye, 9 Cal. App. 574, 577, 99 Pac. 985. See, also, De Loach et al. v. Newton, 134 Ga. 739, 68 S. E. 708; State of Washington v. Jones, 6 Wash. 452, 34 Pac. 201, 23 L. R. A. 340; Field v. Clark, 143 U. S. 672, 12 Sup. Ct. 495, 36 L. Ed. 294. This point requires no further consideration herein than such as is involved in the citation of these cases.

[2, 3] 2. The title to section 288 of the Penal Code, as it was enacted by the Legislature of 1901 (Stats. 1901, p. 630), reads as follows:

"An act to amend the Penal Code by adding a new section thereto, to be numbered section two hundred and eighty-two, relating to crimes against children."

Thus it will be observed that the title of the act states generally that the crimes which the section is designed to punish are those perpetrated upon or against children. It was not necessary, to make the act conform to the requirements of the Constitution in that respect, to embrace in its title a specification of the nature of the crimes to which the section relates; and the courts of this state have held that such a title as was contained in the act in question, being an amendment of one of the Codes, sufficiently expresses the subject of the act as required by section 24 of article 4 of the Constitution. See People v. Dobbins, 73 Cal. 257, 14 Pac. 860; Ex parte Liddell, 93 Cal. 633, 29 Pac. 251; People v. Lovren, 119 Cal. 88, 51 Pac. 22, 638; Jackson v. Baehr, 138 Cal. 266, 71 Pac. 167; County of Butte v. Merrill, 141 Cal. 396, 398, 74 Pac. 1036; People v. Oates, 142 Cal. 12, 75 Pac. 337; People v. Merritt, 18 Cal. App. 58, 122 Pac. 839, 844.

Nor can we perceive any merit in the contention that the act itself contradicts or is in any wise inconsistent with its title. The title, as we have seen, declares that the subject of the act involves certain crimes against children and the act itself specifically sets forth the acts constituting the crimes to which the title refers. In other words, the title declares in general terms the nature of the legislation of which it is a sort of preamble, and that it has relation to certain crimes against children, and the act itself describes or defines the particular kind of act constituting the crime thus intended to be included among those provided for in other sections of the Penal Code against the same class of persons and which define as such crimes acts of a different nature from that constituting the basis of the legislation involved in section 288. It is therefore very clear that, when compared to the act itself, no inconsistency between them can be discerned, nor can it be said, when so compared, that the title is misleading or calculated to deceive or convey an erroneous impression as to the subject of the legislation involved in the act.

[4] 3. Section 288 does not involve special legislation, within the meaning or contemplation of subdivision 2 of section 25, article 4, of the state Constitution. The act applies to all children under 14 years of age, or to all of a class. It has been held time and again that an act of the Legislature which applies uniformly upon the whole or any single class of individuals or objects, when the classification is founded upon some natural, intrinsic, or constitutional distinction is a general law. See cases cited in Treadwell's Constitution, p. 255. That children or minors constitute a class founded upon a natural or intrinsic distinction, and as to whom legislation peculiarly applicable to individuals of their immature years is necessary for their proper protection, are propositions which cannot well be controverted. As to some matters in connection with the welfare of minors, particularly those not beyond or far beyond their infancy, a general law, in the more comprehensive sense of that phrase, could not be made.

Section 288 is particularly directed to the prevention and punishment of lewd and lascivious conduct with and upon the bodies of children under 14 years of age because as a rule, it may properly be assumed, they are not sufficiently matured mentally to appreciate as fully as older persons the consequences to them, both morally and physically, of such acts of degeneracy, and they therefore generally have neither the judgment nor the physical power, which in such cases is often minimized where there is no developed mental power, to protect themselves against the perpetration upon them of such outrages which it is the object of this law to prevent, if it can be done, or to punish where such acts have been done. Such crimes as the one denounced by section 288 are (we think experience shows to be true) ordinarily committed by persons of mature years, or who at any rate are old enough to know that the inevitable tendency of conduct so abnormal and utterly diabolical is to corrupt the morals of children and to make them what the perpetrator of such crime himself is. It was therefore quite natural that the people should by their Constitution authorize the enactment of laws for the special protection of a class of persons not of sufficient mental and physical development by reason of their youth to protect themselves against those human parasites who make a practice of satiating in a measure their abnormal sexual appetites by that sort of conduct with such minors.

[5, 6] The contention that section 288 denies to persons prosecuted under its provisions the equal protection of the law, contrary to the mandates of the first section of the Fourteenth Amendment of the federal Constitution, is founded upon the theory that, while said section makes the act therein denounced as criminal a felony, other sections of the Penal Code relating to crimes against children make the acts specified therein misdemeanors only. In support of this argument, counsel refers to sections 272, 273, 273g and 650½ of said Code. None of these sections, however, relates to lewd and lascivious acts "upon or with the body or any member thereof, of a child under the age of fourteen years." But section 273g does relate to such practices in the presence of any child. It provides:

> "Any person who in the presence of any child indulges in any degrading, lewd, immoral or vicious habits or practices, or who is habitually drunk in the presence of any child in his care, custody or control, is guilty of a misdemeanor."

That section was undoubtedly intended to include those cases only where the lewd or immoral conduct is carried on in the presence of children, and where the same is not practiced upon or with the body of the child. Furthermore, said section includes all children without regard to their age, while section 288 is confined in its operation to children under the age of 14 years. Section 650½ makes it a misdemeanor for any person to do certain acts or things in derogation of the rights of property or of the person of an individual, and, among other things, provides that the rights of person are violated and punishable as above indicated, when the name of a person is used by another for the accomplishment of lewd or licentious purposes, etc. This section obviously has no bearing upon nor is the subject-matter or the object thereof analogous to the crime defined by section 288. The other sections (272 and 273), while prohibiting and penalizing the abuse or misuse of minors, do not relate or refer to acts of lewdness or lasciviousness either with the body of a child or in the presence of children without practicing the same upon or with their bodies. It follows that there is no discrimination involved in our Code sections with respect to acts of lewdness or lasciviousness upon or with or in the presence of children. Indeed, there is a marked distinction between the several crimes denounced by the Penal Code for such acts. It is quite true that the crimes referred to may, in a general sense, be said to be correlated, as are robbery and larceny, because of possessing a certain element in common. Both these crimes involve the element of the felonious taking from another his personal property, but they are essentially differentiated by reason of the fact that the stealing in the one case is accomplished by means of force or fear, while in the other a less violent method is resorted to.

So in the case before us. It is true that the act of lewdness or lasciviousness penalized by section 288 involves some of the elements to be found in section 273g. Indeed, it involves some of the elements involved in the crime of rape or the infamous crime against nature; but there are features in those crimes which not only distinguish them one from the other, but which distinguish them from any other crime denounced in our statutes involving acts appertaining, either directly or indirectly, to sexual relations. Upon such distinction it is competent for the Legislature to annex a different punishment for the different crimes, and in doing this the Legislature will be, and presumptively has always been, governed by the nature of the acts constituting the crime, or in the case of penal statutes for the prevention of crimes against children, fix the penalty in accordance with the effect that the prohibited acts would naturally have upon that class of persons (and consequently upon society), taking into consideration their age, where that element is important in the determination of such effect, or disregarding the fact of age, where it cannot logically or in the nature of the case enter as a factor into the determination of such effect. Of course, no one will question the constitutional authority of the Legislature to fix the penalty to suit the crime, or, in other words, to fix different penalties for different crimes; the penalty in each case being measured or fixed according to the nature of the particular crime and its effect upon society. See People v. Barbieri, 33 Cal. App. 770, 780, 166 Pac. 812; Ex parte Selowski, 177 Pac. 301; Selowski v. Superior Court, 181 Pac. 652. It follows from the foregoing that section 288, either when taken alone or when considered in comparison with the other sections of the Penal Code above named, in no way impinges upon rights guaranteed by the Fourteenth Amendment of the Constitution of the United States, or has the effect of denying to a person prosecuted under its provisions the equal protection of the law or depriving him of his liberty without due process of law. Nor does the section authorize the infliction of unusual punishment, within the meaning of the inhibition in that respect of section 6 of article 1 of the state Constitution. See Wilkerson v. Utah, 99 U. S. 130, 25 L. Ed. 345; Ex parte Kemmler, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519; People v. Finley, 153 Cal. 59, 94 Pac. 248.

[7, 8] 4. There is not imparted to section 288 uncertainty or ambiguity or unintelligibleness as to its meaning or intent by reason of the fact that "part 2" instead of "part 1" is therein erroneously referred to as defining crimes involving in their composition, among other elements, that of lewd or lascivious conduct, which specific conduct is by said section excepted from the operation thereof. Part 2 of the Penal Code relates entirely to the procedure in criminal cases, while part 1 contains the definition of of the several crimes and the penalties annexed thereto. It is therefore plainly manifest that the reference by section 288 to "part 2" in the connection in which it is therein used was due, not to the intention of the Legislature, but to inadvertence or an oversight—perhaps a clerical misprision, possibly a mistake of the printer. At any rate, it is, as stated, very clear that the Legislature did not intend in said section to refer to "part 2" of the Penal Code, for such a reference would make the section an absurdity, and it is one of the cardinal rules of statutory construction that if, by giving to a word or a phrase in a statute its literal meaning, absurd consequences would be the inevitable result, then the literal meaning thereof must be disregarded, and such a meaning ascribed thereto, consistent, of course, with the general context and the evident object of the act, as will render the act, not only consistent in all its parts, but reasonable in its effect, and, therefore effectual for the purposes for which it was intended. The validity of the identical section was challenged upon precisely the same ground in People v. Bradford, 1 Cal. App. 41, 81 Pac. 712, and the views and the conclusion expressed and arrived at in that case are in harmony with the views above expressed.

Counsel for the defendant contends, however, that the rules of statutory construction which are applied in the Bradford Case have application to statutes regulating or defining civil rights, and not to penal statutes or legislative acts defining crimes and fixing their penalties, referring to sections 388, 411, 498, 521 and 524 of Sutherland on Statutory Construction (2d Ed.), and the case of Ex parte McNulty, 77 Cal. 164, 19 Pac. 237, 11 Am. St. Rep. 257, as supporting that proposition. We fully agree with what is said in the California case named, that "constructive crimes—crimes built up by courts with the aid of inference, implication, and strained interpretation—are repugnant to the spirit and letter of English and American criminal law," but we do not assent to the proposition that that case holds, or that Sutherland declares the rule to be, that the rules of statutory construction are not, generally, as well applicable to the construction of statutes defining crimes as to the construction of statutes concerning civil rights. There is nothing in the matter of the construction of section 288 but the simple question whether the Legislature intended to refer therein to a part of the Penal Code which would make said section mean something and what it was obviously intended to mean, or to a part of said Code which would render the section not only absurd but in truth nonsensical;

and, manifestly, it requires under the circumstances present here no strained interpretation, nor does it amount to the building up of a "constructive crime," to find that the Legislature intended to refer in said section to part 1 and not to part 2 of the Penal Code, and that the reference therein to part 2 is the result of an inadvertence.

[9, 10] 5. There is no merit, so far as the record before us shows, in the point that the "judgment and verdict do not show a violation of section 288 of the Penal Code," and therefore, "the offense not being within section 288, the superior court had no jurisdiction to sentence the appellant to the state prison." The argument addressed to the support of this point is that, while the said section defines the crime therein denounced as the commission of "any lewd or lascivious act * * * upon or with the body * * * of a child," etc., the verdict was that defendant was guilty "of the crime of lewd and lascivious conduct with a male child under the age of 14 years, a felony, as charged in the indictment," and the judgment was in similar phraseology. It will be noticed that neither the verdict nor the judgment stated or declared that the crime of which defendant was convicted was committed "upon and with the body," etc. The indictment upon which the defendant was prosecuted and convicted is not in the record here. We must therefore presume, in this collateral attack upon the judgment, that the indictment sufficiently stated the offense defined by section 288 by following substantially and in all essential particulars the language thereof; and, so viewing the indictment, the verdict sufficiently finds that the crime denounced by said section was committed by the accused by the use of the general language therein contained, viz. "a felony, as charged in the indictment." The "judgment," involving the pronouncement of sentence in a criminal case, is generally orally rendered and delivered, and is usually in informal language, and the law requires it to be no more than that. Pen. Code, § 1202; People v. Terrill, 133 Cal. 120, 123, 65 Pac. 303.

The record of a criminal action consists of the following papers: (1) The indictment or information, and a copy of the minutes of the plea or demurrer; (2) a copy of the minutes of the trial: (3) the written instructions, etc.; and (4) a copy of the judgment. "The judgment need not, and it was not intended that it should, repeat anything contained in the papers which precede it, for, in view of the fact that they go into the record and make a part of it, such repetition would be idle and serve no useful purpose. The only material parts of a judgment are the statement of the offense for which the defendant has been convicted, omitting therefrom all that is contained in the previous papers, and therefore not necessary to be repeated, and the sentence of the court." Ex parte Williams, 89 Cal. 421, 426, 427, 26 Pac. 887, 889. If the judgment with sufficient clearness shows that it is the pronouncement of sentence by the court upon the verdict as returned, and the penalty imposed by such sentence is authorized by the statute under which the prisoner has been convicted, then the judgment satisfies the demand of the statute in that respect. The mere omission by the court, in passing sentence on the prisoner, to state or describe the offense with technical precision, certainly should not, in reason, be held to have the effect of rendering the judgment of sentence void or even voidable. Of course, all this is upon the assumption that the verdict finds the crime as charged, and that the charge, as we are authorized to assume is true here, is correctly described in the indictment. The statement in the judgment that, "Whereas, the said Charles Camp has been duly convicted in this court of the crime of lewd and lascivious conduct with a male child under the age of 14 years," implies that he has been convicted of the offense shown by the verdict upon which the judgment must necessarily rest, and therefore further implies that the offense for which he was sentenced embraced all the vital elements constituting the offense as it is defined by the statute, just as a judgment of sentence for murder upon a verdict convicting the accused of that crime implies, without stating it in the judgment, the unlawful taking of human life deliberately and with malice aforethought. As sustaining the foregoing views, we cite the following cases in addition to those above referred to: Matter of Ring, 28 Cal. 248, 253; Ex parte Gibson, 31 Cal. 619, 91 Am. Dec. 546; Ex parte Raye, 63 Cal. 491; People v. Murback, 64 Cal. 369, 372, 30 Pac. 608.

[11] 6. There is absolutely no ground for the contention that section 288 has been repealed by section 28 of the so-called juvenile court law. Stats. 1913, p. 1303. So much of said section as pertains to the penalty for the offense therein referred to reads as follows:

> "Any person who shall commit any act or omit the performance of any duty, which act or omission causes or tends to cause, encourage or contribute to the dependency or delinquency of any person under the age of twenty-one years, as defined by any law of this state, or any person who shall, by any act or omission, threats or commands or persuasion, endeavor to induce any such person, under twenty-one years of age, to do or to perform any act or follow any course of conduct, or to so live as would cause or manifestly tend to cause any such person to become, or to remain a dependent or delinquent person, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding one thousand dollars, or imprisonment in the county jail for not more than one year, or by both such fine and imprisonment."

The design of that law is, so far as a penal statute can go in the accomplishment of so laudable a purpose, to protect minors against those acts and temptations which, if allowed to be practiced and to exist, will surely lead them into habits involving acts of the grossest depravity. Section 3 of the law enumerates and describes eight different acts of omission and commission, any or all of which will constitute a minor a dependent person. Section 4 of said act provides that a "delinquent person" is one who violates any law of the state, or any ordinance of any city, town, etc., defining crime and which involves moral turpitude. Among the variety of acts enumerated in section 3 as constituting the dependency of a minor, neither the act of sexual commerce nor that of lewd and lascivious conduct with or upon a minor is specifically or eo nomine named or mentioned. There can be no doubt, though, that either or both of the last-mentioned acts upon a minor, under the general language of certain subdivisions of section 3 or that of section 4 of the said law, would properly be construed as acts contributing to the dependency or the delinquency of a minor within the common intent of that law; yet it would hardly with seriousness be contended that the penalty fixed by section 28 of said law was intended to supersede or take the place of the penalty prescribed by section 261 of the Penal Code, defining the crime of rape, where a person is prosecuted and convicted under said Code section for the crime of statutory rape—that is, for having sexual intercourse with a female under the age of 18 years, a minor under the juvenile court law as well as under section 261 of the Penal Code.

Nor can such a contention be sustained with respect to the effect of section 28 of the juvenile court law upon section 288 of the Penal Code. Section 28 of the juvenile court law does not repeal section 288 of the Code by express language, and we find nothing in its language, either when considered alone or in connection with other provisions of the law to which it belongs, which would justify the conclusion that it does so by implication or thus affects the penalty prescribed by the Code section for the distinctive crime by said section defined. In other words, the question here is one of legislative intent, and we perceive nothing in the language of section 28 of the juvenile court law, or in that of any other section of said law, from which it is to be inferred that the Legislature intended by said section or by the act of which it is a part to expunge section 288 of the Penal Code or to repeal the penal clause thereof, and this is what the argument of counsel, if sustained, would bring about. The two acts—section 288 of the Penal Code and the juvenile court law, even with its section 28—can consistently stand together, and when this can be said of two different legislative acts having, in a remote way, some relation to each other as to the general subject-matter thereof, then there is no such repugnancy between them as will amount to or operate as a repeal by implication of the earlier act.

[12] 7. The final point urged by appellant is that the court was without jurisdiction to inflict a greater punishment for the violation of section 288 than that of 5 years. The penalty fixed by section 288 of the Penal Code is, as will be observed, imprisonment "in the state prison not less than one year"; no maximum penalty being thereby expressly prescribed. Section 671 of said Code reads:

> "Whenever any person is declared punishable for a crime by imprisonment in the state [prison] for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the court authorized to pronounce judgment upon such conviction may, in its discretion, sentence such offender to imprisonment during his natural life, or for any number of years not less than that prescribed."

The last-named section is obviously a complete answer to the contention of the appellant that the court was without authority to make the penalty in this case greater than that of imprisonment for 5 years. Counsel insists, however, that section 671 has no application to section 288, but that the maximum punishment under the latter section is fixed by section 18 of said Code, which provides:

> "Except in cases where a different punishment is prescribed by this Code, every offense declared to be a felony is punishable by imprisonment in the state prison not exceeding five years."

We are unable to see the force of the argument. Sections 288 and 671 must be read together to ascertain the maximum and the minimum penalties in cases arising under the first named section. The two together fix the lowest and the highest limits within which the court was authorized to exercise its discretion as to the punishment. Thus the case here comes within the exception made by section 18; this being as clearly a case "where a different punishment is prescribed" as though both the maximum and minimum penalties were expressly declared in section 288 of the Code.

We have now as fully as we have conceived necessary noticed all the general points made by the appellant. We have not discussed the points, though, from all the angles of the argument advanced in support of the appeal, or strictly followed the varying ramifications thereof. We have satisfied ourselves, however, that there is no substantial merit in any of the points presented, although they have been ingeniously and with as much force as untenable legal problems may be supported pressed upon us in the briefs.

The order appealed from is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

42 Cal. App. 530

SARTER v. SISKIYOU COUNTY.

(Civ. 1961.)

(District Court of Appeal, Third District, California. Aug. 4, 1919. Rehearing Denied by Supreme Court Oct. 2, 1919.)

1. COUNTIES 🔑74(5) — COMPENSATION OF COUNTY SURVEYOR CANNOT BE INCREASED DURING TERM OF OFFICE.

Pol. Code, §§ 4258, subd. 12, 4044, 4290, relating to compensation of county surveyors, must be strictly construed, the fees and compensation of public officers being a matter of statutory origin and right which cannot be increased during the term for which the officer was elected, in view of Const. art. 11, § 9.

2. OFFICERS 🔑100(2)—PROVISION AGAINST INCREASE OF SURVEYOR'S COMPENSATION DURING TERM APPLIES TO COUNTIES OF TWENTY-NINTH CLASS.

The provision of Const. art. 11, § 9, that compensation allowed by law to county officers cannot be increased during the term for which he was elected, applies as well to a county surveyor of a county of the twenty-ninth class whose compensation consists of fees or salary per diem for work done as to those whose compensation consists of specified salaries.

3. CONSTITUTIONAL LAW 🔑63(3)—POWER OF SUPERVISORS TO DETERMINE COMPENSATION OF OFFICERS UNAUTHORIZED BY CONSTITUTION.

The Legislature alone is authorized by the Constitution to fix the compensation of officers, and any attempted delegation of that power to the board of supervisors is of no force or effect.

4. OFFICERS 🔑96—COMPENSATION OF OFFICER AND DEPUTY FIXED BY STATUTE.

A statutory provision that a certain duty shall be performed by a specified officer means that such officer, and no other person, is chargeable with the performance of such duty, and when performed by the officer or by his authorized deputy the law regards the duty as performed by the officer, and a statutory provision for full per diem compensation of such public officer fixes the amount to be paid, regardless of who actually performs the service.

5. COUNTIES 🔑74(6) — COMPENSATION OF COUNTY SURVEYOR AND DEPUTIES FIXED BY STATUTE CANNOT BE CHANGED DURING TERM.

Neither Pol. Code, § 4044, nor § 4290, nor any other statute, makes any provision for the payment of deputy county surveyors in the counties of the twenty-ninth class, and the board of supervisors are limited to the $10 per day allowable to the county surveyor, and cannot pay him or his deputies any additional amount for such day, in view of Const. art. 11, § 9, providing county officers' compensation cannot be increased during the term for which elected.

6. COUNTIES 🔑74(6)—SURVEYOR'S COMPENSATION FOR SERVICES COVERS OFFICE EXPENSES.

A county surveyor of a county of the twenty-ninth class cannot demand the payment of $6 or $10 per diem for services performed by any of his deputies upon the theory that such per diem constitutes the expense necessary for conducting the duties of his office as the law requires, the services of his office being limited to a per diem compensation of $10, allowed the county surveyor by Pol. Code, § 4044.

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by Harvey J. Sarter against Siskiyou County. Judgment for defendant, and plaintiff appeals. Affirmed.

Taylor & Tebbe, of Yreka, for appellant.

James M. Allen, of Yreka, for respondent.

HART, J. Plaintiff, who is the county surveyor of Siskiyou county, brought the action to recover $1,222 for labor and services alleged to have been performed by him as such county surveyor. The case was tried by the court upon an agreed statement of facts. Judgment was rendered in favor of defendant for its costs, from which judgment plaintiff appeals.

From the agreed statement of facts, which the court adopted as its findings, the following appears: (1) That defendant is a county of the twenty-ninth class. (2) That plaintiff, at all times mentioned in the statement, was the duly elected, qualified, and acting county surveyor of Siskiyou county. (3) "That plaintiff as such county surveyor performed work and labor for defendant during the years 1915 and 1916 as follows." Then follows an enumeration of certain dates in the months of August, September, October, and November, 1915, and March, April, May, June, July, August, and September, 1916, aggregating 184 days. That plaintiff presented a bill to the board of supervisors at the rate of $10 per day for said 184 days, which bill was duly allowed and paid, "but plaintiff refused to accept such payment as payment in full." (4) "That plaintiff as such county surveyor, in person and by duly authorized deputy, performed work and labor for defendant at other places in said county than the work mentioned in paragraph 3 of this statement, which work was performed on the same days as work mentioned in said paragraph 3, and bill was presented for said work as follows." Certain dates were mentioned which were the same as some of those for which plaintiff was allowed $1,840, "totaling 157½ days' work for which plaintiff presented his bill at the rate of $6 per day, which bill was finally rejected by the board of supervisors" in December, 1916, and has not been paid. (5) "That plaintiff as such county surveyor, in person or by duly appointed and authorized deputy, performed work and labor for defendant at other places in said county than the work mentioned in paragraphs 3 and 4 of this statement, which work was performed on the following dates." The dates mentioned were the same as some of those for which plaintiff received the $1,840, and totaled 38 days, for which plaintiff presented a bill at the rate of $10 per day, which was disallowed by the board of supervisors. (6) That all of the work mentioned in paragraphs 3, 4, and 5 was ordered and directed to be done by the board of supervisors, "and was all such work as is required by law to be done by the office of the county surveyor, and it was his legal duty to perform all such work, either in person or by deputy, and it was all work of such nature as could be legally performed by the county surveyor or his deputy. That in order to perform all of said work as directed by defendant and its board of supervisors it was necessary to have much of it performed by deputy." The presentation of the bills to the board of supervisors was then set out, and it was stated "that the board of supervisors of said county, defendant, are ready and willing to allow the county surveyor of said county, plaintiff, $10 per day for all work performed for the county."

[1] As illustrative of the point in dispute, plaintiff was paid $10 for his services rendered on April 12, 1916. He also presented a bill for $6 and another bill for $10 for further services on said day, which, if allowed, would made his compensation for that one day $26. It is appellant's contention that, as he and two deputies performed services on that day, he should receive $26 therefor, while respondent claims that $10 was the full compensation which he could receive under the law.

Subdivision 12 of section 4258 of the Political Code (which section specifies what salaries shall be paid to officers in counties of the twenty-ninth class) reads as follows:

> "The county surveyor, such fees as are now or may hereafter be allowed by law; provided, he shall be given all work for the county in which the county employs a surveyor or civil engineer; and provided, further, that it shall be the duty of the board of supervisors of counties of this class to so employ him."

Section 4044 of the Political Code, enacted in 1907, provides:

> "* * * In lieu of fees, as now provided by law, the surveyor shall receive such compensation as the board of supervisors may allow, not to exceed ten dollars per day for all work performed for the county, and in addition thereto, all necessary expenses and transportation on work performed in the field."

Section 4290 of the same Code provides:

> "The salaries and fees provided in this title shall be in full compensation for all services of every kind and description rendered by the officers named in this title either as officers or ex officio officers, their deputies and assistants, unless in this title otherwise provided, and all deputies employed shall be paid by their principals out of the salaries provided in this title, unless in this title otherwise provided. * * *"

> "Acts relating to the fees and compensation of public officers are strictly construed, and such officers are only entitled to what is clearly given them by law." Lewis' Sutherland on Statutory Construction, § 714; County of San Diego v. Bryan, 18 Cal. App. 460, 123 Pac. 347; City of Corona v. Merriam, 20 Cal. App. 231, 128 Pac. 769; Irwin v. County of Yuba, 119 Cal. 686, 690, 52 Pac. 35; State v. Wofford, 116 Mo. 220, 22 S. W. 486.

The reason upon which this rule rests is that the right of a public officer to be compensated for his services as such is a statutory right or of statutory origin. A public officer, therefore, can receive for his services as such only such compensation as the legislative body competent under the Constitution to prescribe the salaries or compensation of such officers shall or may fix, and when this is done, neither the courts, in any case, nor the board of supervisors, in the case of any county officer, has the power or the right to increase the compensation so fixed (Dougherty v. Austin, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161); and it is well settled in this state that the compensation allowed by law to a county officer cannot be increased during the term for which he has been elected. Article 11, § 9, Const.; Dougherty v. Austin, 94 Cal. 603, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161, and other cases cited in McFadden v. Borden, 28 Cal. App. 471, 152 Pac. 977.

[2] Nor can it be doubted that the constitutional provision just mentioned applies as well to those county officers whose compensation consists of fees as to those whose compensation consists of specified salaries. Martin v. Santa Barbara, 105 Cal. 213, 38 Pac. 687. Section 9 of article 6 of the Constitution does not say that the salaries of county officers shall not be increased during the term for which they are elected, but that the compensation of such officers shall not be so increased. No one would seriously contend that the payment by the day of a person for services rendered is any less a compensation for the services than a salary or a definite sum per month or year would be.

[3] It has also been held by our Supreme Court that the Legislature alone is authorized under the Constitution to fix the compensation of county officers, and that any attempted delegation of that power to boards of supervisors is wholly nugatory and of no

force or effect. Dougherty v. Austin, supra.

[4, 5] The question submitted here must be considered by the light of the principles thus stated.

As we have pointed out above, and, indeed, as the appellant himself claims is his right, the surveyor could, if his construction of the compensation clause of section 4044 of the Political Code be sound, put a number of deputies appointed by him to work and claim and receive for each deputy $6, or, as he did in the case of one deputy in this instance, even $10, per diem for every day they are employed in county work coming within the duties of the county surveyor. In fact, if his construction of said section is correct, he could do this even where the deputies were assisting him in one particular piece of work for the county. We do not think the Legislature, by the section of the Code referred to, intended or contemplated any such a situation. In other words, our opinion is that section 4044 of the Political Code is not justly or reasonably susceptible of such a construction.

The deputy of a public officer, when exercising the functions or performing the duties cast by law upon such officer, is acting for his principal or the officer himself. The deputy's official acts are always those of the officer. He merely takes the place of the principal in the discharge of duties appertaining to the office. When, therefore, the law provides that it shall be the duty of a certain public officer to do or perform certain public official acts, the deputy of such officer, if there be one, is necessarily included within the terms of the provision. If the law provides that an official act shall be performed in a particular way, it is no less the duty of a deputy to do the act in the manner so prescribed than it is that of the officer himself. In brief, a deputy under a public officer and the officer or person holding the office are, in contemplation of law and in an official sense, one and the same person. As stated, the deputy acts for and in the place of the principal, and his (the deputy's) acts are therefore not his, but those of the holder or incumbent of the office. When the holder of a public office dies or resigns, the authority of his deputy ipso facto ceases upon the happening of either event. It is true, therefore, that when the law says that certain duties shall be performed by a certain specified public officer it is meant that such officer and no other person is charged with the performance of such duties, and, when performed, whether personally by the officer himself or by an authorized deputy under him as such officer, the law regards such duties as having been performed by the officer upon whom it has expressly placed that burden, and not by a deputy in the office. It logically follows, then, that where the statute provides, as is the case here, for the compensation of a public officer, and further provides that such compensation shall be in full payment for all services of any kind and description rendered by such officer as such, there can be no other meaning to such statute than that the compensation so provided for shall be in full for all services required to be rendered by such officer, regardless of who actually performs the services—whether the officer himself or an authorized deputy appointed to assist him in the performance of the duties of the office, and it also follows that, where there is no law providing compensation to be paid to a deputy under a public officer out of the public treasury, such deputy is not entitled to and cannot legally claim compensation to be so paid, nor can his principal claim the right to be paid compensation for such deputy. Neither section 4044 of the Political Code nor, so far as we are advised, any other Code section or statute, contains any express provision or authority for the payment of compensation to a deputy or to deputies in the office of the county surveyor of Siskiyou county. The section named merely provides, as stated, for the compensation of the surveyor himself, and section 4290 of said Code plainly and unambiguously declares that the compensation so authorized shall be in full for all services of any kind and description rendered by the surveyor. We must hold that these sections mean precisely what their very plain and unambiguous language clearly implies. To hold otherwise, or as appellant construes section 4044, would compel us to import into said section language or a provision which it does not contain, or, under a fair and reasonable view thereof, it does not contemplate. Moreover, construed as appellant views its language, said section would violate the provisions of article 11, § 9, of the Constitution, in that it would result in increasing the compensation of the surveyor during the term for which he was elected. As above pointed out, even the Legislature itself has no power to do this, and in no event could the supervisors legally do such an act, even if the Legislature were to attempt to confer upon them such power. Dougherty v. Austin, supra. An act which the Constitution says cannot be done directly, obviously cannot be done indirectly, and therefore the position of the appellant that he, and not his deputies, is entitled to compensation to be paid by the county for services rendered the county by such deputies involves, if by such means the deputies are to be compensated, a proposition sanctioning the doing of an act by indirection which the Constitution plainly declares cannot be done directly; and if, on the other hand, the position is that the surveyor himself is entitled to receive more compensation than the maximum amount to which he may, by authority of law and the action of the supervisors, be entitled, then, as already shown, it would involve a proposition diametrically opposed to the mandate of the Constitution that the compensation of a county officer shall not be increased after his election or during his term of office.

It would hardly seem necessary to cite cases to support the above construction of section 4044 of the Political Code, nor do we intend to do so at length herein, but the Indiana case of State ex rel. Holman v. Roach, Auditor, 123 Ind. 167, 24 N. E. 106, so closely resembles the instant case in its facts that we feel that no apology should be required for reproducing herein certain observations from the opinion therein which, it will readily be noted, have cogent application to several of the features of this case. Indeed, strange as the coincidence may appear, that case was one in which a county surveyor made precisely the same claim that appellant here makes, viz. that, under a statute in all respects similar to our section 4044 of the Political Code, he was entitled to receive or to be paid from the public treasury a certain specified per diem for each of his deputies, notwithstanding that there was no provision of law expressly or otherwise authorizing the payment of compensation to deputies in the office of the county surveyor from public funds. The court, in that case, after laying down and buttressing by innumerable authorities the elementary rule that, "where a public officer claims a compensation for official services, he must show either a statute authorizing such compensation, or a contract with some one who has the authority to bind the county," said:

> "It follows that, as there is no statute fixing any compensation to be paid deputy surveyors for services rendered to the county, or to any one else, the county cannot be required to pay for such services. It is believed to be the universal rule that, where the law fixes no compensation for deputies, they must be paid by the officer who employs them, and not out of the public treasury. To hold that a county surveyor could perform the work required of him under this statute by deputy, and charge the per diem fixed by law for each day such deputy served, would be to open the door to the grossest frauds. It would allow the surveyor to employ persons less skillful and competent than himself, at a small compensation, and thus speculate upon the public. If he employed five deputies in one day at $1.50 each, and charged $3 for his own services, he would receive a per diem of $10.50, instead of $3, as the law provides. We do not think this law should receive the construction contended for by the relator."

[6] Nor can the surveyor demand the payment of $6 or $10 per diem for services performed by each or any of his deputies upon the theory that such per diem constitutes the expenses necessary for conducting the duties of his office as the law requires. While not a question necessary to be decided here, we may venture the opinion that the surveyors of counties of the class to which Siskiyou is assigned under the legislative classification of counties are entitled to be reimbursed by the counties for any necessary and legitimate expenses incurred in the discharge of their official duties. But we do not understand that appellant claims such per diem for his deputies as expenses necessarily incurred in the performance of the duties of his office. His position is, as above stated and considered, that the per diem he claims for each of his deputies is compensation for services rendered by him as surveyor through or by such deputies, a proposition which, as we have shown, is clearly untenable.

We have carefully examined the brief of appellant, but we have not thus been convinced that the argument therein advanced sustains his position, or that the cases he cites are in point here. It may be true, as counsel suggest, that the compensation allowed the surveyor by section 4044 is wholly inadequate in proportion to the duties required to be rendered by him, but this fact, if it be one, cannot be made a just basis for a construction of said Code section contrary to the plain language of the statute and the manifest intent of the Legislature.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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42 Cal. App. 304

WITHERS v. BOUSFIELD et al.
(Civ. 2859.)

(District Court of Appeal, First District, Division 1, California. July 21, 1919. Amended Aug. 8, 1919. Rehearing Denied by Supreme Court Sept. 18, 1919.)

1. Vendor and Purchaser ⚷50—Deed to Third Party and Triparty Agreement as to Sales, One Contract.

Where vendors executed grant, bargain, and sale deed to third parties and entered into a triparty agreement with purchaser and third parties, whereby third parties agreed to sell or execute contract for sale of small tracts of the land conveyed upon purchaser's demand, and deposit certain per cent. of proceeds in a bank to vendors' credit, the deed and triparty agreement should be considered as parts of one contract.

2. Mortgages ⚷1—Conveyance to Third Parties, a Deed of Trust Securing Price.

Transaction between vendors, purchaser, and third parties, whereby third parties to whom vendors conveyed land agreed to sell separate tracts of the land upon purchaser's demand and deposit certain per cent. of proceeds in a bank to vendors' credit, was in effect a deed of trust to secure payment of purchase price; the third parties being trustees.

3. Guaranty ⚷35—Of Price Not Affected by Infirmities in Trust Securing Payment.

The liability of guarantors of payment of purchase-money note was not affected by any infirmity in a trust to convey created to secure payment of purchase price; the guarantors being liable on independent contract of guaranty, and not being parties to the trust.

4. Mortgages 🔑82 — Main Scheme of Trust to Convey Land Not Affected by Partial Invalidity.

Where vendors, to secure payment of purchase price, conveyed land to third parties under third parties' agreement to sell tracts thereof upon purchasers' demand and deposit certain per cent. of proceeds in bank to vendors' credit, a provision of the trust so created, authorizing third parties to convey to purchasers upon completion of trust, even though invalid under Civ. Code, §§ 847, 857, would not affect the valid provisions of the trust, since the invalidity would not interfere with main scheme.

5. Mortgages 🔑27—Triparty Agreement Invalid as Trust Enforceable as Equitable Mortgage.

Triparty agreement between vendors, purchasers, and third parties, whereby vendors conveyed the land to third parties to secure payment of purchase money under third parties' agreement to sell separate tracts of the land upon purchasers' demand, deposit certain per cent. of proceeds in bank to vendors' credit, and convey land to purchasers upon discharge of indebtedness and payment of expenses, if invalid as a trust under Civ. Code, § 857, will be given effect as an equitable mortgage.

6. Trusts 🔑136 — Triparty Agreement Where Third Party Taking Title was to Sell Land, Not Dry Trust.

Triparty agreement, whereby vendors conveyed land to third parties to secure payment of purchase price and whereby third parties agreed to sell separate tracts of land on purchasers' demand and apply certain per cent. of proceeds to payment of purchase money, and interest in outstanding contracts and remaining portion of land to purchasers when vendors shall have received payment in full of purchase price *held* not a dry and passive trust.

7. Perpetuities 🔑6(10)—Triparty Agreement Conveying Land in Trust Not Invalid.

Triparty agreement, whereby vendors conveyed land to third parties to secure payment of purchase price and whereby third parties agreed to sell separate tracts of land upon purchasers' demand and apply certain per cent. of proceeds to discharge of purchase-money indebtedness and convey interest in outstanding contracts and remaining portion of land to purchasers upon payment to vendors of purchase price, did not suspend power of alienation beyond period of lives in being under Civ. Code, § 715, since purchasers could at any time secure conveyance.

8. Trusts 🔑11(2) — Re-Execution of Trust to Convey After Amendment of Statute, Valid.

Even if a trust to convey was invalid under Civ. Code, § 857, a later contract, re-executing the original transaction subsequent to the taking effect of the amendment of 1913 (St. 1913, p. 438) to such statute, authorizing trusts to convey, was valid and enforceable.

9. Vendor and Purchaser 🔑180 — Note by Purchaser Deposited with Third Parties, Purchase Money, and Not Penalty.

Note from purchaser to vendors, deposited with third parties to whom vendors had conveyed the land to secure payment of purchase money, *held*, in view of triparty agreement and the deed, and in view of Code Civ. Proc. § 1962, subd. 2, a note for the purchase price, and not merely a penalty deposited with third parties as trustees.

10. Guaranty 🔑21—Guarantors of Purchaser's Note Estopped to Deny It was Evidence of Price.

Guarantors of purchaser's note to vendors, by consenting to and requesting ratification agreement ratifying original agreement between purchaser and vendors referring to note as representing purchase money, were estopped from claiming the note to be a penalty, and not evidence of the purchase price.

11. Guaranty 🔑1, 45, 46 — Nature and Enforcement of.

A guaranty is a promise to answer for the debt of another, and may be enforced upon default of the principal without any previous demand or notice.

12. Guaranty 🔑70—Delay in Enforcing Purchase-Money Note No Defense to Guarantors.

In action against guarantors of payment of purchase-money note, mere delay by vendors in proceeding against purchaser was no defense.

13. Guaranty 🔑34—No Privity Between Principal Debtor and Guarantors.

There is no privity or mutuality or joint liability between the principal debtor and guarantors who by independent contract have guaranteed payment of debt.

Appeal from Superior Court, Alameda County; W. M. Conley, Judge.

Action by W. S. Withers against Robert E. Bousfield, Jennie E. Bousfield, and others Judgment for plaintiff, and named defendants appeal. Affirmed.

Byrne & Lamson, of San Francisco, for appellants.

Robert B. Gaylord, of San Francisco, for respondent.

WASTE, P. J. Plaintiff brought this suit upon a contract guaranteeing the payment of a certain promissory note for $150,000, executed February 21, 1913, by Brook-Wood Acres, Incorporated, payable on demand to the plaintiff or order. Judgment was entered in favor of plaintiff, and defendants Robert S. Bousfield and Jennie E. Bousfield alone appeal. The corporation maker of the note was not made a party.

On the 21st day of February, 1913, plaintiff and the Brook-Wood Acres, Incorporated a corporation, entered into a contract whereby plaintiff sold and the corporation bought that certain real property located in the county of Contra Costa, known as Brook-Wood Acres, the purchase price being the sum of $150,000, together with interest thereon at the rate of 6 per cent. per annum, from October 31, 1913, until paid. Concurrently with the execution of the contract, and as a part of the transaction, Withers and his wife executed and delivered to L. G. Burpee and E. N. Walter, as joint tenants, and not as tenants in common, and to the survivors of them, their heirs and assigns, a grant, bargain, and sale, deed of the property. Burpee and Walters, in writing attached to the agreement of sale, accepted the conveyance of the premises under the deed, so executed, and consented to hold the title under such deed, and accepted such title under, and subject to, and pursuant to, the terms of the entire agreement; it being the purpose of the parties that Burpee and Walter should, upon demand of the corporation, execute contracts for the sale of, or sell for cash, various portions of the Brook-Wood Acres tract at the prices and upon the terms in the contract of sale specified.

Under the terms of the agreement, 80 per cent. of the selling price of the various parcels of land, as sold, and all moneys otherwise paid to Burpee and Walter under the contract, were by them to be forthwith deposited in bank to the credit of plaintiff, the vendor of the whole tract under the contract of sale, and all such moneys were payable to him upon demand, excepting that Burpee and Walter could retain from the final payment, made by any purchaser, sufficient money to release the parcel purchased from the lien of two mortgages covering the entire tract, and which were provided for in the agreement. The remaining 20 per cent. of the purchase price belonged to the Brook-Wood Acres, Incorporated, the buyer of the whole tract under the contract of sale.

By its terms the agreement declared that it was intended to, and did, secure the payment by the corporation to plaintiff of the selling price of Brook-Wood Acres, with interest, and all moneys which might be, or become, payable to him under the agreement, including any advances made by him in connection with the improvement or sale of the property, with interest thereon, and was also intended to secure the payment to Burpee and Walter of their charges and expenses, and all moneys, with interest thereon, advanced by them for the payment of expenses under the agreement, all of which expenses and charges were to be paid by the corporation.

After providing with particularity the conditions under which the corporation should be deemed in default under the agreement, such as failure to sell portions of the tract at selling prices aggregating certain specified sums, and amounting to a certain designated number of acres, by dates specified, and failure to pay to Burpee and Walter, either through payments by purchasers under contracts of sale, or by direct payments made by the corporation, the agreement recites the giving, by the corporation to plaintiff, and its deposit with Burpee and Walter, of a certain promissory note, for the sum of $150,000, representing the purchase price to be paid for the tract of land, the payment of which note, the agreement further recites, "has been guaranteed jointly and severally by Robert E. Bousfield, Jennie P. Bousfield, I. M. Ver Mehr, Irene Lee Ver Mehr, W. G. Dodge, Leonie M. Dodge, F. C. Mills, and Mabel Corse Mills, but which guaranty is conditioned that the liability of said guarantors under said guaranty or any of them, respectively, shall not exceed the sum of twenty-five thousand dollars ($25,000.00); it being the purpose of said guaranty that not more than $25,000.00 shall be collected by said first party (plaintiff) under the same."

Concurrently, also, with the execution of the agreement of sale, the Brook-Wood Acres, Incorporated, executed to plaintiff, and deposited with Burpee and Walter, its promissory note for the principal sum of $150,000, representing the purchase price to be paid Withers for the land. The note contained the following paragraph:

> "Payment of this note is secured by a certain agreement of even date herewith entered into between Brook-Wood Acres, Incorporated, and with W. S. Withers, relating to the sale by W. S. Withers to Brook-Wood Acres, Incorporated, of certain real property of W. S. Withers in Contra Costa County, California, known as Brook-Wood Acres. The personal liability of Brook-Wood Acres, Incorporated, under this note aside from the security above mentioned, or after realizing upon such security, shall not exceed and is hereby limited to the sum of twenty-five thousand dollars ($25,000)."

The note was executed for the corporation by its president and secretary, and the seal of the corporation attached. It was signed by each of the defendants, who each in turn acknowledged and signed, before a notary public, a joint and several guaranty of payment of the note, waiving presentation, demand, notice of nonpayment, and protest. The liability of the guarantors was, by the terms of the instrument, limited to the sum of $25,000.

In the event of any default upon the part of the corporation, so the agreement provides, but apparently not before, Burpee and Walter are to deliver the note to plaintiff on demand, after indorsing, as payments thereon, all moneys received by them for the account of plaintiff, on the purchase price of Brook-Wood Acres, including any payments on account of interest, and certain other credits which are specified. At any time on, or after, the delivery of the note to plaintiff, or in the event of any default upon the part of the corporation in the payment of the note according to its terms, upon demand of plaintiff Burpee and Walter are, by the agreement, required to sell all portions of Brook-Wood Acres not theretofore conveyed by them, or such portions as in their discretion they may find it necessary, to make the payments thereafter provided in the agreement, and to make the sale in the manner therein fully and with particularity described. Suffice it to say that the procedure for making these sales is similar to, if not exactly like that provided in the various forms of trust deeds, so universally used, and so long upheld by the courts of last resort of this and other states, as being a legal method for the sale of property conveyed to trustees as security for the payment of an existing indebtedness. Sacramento Bank v. Alcorn, 121 Cal. 379, 53 Pac. 813; Balfour-Guthrie Co. v. Woodworth, 124 Cal. 169–174, 56 Pac. 891; Younger v. Moore, 155 Cal. 767–771, 103 Pac. 221.

[1, 2] The grant, bargain and sale deed of Brook-Wood Acres, executed by plaintiff and wife to Burpee and Walter, and the triparty agreement, executed by plaintiff as first party, the corporation, Brook-Wood Acres, Incorporated, the second party, and Burpee and Walter as the third parties, were intended to be effective, and must be considered and regarded, as parts of one contract. Younger v. Moore, supra; San Diego Construction Co. v. Mannix, 175 Cal. 548, 166 Pac. 325. So construed, the transaction between the parties loses its complexity, and amounts to nothing more nor less than the execution by the corporation to plaintiff of an ordinary deed of trust, to secure the payment of the note for $150,000, given as the purchase price of Brook-Wood Acres, the payment of the note being further secured to the extent of their limited liability, by the contract of guaranty executed by the guarantors, who are the defendants in this action. While Burpee and Walter are not referred to in the transaction as trustees they were in fact such.

[3] Because the trust agreement provides that upon payment to plaintiff of the entire selling price, with interest, and all other indebtedness of the maker of the note, connected with the sale of the tract—in short, upon full performance of the terms of the agreement—the trustees shall convey to Brook-Wood Acres, Incorporated, all unsold portions of Brook-Wood Acres, and all portions sold but for which deeds have not issued, and, likewise, were, in the event of a failure of title at the inception of the deal, to reconvey the property to plaintiff, the appellants contend that the trust is void, under sections 847 and 857 of the Civil Code. They rely upon Estate of Fair, 132 Cal. 525, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70; Id., 136 Cal. 79, 68 Pac. 306, as authority to the effect that a trust to convey is void, and that the statute concerning trusts was a legislative pronouncement of the public policy of the state. Invoking the rule that courts will not directly enforce any obligation arising out of a contract illegal by reason of being against public policy, by carrying it into effect, or indirectly by awarding damages, or compensation, for a breach of it, appellants first seek to avoid the liability of their contract of guaranty by an assertion of the infirmity of the trust. We fail to see any right resting in the appellants to attack the trust, if any of the alleged weaknesses therein exist. The guarantors became liable, on default of the corporation to pay its note, to the extent of their independent contract of guaranty. They were not parties to the trust in any manner. Kinsel v. Ballou, 151 Cal. 754, 761, 91 Pac. 620. They had no interest in the real property involved in, or in the outcome of, that transaction, other than to expect that whatever sums were realized from the sales of the property, either to purchasers or at trustees' sales, on default made by the maker of the note, would be applied in reduction of the amount due on the note.

[4] Assuming, however, but not deciding under the facts of this particular case, that the conveyance in trust is invalid, in so far as it purports to authorize the trustees to convey the property to the corporation, on fulfillment of the terms of the contract of sale, the invalidity should not be held to affect the valid provisions of the trust. The main and ultimate purpose of the trust created by these instruments was to convert the trust property by sale, so far as necessary, into money wherewith to discharge the indebtedness secured thereby. Younger v. Moore, supra. The power to convey on completion of the trust, the occasion for which might never, and in the present case did not, arise was not essential thereto. If the trustees could not be legally authorized to convey the property to the corporation, the provisions in that behalf can be disregarded without interfering with and changing the main scheme of plaintiff and Brook-Wood Acres, Incorporated. Sacramento Bank v. Montgomery, 146 Cal. 745, 81 Pac. 138. In other words, as was said in that case, we see no such inseparable scheme, that the said power to convey cannot be disregarded without affecting, or interfering with, the main purpose of the parties. If the trustees were attempting to so convey the property, the question of the validity of such provision would become material if made an issue by parties properly interested in the subject-matter, but we do not consider it material here. No attempt to convey was ever made, for, as will later appear, the property was sold by a trustee, substituted and acting under the terms of the trust agreement. Younger v. Moore, supra.

[5] For another reason appellants' attack on the transaction resulting in the trust should not be allowed to prevail. As before pointed out, the deed of February 21, 1913, from plaintiff and wife to Burpee and Walter, and the trust agreement of the same date between the same parties, and accepted by Burpee and Walter, must be considered as parts of a single transaction, and so construed. Primarily, the trust expressed was intended solely by way of security for the indebtedness of Brook-Wood Acres, Incorporated, with interest, expenses of protecting the property, and compensation of the trustees. If, as is urged, the resulting trust was invalid, as being for some purpose not authorized by section 857 of the Civil Code, defining the purposes for which express trusts in relation to real property may be created, and we were thereby compelled to hold it was not a valid deed of trust, the rights of the parties could be preserved by holding the instruments to constitute an equitable mortgage (Younger v. Moore, supra), with power of sale as part of the security and an incident or appurtenance of the mortgage lien (Faxon v. All Persons, 166 Cal. 707, 716, 137 Pac. 919, L. R. A. 1916B, 1209). "No policy of the law is violated by treating this instrument as creating a lien in the nature of a mortgage, if it cannot be upheld as a deed of trust." Earle v. Sunnyside Land Co., 150 Cal. 214, 228, 88 Pac. 920, 925.

[6] Appellants urge a further objection that the trust in the present case is but a dry and passive trust. They are mistaken. The agreement declares that it is intended to secure, and shall secure, the payment by the purchaser to the seller of his selling price of the property, with interest, and all other moneys which may become due or payable under the contract. The trustees are given various active duties to perform in the execution of the trust. These are: Upon failure of title of Brook-Wood Acres to reconvey the premises to plaintiff; upon demand of the corporation (provided it was not in default) to enter into contracts for the sale of, or sell for cash, various portions of the tract at the prices, and upon the terms in the contract specified; to receive the selling price therefor and apply the same on the purchase price of the entire tract; to approve the form of sales contracts agreed to by the other parties to the agreement; upon performance by any purchaser of his contract to convey to him the subdivision so purchased by him; to execute upon request of Brook-Wood Acres, Incorporated, such maps for recordation as might be from time to time approved by the other parties to the contract; in the event of any default by Brook-Wood Acres, Incorporated, to deliver the note of the corporation to Withers, after having indorsed as payments thereon all moneys received by them on the purchase price of the tract; at any time after delivery of the note, or any default of the corporation, upon demand of Withers to sell all unsold portions of the tract, at public auction, in the manner set forth in the agreement, and apply the proceeds of such sale, as directed therein; to assign to Brook-Wood Acres, Incorporated, any unsold outstanding contracts of sale upon payment to Withers, or themselves, of all moneys due; and upon payment of all the purchase price of the tract, and all moneys due under the agreement, to convey the remaining portions of Brook-Wood Acres to the corporation.[1]

[7] Another contention of the appellants is that the trust, if otherwise valid, provided for a suspension of the absolute power of alienation beyond the period of lives in being. Section 715, Civ. Code. "The power of alienation is not suspended when all the parties in interest, including the trustee and the beneficiary, can join in a conveyance and transfer a legal title."

In the present case there was no suspension of the power of alienation, since Brook-Wood Acres, Incorporated, "could at any time, by paying the indebtedness to the plaintiff, receive a reconveyance of the property, or, by uniting with the trustees and" plaintiff execute a conveyance to a purchaser. Balfour, Guthrie Co. v. Woodworth, supra; Blakeman v. Miller, 136 Cal. 138, 141, 68 Pac. 587, 89 Am. St. Rep. 120; Toland v. Toland, 123 Cal. 140, 141, 142, 55 Pac. 681.

Respondent makes a timely suggestion in opposition to the right of appellants to assert the alleged invalidity of the trust. Section 857 of the Civil Code was amended at the session of the Legislature in 1913 (St. 1913, p. 438) by including, among authorized trusts in real property, a trust to convey. Long after this amendment became effective, to wit, on December 15, 1914, in connection with certain extensions of time and other modifications of the contract, plaintiff and Brook-Wood Acres, Incorporated, executed a document in which they re-executed the original contract of February 21, 1913, as modified in the documents of later date, and each respectively agreed to perform the provisions of the original instrument.

This agreement, after reciting the due execution of the original contract of February 21, 1913, the modification thereof under dates of July 15, 1913, and December 30, 1913, and the taking of contracts, under the provisions of the main contract for the purchase of various portions of Brook-Wood Acres, contains the following clause: "Now, therefore, this agreement, witnesseth: That the said main contract and the terms and provisions thereof shall be and are hereby modified as hereinafter set forth, but not otherwise, and each party hereto upon his part agrees to perform the terms and provisions of this agreement and of said main contract and modifying agreements as modified by this agreement, and in that behalf, it is hereby by the parties hereto agreed as follows, to wit." Then follow the modifications referred to, which, among others, constitute an extension of time of the making of various payments and which constitute a change in regard to acreage required to be sold to subdivision purchasers. The agreement, in addition to many apt references to the "main contract," contains this clause, "except as herein expressly stipulated all of the provisions of said main contract and said modifying agreements shall stand and that any and all terms and provisions thereof not in conflict with the terms of this agreement shall continue in force; to the end that the said main contract and modifying agreements shall continue in force as written, except as expressly modified by the terms of this agreement, and that all and singular the terms and provisions of said main contract shall apply and continue in force as if the modifying terms herein set forth had been originally contained in said main contract and modifying agreements." [2]

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[1] This sentence added by amendment dated August 8, 1919.

[8] At the same time, and as a part of the same transaction, six of the guarantors, including the present appellants, signed a waiver of the $25,000 limitation upon their liability as guarantors, and jointly and severally guaranteed full payment of the note for $150,000. Whether the original trust agreement was valid or invalid by reason of the prohibition of the statute, the later contract re-executing the original transaction was valid and enforceable (Burleson v. Burleson, 11 Tex. 2), and the appellants guaranteed the payment of the note which it provided for.

After the making of the contract of sale, on July 15, 1913, the Brook-Wood Acres, Incorporated, being in default in the aggregate amount of its sales, as required by the agreement, Withers, by separate agreement, executed by himself and the corporation, waived the default and extended the time until January 1, 1914, for procuring selling contracts aggregating $50,000, making sales aggregating 200 acres of land and paying the aggregate sum of $2,500. The new agreement was conditioned that no other condition of the contract of sale should be waived, and that the time for performance of any other provision of the contract should not be extended or affected; also, that this new agreement should only become effective when consent to the execution thereof was executed by all the guarantors of the note executed and referred to in the first agreement. Pursuant to this requirement, each of the defendants signed an instrument, which was annexed to and made part of the new agreement, whereby each of them jointly and severally requested and consented to the execution of the agreement and the modifications therein provided, and stipulated that neither the execution of the new agreement nor said modifications should modify or release the liability of any of them under their guaranty of said note; such guaranty being thereby ratified, approved, and confirmed.

Thereafter, on July 29, 1913, another agreement was made and signed by plaintiff Withers as the first party, Brook-Wood Acres, Incorporated, the second party, and all of the defendants as third parties, wherein, after reciting the agreement of sale, February 21, 1913, and the extension agreement of July 15, 1913, the corporation and the defendants agreed that plaintiff might at any time waive or modify all or any of the provisions of the agreement of sale of February 21, 1913, and that any departure from said agreement by Withers should not in any way waive, release, or modify the liability of the corporation or of the defendants under the promissory note executed and referred to in the agreement of February 21, 1913, or under the guaranty of said note by the defendants.

On December 15, 1914, plaintiff and Brook-Wood Acres, Incorporated, entered into an agreement in writing, modifying the agreement of the main contract of February 21, 1913, and requiring a balance to be struck as of January 1, 1915, which said balance should constitute the unpaid portion of the purchase price of the land, and providing for the payment thereof. This agreement provided that it should not be binding until the written consent to and request for its execution, annexed thereto, was executed by the guarantors of the note referred to in the main contract. It further provided that the limitation of personal liability of $25,000 of the corporation was waived by it to the end that it became obligated the full amount ot the unpaid purchase price. Concurrent with the execution of this agreement, and as part of the same transaction, each of the guarantors, including the defendants, in writing consented to and requested the execution thereof and in consideration of the agreement they each waived the statute of limitations upon the guaranty of the note to the end that the statute should not begin to run on said guaranty prior to the first of January, 1918.

On the same day, December 15, 1914, each of the defendants other than E. C. Mills and Mabel Corse Mills signed an instrument in writing, by which, after reciting the contract of February 21, 1913, and the guaranty of the note by them, together with the recital of the various extensions, they jointly and severally guaranteed the full payment of the note for $150,000, waiving presentment, demand for payment, notice of nonpayment and protest, it being the declared intention thereof, according to the document, among other things, to guarantee said note unqualifiedly and to waive the $25,000 limitation upon the liability of the guarantors and each of them.

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[2] This sentence and the one preceding it were added by amendment made August 8, 1919.

Various contracts had from time to time been made by the parties under the provisions of the agreement of sale, and on the 26th day of January, 1915, plaintiff and Brook-Wood Acres, Incorporated, agreed that there was due and unpaid from the company to plaintiff, under the agreement and the various contracts, the sum of $130,000.54, together with interest thereon at the rate of 6 per cent. from and beginning with the 15th day of January, 1915, and provided for designated credits upon the happening of certain contingencies.

On February 25, 1915, the Berkeley Bank of Savings & Trust Company was designated by Withers and the Brook-Wood Acres, Incorporated, as third party to the agreement in place of Burpee and Walter. The latter, by deed, joined in by the wife of each, conveyed the property to the Berkeley Bank of Savings & Trust Company, and delivered the promissory note to the bank.

Further defaults being made by Brook-Wood Acres, Incorporated, plaintiff brought this action against defendants on April 5, 1915, on their guaranty. No demand was made upon defendants before bringing the action; neither was the property sold by the trustee prior to that time. Pending trial, however, the Berkeley Bank of Savings & Trust Company duly sold the property upon the demand of the plaintiff, under the terms of the agreement of sale. The net proceeds of said sale were the sum of $45,112.35, which sum said plaintiff credited on the note set forth in plaintiff's complaint herein.

Upon the filing of the complaint, the defendants Bousfield, Ver Mehr, and Dodge filed their answers denying any liability under the guaranty, and alleging that there was no consideration for the same. The cross-complaint admitted the execution of the instrument of the 15th day of December, 1914, waiving provisions of the guaranty, limiting their liability thereunder to $25,000, but alleging that the defendants never agreed that said guaranty should be an unrestricted guarantee of the full payment of the note, but that said waiver only guaranteed the deficiency, if any, up to $150,000, which should remain to satisfy the balance of the purchase price of the real property, which was the subject of the agreement of sale, after the same had been sold, and the proceeds divided according to that contract.

By way of cross-complaint, which defendants Bousfield subsequently filed, it was alleged that the instrument of December 15, 1914, by which defendants Bousfield, Dodge, and Ver Mehr, jointly and severally guaranteed the full payment of the note for $150,000, waiving presentment, and unqualifiedly waiving the $25,000 limitation upon the liability of the parties (already referred to) was intended to mean, and its legal consequences were intended to be, that said defendants waived the limitation of $25,000, contained in the guaranty for said note, and that they were to be liable for the deficiency, if any, up to $150,000, which should remain of the said purchase price after the real property, described in the agreement of sale, had been sold, and the proceeds applied according to the terms thereof, but through the mutual mistake of the defendants and the plaintiff, and the Brook-Wood Acres corporation, said instrument failed to express that intention in so many words, and prayed that the instrument be reformed accordingly.

The court found in favor of plaintiff and against the defendants on all points, and, after crediting the net proceeds of the sale of the property made by the substituted trustee, the Berkeley Bank of Savings and Trust Company, of $45,112.35, gave judgment against defendants Mills in the sum of $25,000, and against defendants Bousfield, Ver Mehr, and Dodge in the sum of $58,554.36, together with the sum of $5,000 attorney's fees.

[9] Appellants contend that the main agreement, the contract of February 21, 1913, was not a contract of purchase and sale of real property, and that the note for $150,000 was not a note for the purchase price of the land, but that in reality it was executed and deposited with the trustees as a penalty; that the recital in the preamble of the contract "that the said first party (plaintiff) has sold to the said second party (Brook-Wood Acres Company, Incorporated), and the said second party has bought from the said first party, all upon the terms and conditions, and in the manner hereinafter set forth, and purchase price thereof to be payable as hereinafter set forth, that certain real property," etc., is palpably untrue. This contention cannot be supported by a logical analysis of the note, the deed and the agreement, when read together. In view of the plain and unambiguous statement in the agreement we are satisfied, as a matter of fact, that the note represented the purchase price paid for Brook-Wood Acres.

[10] We prefer to accept the view of respondent that the parties to the contract intended to be, and were, bound by its recitals. Section 1962, subd. 2, Code Civ. Proc. From all the surrounding circumstances attending the transaction, we are led to conclude that no other contract relative to the sale of the land was contemplated, and that the note for the $150,000, was executed by the corporation, and delivered to the trustees, as the evidence of and for the purchase price of the tract. The main agreement of February 21, 1913, in paragraph 29 thereof, refers to the note "for the principal sum of one hundred and fifty thousand dollars ($150,000.00), representing the purchase price to be paid for said Brook-Wood Acres; the payment of which note has been guaranteed, jointly and severally by" the defendants. Concurrently with the execution of the ratification agreement, of December 15, 1914, and as part of the same transaction, the appellants, and the other guarantors, consented to and requested the execution of the said ratification agreement which by its terms specifically refers to and deals with the note for the $150,000. Appellants, by their own acts, therefore, are estopped from claiming the note to be a penalty, and not evidence of the purchase price for the land. The note is a demand note. Appellant contends that as there is no allegation in the complaint that a previous demand was made on the maker of the note, or that suit had been instituted against it (which would have taken the place of a formal demand), and as there was no proof in support of any such demand or suit, the maker of the note never became liable, and the action against the guarantors was premature.

[11-13] A guaranty is a promise to answer for the debt of another person, and it may be enforced, upon default of the principal, without any previous demand or notice. By its various transitions the contract of guaranty in this case became an absolute undertaking to pay the whole debt of Brook-Wood Acres, Incorporated, if the company did not, and no mere delay of plaintiff to proceed against the maker of the note, or to enforce any other remedy, can be availed of by the guarantors as a defense. First National Bank v. Babcock, 94 Cal. 96, 104, 29 Pac. 415, 28 Am. St. Rep. 94; Carver v. Steele, 116 Cal. 116, 47 Pac. 1007, 58 Am. St. Rep. 156. This is not an action for the collection of the Brook-Wood Acres, Incorporated, debt as such. It is an action upon an independent contract of the defendants. There is no privity, or mutuality, or joint liability between the principal debtor and its guarantors. Adams v. Wallace, 119 Cal. 67, 71, 51 Pac. 14. Moreover, the defendants, including appellants, made an independent contract upon which they became liable without regard to the sale of the property, under the terms of the trust, as against the principal debtor. Kinsel v. Ballou, 151 Cal. 754, 762, 91 Pac. 620; Adams v. Wallace, supra.

This case presents no different aspect from the foregoing, and numerous other cases, decided by the courts of last resort of this state, in which it has been held that, regardless of the necessity for exhausting the security given, before resorting to the personal liability of the maker of a note, nevertheless an indorser, or guarantor, may be sued upon his personal liability before, and without, such action having been taken.

It was proper for the court to allow the attorney fee included in the judgment.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

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42 Cal. App. 567

LISENBEE v. LISENBEE. (Civ. 1983.)

(District Court of Appeal, Third District, California. Aug. 6, 1919.)

1. DIVORCE ⚿286—IN ABSENCE OF APPEAL FROM DECREE POWER OF COURT OVER HUSBAND'S PROPERTY NOT REVIEWABLE.

In the absence of appeal from the decree in a divorce action, the appellate court, on the husband's appeal from an order appointing receiver of the proceeds of his realty after failure to comply with the terms of the decree in the divorce suit, cannot review the question whether the superior court in a divorce proceeding has jurisdiction to deal with the separate property of the spouses.

2. DIVORCE ⚿267—COURT CAN SELL HUSBAND'S PROPERTY TO MAINTAIN WIFE AFTER DECREE FOR MAINTENANCE.

Under Civ. Code, §§ 136, 140, and in view of Code Civ. Proc. § 671, the court which in her divorce suit had granted a wife a decree for maintenance, did not exceed its jurisdiction, in appointing receiver to take custody of and sell the husband's property to satisfy such decree for maintenance, on any ground that the judgment upon either the community property or the separate property of the husband created a lien which must be foreclosed to become effective.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action for divorce by Maud Irene Lisenbee against Charles Samuel Lisenbee, wherein plaintiff was awarded a community interest in certain realty, and defendant was ordered to pay a sum per month for her maintenance. From an order appointing receiver to take over and receive from the sheriff all money derived from the sale of the realty of the husband, he appeals. Affirmed.

See, also, 181 Pac. 804.

A. H. Carpenter and J. D. Hinkle, both of Stockton, for appellant.

Charles De Legh, of Stockton, for respondent.

HART, J. On the 22d day of May, 1915, the complaint in this action was filed, in which plaintiff prayed for a divorce from defendant, and, among other things, asked that certain property, mentioned in the complaint be declared to be community property. The action went to trial, and the court found that plaintiff was not entitled to a divorce for the reason that there was not sufficient corroboration of the alleged acts of cruelty set forth in the complaint; that the real property mentioned in the complaint was the separate property of defendant, but that plaintiff, having with money earned by her from her work and labor contributed toward the purchase of said property, was entitled to a community interest therein to the value of $1,500; and defendant was ordered to pay for her maintenance the sum of $25 per month, which payments were made a lien on the community interest of the parties.

On the 24th day of November, 1917, the court made a formal order for the issuance of a writ of execution, directed to the sheriff of San Joaquin county, "reciting said judgment and directing the said sheriff to levy upon and sell according to law in such cases the following described real property, or so much thereof as may be necessary to satisfy said judgment" for maintenance and costs, the real property described in the complaint, and in which, it was found, the plaintiff had a community interest to the extent of $1,500.

The defendant having failed to comply with the terms of the decree requiring him to pay to plaintiff $25 per month, the court on the 14th day of January, 1918, after due proceedings, made an order appointing one R. B. Teefy a receiver in the premises, said order reciting that he "is authorized and empowered to take over and receive from the sheriff of this county any and all money derived from the sale of the real property upon execution in this action in excess of the sum of $500 (now due this plaintiff), and the said R. B. Teefy is also authorized and empowered to take over and hold possession of any real property described in said writ of execution remaining unsold after the satisfaction of such writ."

This appeal is by the defendant from said order appointing receiver.

It is contended: (1) That "the superior court in a divorce proceeding has no jurisdiction to deal with the separate property of the spouses"; (2) that the court exceeded its jurisdiction by appointing a receiver to take custody of and sell the property described in the order appointing the receiver for the purpose of satisfying the judgment for maintenance, costs, etc.

[1] The point first above stated we cannot review on this appeal, since there is here no appeal from the judgment in the divorce action. Indeed, all that the record here contains as to the divorce action itself is the judgment roll therein. The record does not show the evidence upon which the court based its findings in said action. We must therefore presume that there was sufficient evidence to support the findings. While the order from which this appeal is prosecuted grew out of the divorce action and, indeed, involves the granting of an ancillary remedy in aid of the execution of the judgment in said action, this is, nevertheless, so far as the right to attack said judgment is concerned, under the record before us, a collateral proceeding—that is to say, the attack on said judgment on this appeal is in effect collateral, and consequently all intendments and presumptions in support of the judgment must be indulged just the same as though the present proceeding were an entirely new and independent action having such relation to the divorce action as to make the question of the validity of the judgment in the latter action a material and important issue in the former. It may be observed that the finding that the property described in the complaint "is the separate property of the defendant, save and except the sum of $1,500 in value thereof, which the court finds is the community interest of plaintiff and defendant," seems on its face to be somewhat contradictory or, at least, not clear in its meaning, still it is a matter of little consequence whether the property which the receiver was authorized to take charge of and sell to satisfy the judgment is community or the separate property of the defendant. Civ. Code, § 141. That section, in effect, provides that, where there is community property of the spouses, such property must be resorted to for satisfaction of an allowance for maintenance or alimony, but, if there be no community property, then the separate property of the husband may be resorted to for that purpose.

[2] As to the second point, viz. that the court exceeded its jurisdiction by appointing a receiver to take custody of and sell the property, the contention of the appellant is that the effect of the judgment upon either the community property or the separate property of the defendant was to create a lien thereon, and, therefore, to make the lien effective, it was necessary to foreclose the same in a proceeding for that purpose. There is no force to the proposition.

Under the terms of section 671 of the Code of Civil Procedure a judgment, from the time it is docketed, becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in the county, owned by him at the time, or which he may afterwards acquire, until the lien ceases. The effect of such lien is to preserve whatever efficacy the judgment has from the time it is docketed, and it is, in effect, merely a remedy in aid of the execution. In other words, the object of the lien is manifestly to render the judgment capable of enforcement, even though the judgment debtor should sell or mortgage his real property after the judgment was docketed. No contention has ever been made that a judgment cannot be satisfied by an execution issued in the usual manner of such a process. It would, indeed, amount to a procedural circumvolution wholly unnecessary and antagonistic to the genius of the reformed procedure if the law contemplated and it was necessary to hold that, to secure the benefit of the lien provided in section 671, a proceeding to foreclose such lien was required. The judgment in a divorce action, in so far as it awards maintenance to the wife, is the same as any money judgment, the wife's position being assimilated to that of a creditor of her husband (Murray v. Murray, 115 Cal. 266, 275, 47 Pac. 37, 37 L. R. A. 626, 56 Am. St. Rep. 97); and, while the effect of the docketing of such a judgment is to create a lien upon the property, community or separate, of the husband, the satisfaction of such judgment, in the absence of a provision awarding any other remedy for that purpose, could undoubtedly be secured by the usual method of executing judgments or without resorting to a proceeding to foreclose the lien following from the docketing of such judgment.

But the Code sections conclusively answer the contention of appellant with respect to the remedy to be invoked to secure the payment of money due under an order or judgment awarding, in a divorce action, maintenance to the wife.

Section 136 of the Civil Code provides:

> "Though judgment of divorce be denied, the court may, in an action for divorce, provide for the maintenance by the husband, of the wife and the children of the marriage, or any of them."

Section 140 of the same Code reads:

> "The court may require the husband to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case."

Thus the remedy for the enforcement of an order or a judgment for maintenance through the instrumentality of a receiver appointed by the court for that purpose is expressly authorized by the Code, and in this case the court has done no more or gone no further than the law authorizes.

It is, of course, true that the general power in the courts to appoint receivers to take charge and control of and, for the purposes of the receivership, title to property in litigation is an extraordinary power, and should be exercised with great care and circumspection and only upon the imperative necessities of the case in which it is sought to be invoked. The Legislature, however, seems to have deemed the appointment of a receiver as peculiarly adapted to the enforcement of a judgment for maintenance in an action for divorce and, indeed, the only efficacious remedy in cases like this where other remedies applicable thereto have failed in their purpose, and it is probable, therefore, that it was intended that it should be allowed upon a mere showing that other remedies had proved to be ineffectual for that purpose. This view is sustained by the consideration that, generally, such cases do not involve complicated matters or numerous conflicting interests, the sole object being merely to satisfy a judgment as to a single claim growing out of the relationship of marriage between the parties, and therefore primarily based upon considerations antedating the time of separation or divorce and inhering in the contract of marriage itself.

Section 140 of the Civil Code does not, it is true, specifically point out the duties and powers of a receiver appointed by virtue of its provisions; but the section has been construed in several cases and the authority and duties of such a receiver defined. We may refer herein to one of those cases only —Petaluma S. Bank v. Superior Court, 111 Cal. 488, 44 Pac. 177, in which at page 495 (44 Pac. 179), the court thus explained the powers and duties of a receiver appointed under said section 140:

> "So far as I am advised, this section has not been the subject of a judicial construction, and the powers and duties of a receiver appointed in pursuance of its provisions have not been defined; but it would not seem difficult to determine in what cases and for what purposes he is to be appointed. The whole object of his appointment is to provide security for the payment of such allowance as is made for the maintenance of the divorced wife, and this would be accomplished by vesting him with the title and control of some productive property of the husband, out of the income of which he could pay such allowance, or by authorizing the sale of property to create a fund, the income of which would be applied to the same purpose."

It is not improper to say that counsel for the respondent filed no brief in this case, nor did they orally argue the cause when it was called for hearing. Whether respondent thus intended to manifest an abandonment of the case on appeal or regarded her position so obviously sound as to require no argument, either oral or written, we are, of course, unable positively to say. We are constrained to say, however, that, if it was her intention for any reason to abandon the case on appeal, it was her duty to have joined in an authorization for a dismissal of the appeal, and thus have saved this court, already burdened with work which must be disposed of within a limited time, of a considerable amount of extra labor. On the other hand, if it was her desire to secure a decision by this court of the legal issues submitted by the appeal, she should have supported her position upon the points involved either by oral argument or a printed or typewritten brief, and thus have taken from this court that labor which rightfully belongs to the lawyers. We have, however, notwithstanding the extra labor entailed upon us by the neglect of respondent to present her side of the case, examined the points with the same care that we always try to give to those cases which are fully argued and presented, assuming that, if respondent desired to abandon the case on appeal, she would have apprised us of the fact, and the examination thus given the case has convinced us that there is, upon the record as it stands before us, no merit in the appeal.

The order is affirmed.

We concur: CHIPMAN, P. J., BURNETT, J.

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42 Cal. App. 385

PEOPLE v. MILLS SING. (Cr. 656.)

(District Court of Appeal, Second District, Division 2, California. July 25, 1919. Rehearing Denied by Supreme Court Sept. 22, 1919.)

1. SALES 🔑202(1), 316(1)—ON CASH SALE, DELIVERY AND PAYMENT CONCURRENT ACTS.

Where a sale is a cash sale, delivery of the goods and payment of the price are concurrent acts, and the vendor, though he has delivered, supposing he would immediately receive the price, may reclaim the property, if the purchase money is not paid according to terms, provided he has not waived payment, or been guilty of laches or estopping conduct.

2. SALES 🔑199—ON CASH SALE, WAIVER OF CONDITION OF CONCURRENT PAYMENT QUESTION OF INTENT.

In case of a cash sale, where delivery and payment are concurrent conditions, whether or not the seller has waived the condition of payment is a question of intention.

3. SALES 🔑218½ — ABSOLUTE DELIVERY WITHOUT DEMAND OF PRICE PRESUMPTIVE EVIDENCE OF WAIVER OF CONCURRENT PAYMENT.

An absolute delivery of property to the buyer without demand for the price is presumptive evidence of a waiver of the condition of present payment and of a willingness to give credit, which presumption may be rebutted by the acts and declarations of the parties, or the circumstances.

4. SALES 🔑218½—WHETHER DELIVERY ON CASH SALE WITHOUT PAYMENT PASSES TITLE FOR JURY.

Whether delivery of goods on a cash sale without payment is absolute, so as to pass title, or conditional, so that title does not pass, depending, as it does, on the intention of the parties, the intent that the delivery before payment shall be conditional may be inferred from the acts of the parties and the circumstances, and is a question for the jury; an express declaration of intention to insist on immediate payment not being necessary.

5. LARCENY 🔑60—EVIDENCE THAT ON CASH SALE IMMEDIATE PAYMENT WAS WAIVED.

In a prosecution for larceny of potatoes, possession of which was obtained by defendant on the pretense of buying for cash, evidence *held* to warrant the jury in inferring that the seller did not intend to waive payment as a condition to the passing of title to the potatoes.

6. LARCENY 🔑8—POTATOES SOLD FOR CASH WITH RETENTION OF TITLE BY SELLERS SUBJECT OF LARCENY BY BUYER.

Where title to potatoes remained in the persons who grew them, the potatoes were subject to larceny by defendant, though he had obtained their possession by representing himself as a buyer for cash, and so obtained delivery conditional on payment.

7. FALSE PRETENSES 🔑12—LARCENY 🔑14 (1) — BUYER FOR CASH OBTAINING POSSESSION WITHOUT PAYMENT GUILTY OF LARCENY.

Where defendant represented to the owner of potatoes that he was a buyer for cash, and so obtained possession of the potatoes conditional on immediate payment, and stole them, he was not guilty of obtaining goods under false pretenses, rather than larceny, in which the owner has no intent to part with his title, though he may intend to part with possession, while in false pretenses the owner does intend to part with title.

8. EMBEZZLEMENT 🔑5 — LARCENY 🔑3(2) — DISTINCTION AS TO TIME OF FORMATION OF INTENT.

In embezzlement, there is no intent at the time of taking to steal or wrongfully appropriate the property, but accused, having rightfully come into possession, thereafter forms the intent fraudulently to convert the property to his own use, while in larceny the person taking it has at the time an intent to steal or feloniously appropriate.

9. CRIMINAL LAW 🔑112(7) — TRANSPORTATION OF STOLEN GOODS INTO A SECOND COUNTY, CRIME IN EACH COUNTY.

Where, after defendant had first stolen the potatoes, larceny of which is charged, he carried them away into another county for sale, his possession was a larceny in each county into which he carried the goods, every moment's continuation of the trespass and felony amounting in legal contemplation to a new caption and asportation, and he could be prosecuted in the second county, into which he carried the goods, as for a larceny committed therein, apart from Pen. Code, § 786.

10. LARCENY 🔑28(3), 40(5)—PROOF OF TAKING ADMISSIBLE IN COUNTY TO WHICH GOODS WERE CONVEYED.

An information for larceny may charge its commission in the county into which the goods were taken, and the first larceny in another county, though not alleged in the information, may be given in evidence.

11. LARCENY 🔑32(1)—NAME OF OWNER OF PROPERTY NOT MATERIAL IN INFORMATION.

In larceny, the name of the owner of the stolen property is not a material part of the of-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

fense charged, being required only to identify the transaction, so that defendant by proper plea may protect himself against another prosecution, as he could do on a charge of feloniously stealing sacks of sweet potatoes, the property of three named Japanese.

12. Indictment and Information 🔑132(2)—Three Days' Hauling of Potatoes Stolen, One Offense.

Where defendant planned to steal 252 sacks of potatoes, by representing that he was buying for cash and so getting possession, and it took three days to haul the potatoes away from the sellers' ranch, there was nevertheless but one larceny, not a distinct offense at the time of each of the three haulings requiring an election by the prosecutor.

13. Criminal Law 🔑829(18)—Refusal of Instruction, Repetition of One Given, Not Error.

In prosecution for larceny, where defendant pleaded not guilty, but offered no evidence, and the court instructed on reasonable doubt, and on the duty of the jury to acquit if such a doubt existed, etc., refusal of an instruction that, if there was any reasonable theory deducible from the evidence consistent with defendant's innocence, there must be an acquittal, *held* not prejudicial; the matter having been adequately covered.

14. Criminal Law 🔑465—Evidence of Price Accused had Agreed to Pay Not Inadmissible as a Conclusion.

In a prosecution for larceny of potatoes, defendant representing that he was a buyer for cash, testimony of a witness as to the price defendant and his confederate had "agreed" to pay for the potatoes *held* not inadmissible as a conclusion; the witness having testified to the particulars of the negotiations.

15. Criminal Law 🔑423(1)—Declarations and Acts of Conspirators Admissible Against Coconspirator.

What one conspirator to commit larceny said or did in furtherance of the common purpose during the life of the conspiracy was admissible against his coconspirator, prosecuted for the larceny.

16. Criminal Law 🔑427(3)—Manner of Introduction of Evidence to Establish Conspiracy.

Where the facts from which a conspiracy is to be inferred are so intimately blended with other facts going to constitute the crime conspired to be committed that it is difficult to separate them, it is not essential to the introduction of evidence of the acts and declarations of one of the conspirators that the evidence should first be introduced to establish prima facie the fact of the conspiracy.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Mills Sing was convicted of grand larceny, and from the judgment, and an order denying his motion for a new trial, he appeals. Judgment and order affirmed.

Paul W. Schenck and Richard Kittrelle, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. Defendant was convicted of the crime of grand larceny. He appeals from the judgment of conviction, and from an order denying his motion for a new trial.

The information was filed in, and the action tried by, the superior court of Los Angeles county. It is charged in the information that defendant and one St. Clair, "on or about the first day of September, 1918, at and in the county of Los Angeles, * * * did * * * feloniously steal, take, and haul away 252 sacks of sweet potatoes, * * * the personal property of N. Namekawa, Y. Takahaihi, and K. Yasunaga." Briefly, the evidence discloses the following facts:

The three persons whose property defendant is alleged to have stolen are Japanese. These three Japanese were partners, farming on a ranch near Anaheim, in Orange county. On August 31, 1918, defendant, who is a Chinaman, and St. Clair, went to the ranch of the Japanese, introduced themselves, and told one of the Japanese that they wanted to buy some sweet potatoes, for which they would pay $3.50 a hundred pounds. The Japanese told them he would sell them the potatoes if they would pay cash, and asked them if they were ready to pay the cash that day telling them it would take about three days to dig the potatoes. In reply, defendant and St. Clair told the Japanese that they did not have the cash with them that day, but to dig the potatoes nevertheless, and they would bring the cash the next day. That day defendant and St. Clair agreed to take 150 sacks of a hundred pounds each, at $3.50 per hundred pounds, agreeing to make a cash payment. The next day, September 1st, defendant returned to the ranch with a truck and driver. The Japanese who, the day before, had made the agreement for the sale of the potatoes, asked defendant if he had brought the cash. Defendant replied that he had not, but that his company was a "big company," and that he would bring the cash the next day. That day, September 1st, defendant took away in the truck and hauled to the White Express Garage in Los Angeles a little more than 100 sacks. The next day, September 2d, defendant again visited the ranch with a truck, and hauled away, to the same garage in Los Angeles, about 70 sacks of potatoes. The following day, September 3d, St. Clair came to the ranch, with a truck and driver, and hauled away, to the same garage in Los Angeles, 76 sacks. Upon this occasion the Japanese asked St. Clair if he had brought the money. St. Clair said that he had not, whereupon the Japanese asked him why he had not. St. Clair replied, as defendant previously had, that his company was a "very big company." He then asked the Japanese to accompany him to Los Angeles, saying: "I will pay right away." Altogether, 252 sacks of potatoes were hauled away from the ranch near Anaheim to the garage in Los Angeles. On the third trip, the occasion when St. Clair caused the 76 sacks to be hauled away, the Japanese who had conducted the negotiations accompanied St. Clair to Los Angeles, arriving at the garage about 1 o'clock on the morning of September 4th. The Japanese remained outside the door of the garage until after daylight, watching the potatoes. Defendant previously had given this Japanese a card on which was written, "Henry St. Clair Produce Co., 1807 East Seventh Street," and under this, "112 West Ninth Street. Main Office, room 235, telephone 10175." When St. Clair and the Japanese arrived at the garage early in the morning of September 4th, the former told the Japanese to go to the office of the company in the morning and he would receive his money. About 8 o'clock in the morning of September 4th, the Japanese went to the office of the supposed "big company," as described on the card given him by defendant, but there was no office there. About an hour and a half later he returned to the garage, only to discover that, in the meantime, the potatoes had been taken away. Two days later some of the potatoes were found in the stall of a produce man in a market in Los Angeles. This produce man testified that he had bought two truck loads of potatoes from defendant at $3.25 a hundred pounds. At this time the market value in Los Angeles was $4 per hundred pounds. There is evidence to justify the inference that defendant and St. Clair sold the balance of the potatoes to other produce men, after they had caused them to be hauled to Los Angeles.

[1-3] That the evidence shows the case to be, not larceny, but some other crime, such as false pretenses, or embezzlement, is a proposition seriously urged upon us by appellant. With this contention we cannot agree. That the crime was larceny, and none other, is clearly established by the evidence. Throughout all the dealings, the Japanese who carried on the negotiations with defendant and St. Clair was particular to emphasize the fact that the sale was to be strictly a cash transaction. Where a sale is a cash sale, delivery of the goods and payment of the purchase money are concurrent acts, and the vendor, though he has made delivery, supposing that he would immediately receive the purchase price, may reclaim the property from the purchaser, if the purchase money be not paid according to the terms of the sale, provided he has not waived the cash payment, or been guilty of laches or such conduct as would estop him. If the condition of cash payment is not waived, the title does not pass until the price is paid. Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 Pac. 284, 9 Am. St. Rep. 199; 24 R. C. L. p. 23. It frequently happens that the seller will deliver the goods, notwithstanding the failure to fulfill the condition of payment. In such cases, the question whether the delivery is to be considered a waiver of the condition that payment shall be made before the title passes may depend upon the attendant circumstances; for whether the condition has been waived or not is a question of intention. An absolute delivery of property to the buyer without a demand of the purchase price is presumptive evidence of a waiver of the condition of present payment and of a willingness to give credit to the buyer. This presumption, however, may be rebutted by the acts and declarations of the parties, or by the circumstances of the case.

[4-6] Whether the delivery without payment is absolute, so as to pass the title, or conditional, so that the title does not pass, depending as it does upon the intention of the parties, the intent that the delivery before payment shall be conditional, and not absolute, may be inferred from the acts of the parties and the circumstances of the case, and is a question of fact for the jury. An express declaration of an intention to insist upon the performance of the condition is not necessary, but such intention may be inferred from acts and the attendant circumstances. Osborn v. Gantz, 60 N. Y. 542; Parker v. Baxter, 86 N. Y. 593. In the present case the jury was warranted in inferring that the Japanese did not intend to waive payment as a condition to the passing of title to the potatoes. All his acts, coupled with the evident purpose of defendant and St. Clair to obtain possession of the potatoes by fraud and deceit—leading the Japanese to believe at each successive step in the transaction that a cash payment would be made immediately—clearly indicate that it was not the intention of the vendors to pass the title to the potatoes, or to permit their resale by defendant or St. Clair prior to the payment of the cash price agreed upon. The title remaining in the three Japanese partners, the potatoes were subject to larceny. If a person, with a preconceived design to appropriate the property to his own use, obtains possession of it by means of fraud or trickery, the taking is larceny. 17 R. C. L. p. 13; People v. Rae, 66 Cal. 423, 6 Pac. 1, 56 Am. Rep. 102.

[7] There is no foundation for the claim that the crime was that of obtaining goods under false pretenses. In larceny, the owner of the thing has no intention to part with his title to the person taking the thing, although he may intend to part with possession. In false pretenses, the owner does intend to part with his title to the thing, but it is obtained from him by fraud. People v. Delbos, 146

Cal. 734, 81 Pac. 131; People v. Rial, 23 Cal. App. 713, 139 Pac. 661. Here there was evidence justifying the inference that the Japanese had no intention to part with title until the cash payment should be made; also that defendant and St. Clair, by fraud and deception inducing the Japanese to believe that an immediate cash payment would be made, and harboring the preconceived intention feloniously to appropriate the potatoes to their own use, obtained the possession fraudulently.

[8] Nor was the crime that of embezzlement; for, the title remaining in the Japanese, defendant and St. Clair, as the evidence shows, not only obtained possession by fraud and deceit, thereby inducing the owners to make delivery, but, before delivery was made to them, they had formed the preconceived design to appropriate the potatoes to their own use after they should have succeeded in inducing the Japanese to part with the manual possession. In embezzlement, there is no intent, at the time of the taking, to steal or wrongfully appropriate the property; but the accused, having rightfully come into possession, thereafter forms the intent to fraudulently convert it to his own use. In larceny, the person taking the property has, at the time of the taking, an intent to steal the property or to feloniously appropriate it to his own use. People v. Bojorquez, 35 Cal. App. 350, 169 Pac. 922; People v. Smith, 23 Cal. 280.

[9, 10] It is claimed that the superior court of Los Angeles county did not have jurisdiction to try the case. Appellant contends that the crime was wholly begun, ended, and consummated in Orange county, and hence argues that section 781 of the Penal Code, which gives jurisdiction to either court where the crime is committed partly in one county and partly in another, is inapplicable. It is also urged by appellant that the court did not acquire jurisdiction under section 786 of the Penal Code, because the information charges the crime to have been committed in Los Angeles county, instead of charging that it was committed in Orange county, and the potatoes then brought into Los Angeles county. Section 786 of the Penal Code provides that—

> "When property taken in one county by burglary, robbery, larceny or embezzlement, has been brought into another, the jurisdiction of the offense is in either county."

It doubtless is true that the crime of larceny was committed when defendant, with intent feloniously to appropriate the potatoes to his own use after he should have obtained their possession, secured the possession in Orange county through the fraud and deceit then and there used to induce the Japanese to make a delivery to defendant or to his confederate St. Clair, or to the truck driver who was employed by them to haul the potatoes to Los Angeles. But even so a new larceny was committed in Los Angeles county—the larceny with which the defendant was charged in the information. If, after one has done what completes the theft, he continues traveling away with the goods, still intending to appropriate them to his own use, each step is a new trespass and a fresh larceny. So that the possession of goods stolen by the thief is a larceny in each county into which he carries them. The legal possession still remaining in the true owner, every moment's continuation of the trespass and felony amounts, in legal contemplation, to a new caption and asportation. Bishop's New Crim. Proc. vol. 1, § 59; 17 R. C. L. pp. 45, 46; People v. Staples, 91 Cal. 27, 27 Pac. 523. In legal contemplation, the crime of larceny is committed in both counties, and the thief may be prosecuted and punished in either. People v. Mellon, 40 Cal. 648, 654; People v. Scott, 74 Cal. 94, 96, 15 Pac. 384; People v. Tyree, 21 Cal. App. 701, 132 Pac. 784 This principle of law is elementary; and the information may, as here, charge the commission of the larceny in the county intc which the goods have been taken, and the first larceny, though it is not alleged in the information, may be given in evidence.

Appellant, with much confidence, asserts that People v. Prather, 134 Cal. 386, 66 Pac. 483, 724, is in irreconcilable conflict with these views. That case, recognizing that the crime of larceny is committed in both counties, when a thief, having taken property by larceny in one county, brings it into another, the intent to steal continuing, simply holds that the prosecutor for the county into which the goods are brought may pursue either one of two courses: (1) He may lay the venue in the county into which the property is brought, charging the crime to have been committed in that county, thus relying upon the larceny that, in legal contemplation, is committed therein; or (2) he may charge the larceny that was committed in the county where the first felonious taking occurred and then allege that the stolen property was brought into the county in which the crime is prosecuted. It was the second of these two possible courses that was pursued by the prosecutor in the Prather Case. Where the intent still to steal the property does not continue when the property is brought into the county where the prosecution is had the information must charge the larceny that was committed in the county where the property was originally stolen and then allege that the property was brought into the county where the prosecution is had. In such a case, jurisdiction in the county into which the goods are brought can only be by reason of the provision contained in section 786 of the Penal Code. But where, as here, the intent to steal continues after the goods are brought into the second county, the larceny may be charged to have been committed in that county.

That this view of the law is fully recognized by the court in the Prather Case is established by the fact that there the court, after quoting from Bishop, says:

> "This principle of law is elementary, and involves the proposition that a new larceny is committed in every county to which the thief takes the property; *and the correct information in such a case should charge the commission of the crime of larceny in the county where the person is to be prosecuted.* Under such circumstances, the first larceny is a mere matter of evidence, and should not be alleged." 134 Cal. 388, 66 Pac. 484. (Italics ours.)

In the Prather Case the prosecution was based upon the original larceny committed in Yolo county, and the jurisdiction of the court in Sacramento county was based upon section 786. Here the prosecution is not based upon the original larceny committed in Orange county, but upon that which in legal contemplation, was subsequently committed in Los Angeles county, and jurisdiction of the Los Angeles court is in no wise dependent upon section 786, but exists because, in the eyes of the law, a larcenous taking was had in the latter county.

[11] The information charges that defendant did feloniously steal and take away 252 sacks of potatoes, "of the personal property of N. Namekawa, T. Takahaihi and K. Yasunaga." Appellant claims that there is no evidence that these three owned the potatoes. N. Namekawa, one of the three Japanese named in the information as the owners of the potatoes, testified that he and the other two were partners, that he was engaged in farming on a ranch near Anaheim, that his two partners were farming with him, that they were raising sweet potatoes, and that he carried on all the negotiations with defendant and St. Clair for the sale of the potatoes. This was sufficient evidence of the ownership as alleged, even though the witness, as might be expected of an ignorant person, frequently referred to the potatoes as "my potatoes," and to the ranch as "my ranch." Moreover, the variance, if any there was, was not fatal. It would have been fatal at common law; but in this state it is provided by statute (section 956 of the Penal Code) that—

> "When an offense involves the commission of, * * * a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured * * * is not material."

In larceny the name of the owner of the stolen property is not a material part of the offense charged. It is only required to identify the transaction, so that the defendant, by proper plea, may protect himself against another prosecution for the same offense. The essential thing is an averment which shall show conclusively that the property does not belong to the defendant. People v. Nunley, 142 Cal. 105, 75 Pac. 676. Defendant and St.Clair having been charged with feloniously stealing and taking away 252 sacks of sweet potatoes, the property of the three Japanese named in the information the larceny was identified with sufficient certainty to enable defendant, by proper plea, to protect himself against another prosecution for the same offense, even though it should appear that the potatoes were owned by but one of the three.

[12] Because part of the potatoes were taken and hauled away from the ranch of the Japanese on September 1st, and part on September 2d, and the balance on September 3d, appellant claims that there were three separate and distinct offenses, and that the court should have granted his motion to compel the prosecution to elect one of the three offenses as that upon which it would rely for a conviction. The transaction in which the potatoes were taken was a continuous one. Appellant and his confederate, St. Clair, when they first went to the ranch of the Japanese and negotiated for the potatoes, evidently designed to obtain possession of the 252 sacks by fraud and deceit; i. e., by fraudulently pretending that the sale was a bona fide cash sale, and by leading the Japanese to believe that the potatoes notwithstanding their delivery, would be immediately paid for, and would not be resold until cash payment should be made as represented by them. It is evident that, from the beginning, defendant and St. Clair intended to appropriate the potatoes to their own use after having obtained the possession fraudulently. Although the deliveries to defendant and St. Clair and the hauling away were distinct acts, still they were continuous. The whole transaction was one continuous proceeding, instigated by one impulse and one purpose. Appellant and his confederate having embarked upon a scheme to appropriate the potatoes to their own use, after they should have induced the Japanese to deliver possession under the impression that they would immediately receive cash payment, and having pursued this scheme until it was effectuated, it is immaterial that it required a number of days to consummate it. All the potatoes having been taken in pursuance of one purpose, they were, legally speaking, taken at the same time, The law is that, if the different asportations from the same owner are prompted by one design, one purpose, one impulse, they are a single act, without regard to time. Carl v. State, 125 Ala. 89, 28 South. 505; Flynn v. State, 47 Tex. Cr. R. 26, 83 S. W. 206; Ex parte Jones, 46 Mont. 122, 126 Pac. 929; Wilson v. State, 70 Tex. Cr. R. 631, 158 S. W. 512; State v. Gibson, 37 Utah, 330, 108 Pac. 349; State v. Mandich, 24 Nev. 336, 54 Pac. 516; 25 Cyc. 61.

[13] Complaint is made that the court refused to give an instruction as follows:

> "If there be any reasonable theory or hypothesis deducible from the evidence consistent with

the innocence of the accused, your sworn duty compels you to accept such theory or hypothesis and acquit him."

This instruction might well have been given, but its refusal was not prejudicial error. Defendant offered no evidence. He neither developed, by evidence on his behalf, nor, so far as the record before us shows, put forth or suggested, any particular or special theory or hypothesis. In every criminal case, where the defendant has interposed the plea of "not guilty," the general theory of innocence is, of course, adopted by him. But as to this general theory the court's instructions covered all that appellant was entitled to ask. The court defined larceny, grand and petit; instructed the jury that, to justify a conviction, the prosecution must establish, beyond a reasonable doubt, the crime as charged in the information; and defined "reasonable doubt" by giving the oft-approved language of Chief Justice Shaw in the Webster Case, 5 Cush. (Mass.) 295, 52 Am. Dec. 711. The jurors were told that "a defendant in a criminal action is presumed to be innocent until the contrary is proven"; that "in case of a reasonable doubt, whether his guilt is satisfactorily shown, he is entitled to an acquittal"; that "if, after a consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror entertaining such doubt not to vote for a verdict of guilty"; that "the burden of proof is upon the prosecution"; that "every person is presumed to be innocent until he is proven guilty"; and that "if, upon such proof, there is a reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal." For these reasons we are satisfied, after an examination of the entire case, including the evidence, that the refusal to give the requested instruction did not result in a miscarriage of justice.

[14-16] We find no prejudicial error in the admission or rejection of evidence. Appellant bases several of his objections upon theories of the law that we already have disposed of contrary to his contentions. A number of objections to questions were made upon the ground that they called for the conclusion of the witness; as, for example, a question asked of the Japanese witness as to the price the defendant and St. Clair had "agreed" to pay for the potatoes. This, like other similar questions, was unobjectionable, for the witness had previously testified to the particulars of the negotiations between himself and appellant and St. Clair. Appellant objects that evidence of certain declarations made by and acts of St. Clair was hearsay. But the entire record warrants the inference that appellant and St. Clair were conspirators from the moment when they first visited the Japanese ranch to the time when the last potatoes were sold or otherwise disposed of by them. What St. Clair said or did in furtherance of the common purpose during the life of this conspiracy, was, of course, admissible. Where, as here, the facts from which the conspiracy is to be inferred are so intimately blended with other facts going to constitute the crime that it is difficult to separate them, it is not essential to the introduction of evidence of the acts and declarations of one of the conspirators that evidence should first be introduced to establish prima facie, in the opinion of the court, the fact of conspiracy. People v. Fehrenbach, 102 Cal. 394, 36 Pac. 678.

What we have said thus far disposes of every point made in support of the appeal that is worthy of discussion.

Judgment and order affirmed.

We concur: SLOANE, J.; THOMAS, J.

42 Cal. App. 505

McAULIFF v. McFADDEN et al.

(Civ. 2159.)

(District Court of Appeal, Second District, Division 2, California. July 30, 1919.)

1. Appeal and Error ⟹757(1)—Only Portion of Record Necessary to be Printed on Appeal Under Alternative Method

On an appeal under the alternative method, where a lengthy typewritten reporter's and clerk's transcript is presented as the record, appellant is only required to print in his brief such portions of the record as are needed to fairly and lucidly present the points upon which he relies.

2. Appeal and Error ⟹757(2)—Admission in Answer Not Considered Where Pleading Not in Full in Brief.

Appellant's claim that material facts are admitted by the answer cannot be determined, where the pleadings are not printed in full in the briefs, since a careful comparison of the entire complaint with the entire answer is required.

3. Vendor and Purchaser ⟹50—Written Instrument and One Made in Consideration thereof form Single Contract.

Where a written contract for the sale of a lot upon installment payments and a contemporaneous written contract, expressly referring thereto and reciting that it was made in consideration thereof providing that vendors should not look to purchaser for payments of amounts beyond a certain portion of what purchaser earned painting signs for vendors, the two instruments evidence but a single contract, under Civ. Code, § 1642, and must be so construed as to give effect to each under section 1641.

4. Reformation of Instruments ⟹47 — Plaintiff Entitled At Least to Portion of Price Paid by Him.

Where sign painter contracted with real estate firm to purchase a lot owned one-half by the firm and one-half by undisclosed co-owners, and collaterally contracted that he might pay the purchase price installments by one-third of his monthly bills for sign painting, in his suit against the firm and undisclosed co-owners for reformation of the contract and for recovery of sums paid thereon, judgment for defendants, foreclosing plaintiff's interest in the lot unless balance of purchase price was paid, cannot be supported on theory that firm had no authority to find the co-owners by the collateral agreement as well as the land sale, for in such case, the contracts being inseparable, there would be no contract at all binding plaintiff, and he should have had judgment for at least the portion of the purchase price paid.

5. Equity 🔑39(1)—Can Adjust All Matters Between Parties Within Issues and Evidence.

In an equity suit to reform a land sale contract and for recovery of amount paid thereon, the court can retain jurisdiction to adjust all the rights and equities of the respective parties that are within the issues and disclosed by the evidence.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by H. B. McAuliff against Joseph E. McFadden and others. Judgment for defendants, and plaintiff appeals. Reversed, and new trial ordered.

Herbert N. Ellis, of San Diego, and C. B. Ellis, for appellant.

Riley & Heskett, of San Diego, for respondents.

FINLAYSON, P. J. This is an action for reformation of a contract, for the recovery of $421.07 alleged to have been paid by plaintiff on the contract, and for the further sum of $2,000 damages alleged to have been suffered by reason of the defendants' breach of the contract. From a judgment in favor of defendants, plaintiff appeals. The contract was one for the sale to plaintiff of certain real property.

[1] The appeal is prosecuted under the "alternative method," and a lengthy typewritten reporter's and clerk's transcript is presented to us as the record on appeal. No part of the record is printed in respondents' brief, or in any supplement thereto. In appellant's brief there is printed the findings, in full, fragments of the pleadings, and a few excerpts from the testimony of the witnesses. As appellant is only required to print in his brief such portions of the record as may be necessary to present to this court, fairly and lucidly, the points upon which he relies (De Bock v. De Bock, 28 Cal. App. Dec. 1029[1]), we think enough is printed in appellant's brief to necessitate a consideration by us of the principal question presented by his appeal.

[2] We cannot, however, consider appellant's claim that certain facts, material to the question mainly relied upon by him, are admitted by the answer. Whether such facts are so admitted could be determined only from a careful comparison of the entire complaint with the entire answer. As neither pleading is printed in full in the briefs, we are unable to say that the answer makes any of the admissions claimed by appellant.

From the findings—printed in full in appellant's brief—and from such of the evidence as is therein printed, we are able to glean the following:

Prior to January 27, 1913, plaintiff had been furnishing to defendants McFadden & Buxton, copartners, sign paintings in considerable quantities, for which he was entitled to receive pay at certain rates. On the date last mentioned, defendants McFadden, Buxton, Strahlmann, and Mayer, as vendors, but through and "in the name of the defendants McFadden & Buxton," entered into a written contract with plaintiff—hereafter referred to as the formal written contract of sale—whereby plaintiff, as vendee, agreed to purchase from the vendors, and the latter agreed to sell, lots 32 and 33 in block G of McFadden & Buxton's North Park, in the city of San Diego. Strahlmann and Mayer are not mentioned in the contract as parties thereto. This particular written contract provided that the purchase price, $1,350, should be paid as follows: $50 cash, and the remainder in monthly installments of $50 each on the first day of each and every month thereafter, until the total balance of $1,300 should be paid, deferred payments to bear interest at 7 per cent., and plaintiff to pay all taxes and assessments. According to the terms of this contract, plaintiff was obligated to pay at least $50 per month on the first day of each and every month, commencing February 1, 1913, and ending March 1, 1915. The action appears to have been commenced after the last-mentioned date. So that if this was the only contract relative to the sale of the lots and the payment of the purchase price—that is, if this document contained the whole agreement respecting the sale—then plaintiff was in default, for he had not paid more than $421.07 when the action was commenced, and, consequently, he is not entitled to any relief, unless, as he claims, another writing, signed by McFadden & Buxton, was not only a part of the entire contract, but introduced a new element respecting the manner of paying the purchase price.

At the time when the formal written contract of sale was entered into, it was contemplated by plaintiff and by McFadden & Buxton that the former would continue to furnish sign paintings as theretofore. Pursuant to such expectation, and at the same time when the formal contract of sale was executed, plaintiff and McFadden & Buxton made another contract—a contract which hereafter will be referred to as the collateral agreement. This collateral agreement was evidenced by a writing signed by McFadden & Buxton, and, though not signed by plaintiff, was unquestionably acted upon by him. This document is as follows:

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[1] Opinion superseded by decision on rehearing, 183 Pac. —.

> "San Diego, California, Jan. 27, 1913. Mr. H. B. McAuliff, City—Dear Sir: In consideration of the contract entered into this date whereby you have agreed to purchase lots 32 and 33, block G, North Park, for the sum of thirteen hundred fifty dollars, it is agreed and understood that all payments to be made on this property shall be one-third the monthly bills for sign painting rendered from you, and in no case will we ask for more. Said payments to be credited on the first of each month. Yours very truly, McFadden & Buxton, by G. E. Buxton."

Buxton, who was the only witness for defendants, testified that the two contracts "were made at the same time; * * * it was the mutual understanding between us [plaintiff and McFadden & Buxton] that the deal [the contract for the sale of the two lots] wouldn't have been made without having this agreement"—the collateral agreement. Buxton, in his testimony, also said that it was not contemplated that there should be any other method of paying for the lots than the sign painting that plaintiff was to do. McFadden & Buxton were the record owners of the lots and had the handling of the property, though it is a fair inference from the facts appearing in the court's findings together with those disclosed by the brief excerpts from the evidence printed in appellant's brief, that, at the date of the contract of sale, the two lots were owned by the four defendants—McFadden, Buxton, Strahlmann, and Mayer. Plaintiff testified as follows:

> "He [Buxton] * * * says: 'You have been doing a lot of work for us people [referring to a time immediately preceding the contract of purchase and sale]; we think you ought to reciprocate by buying a lot.' I told Buxton that I didn't want a lot; that I didn't think I could afford to buy a lot. 'Well,' he says, 'We can make this so easy that it won't cost you a cent.' * * * Mr. Buxton told me, and I understood him fully, that they would have enough work so that I could pay $50 a month towards the lot, being two-thirds of the amount of work they were likely to have, and the two-thirds would be paid in cash."

This testimony is not contradicted by any evidence printed in the briefs. Plaintiff paid his vendors a total of $421.07. From the findings and the parts of evidence printed in the briefs, it is clear that this aggregate sum of $421.07 was made up of payments made in the manner provided for in the contemporaneous collateral agreement. Plaintiff made all the signs and did all the sign painting that he was asked to do after the execution of the formal contract of sale and the contemporaneous collateral agreement. He was eager to do anything the defendants had for him to do, and never refused a job for them. It is a reasonable inference from such of Buxton's testimony as is printed in appellant's brief that the real estate business fell off shortly after the contract of sale, that for this reason McFadden & Buxton had no property for sale upon which to paint advertising signs, and that for this reason the work which they had contemplated having for plaintiff, when the contract of sale was made, fell off, and hence the amount thereafter earned by plaintiff from his sign painting was not sufficient to enable him to make the payments on the lots in the manner provided by the contemporaneous collateral agreement.

The court found that there was no agreement between plaintiff and any of the defendants that the latter, or any of them, would purchase from plaintiff signs or sign paintings subsequent to the contract of sale; that the formal written contract of sale, executed by plaintiff and the record owners, McFadden & Buxton, was complete within itself and contained all the conditions of the agreement of sale; that the contract of sale was voluntarily entered into by plaintiff; that no fraud, misrepresentation, deceit, or bad faith was practiced upon him by defendants, or any of them; and that no provision or condition of the formal written contract of sale was omitted through error, mistake, fraud, deceit, or oversight. The court also found that defendants have performed all of the conditions of the contract of sale to be by them performed, but that plaintiff has failed to perform the terms and conditions of the contract of sale on his part to be performed.

[3] In its conclusions of law, presumably followed by and incorporated in the judgment—though the latter document is not printed in any of the briefs—the court finds that defendants Strahlmann and Mayer, to whom McFadden & Buxton had assigned their interests before the action was commenced, are entitled to recover from plaintiff $1,182, as the unpaid balance of the purchase price, and that, if plaintiff fails to pay the same within 30 days from the entry of judgment, all his right and title to the lots shall be foreclosed.

The finding that the formal written contract of sale was complete within itself and contains all the conditions of the agreement of sale, and the finding that plaintiff has failed to perform the terms and conditions of the contract of sale on his part to be performed, can be sustained only upon the theory that the two instruments were not parts of one transaction and did not evidence one single contract. But this, we think, is an erroneous theory. The two instruments, the formal written contract of sale and the contemporaneous collateral agreement, signed by the vendors, McFadden & Buxton, and acted upon by plaintiff, relate to the same subject-matter and were executed as parts of one transaction; the latter expressly referring to the former, and reciting that it was made in consideration of the execution of the formal contract of sale. The language of the collateral agreement is:

> "It is agreed * * * that *all* payments [on the contract of sale] * * * shall be one-third of the monthly bills for sign painting rendered from you [plaintiff], and in no case will we ask for more."

This language, read in the light of the attendant circumstances, as disclosed by the evidence printed in appellant's brief, and taken in connection with the provision of the formal written contract of sale calling for the payment of $50 per month until the full amount of $1,300 shall have been paid, means that each monthly installment of $50, together with interest and the sums due from plaintiff for taxes and assessments, shall be paid out of moneys to be earned by plaintiff from sign painting to be done by him for the record owners, McFadden & Buxton, and implies that plaintiff shall be given enough sign painting to enable him to earn thereby such amounts that he could receive at least two-thirds of the amount earned in cash, and allow the remaining one-third to be credited on the monthly installments of the purchase price of the lots, as such installments fell due. It is a familiar rule, recognized by all courts, that where several papers covering the same subject-matter are executed by or between the same parties at the same time, all are to be considered together, and with the same effect as if all had been incorporated in one document. Civ. Code, § 1642; Ingoldsby v. Juan, 12 Cal. 564, 577. The several contracts must be so construed as to give effect, as far as practicable, to every part of each instrument. Civ. Code, § 1641; Flinn v. Mowry, 131 Cal. 481, 484, 63 Pac. 724, 1006.

[4, 5] The judgment of the lower court cannot successfully be defended upon the theory that McFadden & Buxton, the sole record owners, had no authority to bind their undisclosed co-owners, Strahlmann and Mayer, by the collateral agreement. Strahlmann and Mayer are not mentioned in the formal written contract of sale. As the court finds, that contract "was made by defendants [i. e., the four defendants Strahlmann, Mayer, McFadden and Buxton] through and *in the name of* McFadden & Buxton," the owners of record. Plaintiff dealt with the record owners and no one else. If these record owners had no authority to bind their undisclosed co-owners by the collateral agreement, or if the collateral agreement was not ratified by the latter, then there was no contract binding on appellant. For appellant unquestionably contracted for, and supposed he would receive, the entire fee-simple title to the lots, not merely an undivided one-half, or such undivided part of the whole title as might be owned by but two of the four co-owners. It was for the complete fee-simple title that he agreed to pay. And he agreed to pay for it in the manner provided by the contemporaneous collateral agreement that was signed by and given to him by the only owners of record—the persons, and the only persons, with whom he dealt. That is what he bargained for—that and nothing else. He, and those with whom he had all his dealings, the two record owners, understood that he was to pay for the lots as provided in the contemporaneous collateral agreement, and not otherwise, and that thus he was to become entitled to own the two lots in severalty. If, therefore McFadden & Buxton had no authority to bind their undisclosed co-owners, then the contract did not give appellant what he bargained for, and in that event it would not be binding upon him, he would not be in default, and the court should have given him judgment against McFadden & Buxton, at least for the sum of $421.07, which the latter, withholding from plaintiff out of his earnings for sign painting, had applied on the purchase price of the lots.

The action was a suit in equity, and the court could have retained jurisdiction to adjust all the rights and equities of the respective parties that were within the issues and disclosed by the evidence. If, on the other hand, McFadden & Buxton were authorized to contract with plaintiff in their own name, but on behalf of themselves and their co-owners, Strahlmann and Mayer, then there was but one contract, and the collateral agreement, without any reformation of the formal written contract of sale, must be taken to be a part of the whole contract—a contract which, as already shown, permitted appellant to make his payments on the lots out of such future earnings as he might make in painting signs for the record owners, McFadden & Buxton.

We have not undertaken to determine the precise nature of all the rights of the respective parties to the action, nor what judgment should be entered herein. That would involve a consideration of facts and questions not presented by or argued in the briefs on file. For this reason we content ourselves with saying that, for reasons already given, certain of the findings are contrary to the evidence and inconsistent with other facts found by the court, and, upon the record before us, the judgment as entered is clearly erroneous.

For these reasons, the judgment should be reversed, and the case retried. It is so ordered.

We concur: SLOANE, J.; THOMAS, J.

42 Cal. App. 540

PEOPLE v. ROSE. (Cr. 476.)

(District Court of Appeal, Third District, California. Aug. 4, 1919.)

1. False Pretenses 🔑4 — Elements of Offense Defined.

To constitute the offense of obtaining money by false pretenses, there must be an intent to defraud, actual fraud must be committed, false pretenses must be used to perpetrate the fraud, and it must be accomplished by means of false pretenses, which are the cause of inducing the owner to part with his money.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, False Pretense.]

2. False Pretenses 🔑49(1)—Sufficiency of Evidence to Sustain Conviction.

Evidence *held* to sustain conviction of having obtained money by false pretenses from the innocent indorser of a forged check.

3. Criminal Law 🔑1144(16) — Presumption on Appeal That Verdict was Based on Any Theory Shown by Evidence.

In support of conviction, the appellate court is authorized to presume that the verdict was predicated on any theory deducible from the evidence which will support the charge and the verdict.

4. Criminal Law 🔑511(2) — Corroboration of Accomplice Sufficient if It Tends to Connect Defendant with Crime.

Corroboration of an accomplice need not be by evidence of itself sufficient to support the charge, being sufficient, though slight, if it tends to connect defendant with the commission of the crime charged.

5. False Pretenses 🔑7(1)—Representation that Check was Good Meant Good for Its Face.

The representation of defendant, subsequently charged with obtaining money by false pretenses on a check, that the check was good, made when he presented it for indorsement to the party defrauded, necessarily carried with it the representation that the check was good for its face, or $200.

6. Criminal Law 🔑1159(4) — Credibility of Witnesses for the Jury.

The appellate court, even with the added powers vested in it with respect to review of questions of fact by Const. art. 6, § 4½, cannot consider the evidence to determine whether the witnesses on whose testimony the jury presumptively predicated a verdict of guilty testified to the truth or not.

7. Criminal Law 🔑1173(2) — Failure to Instruct on Accomplice Testimony Harmless Where Other Evidence Sustains Conviction.

In a prosecution for obtaining money by false pretenses on a forged check, in view of the circumstances, failure of the trial court to explain to the jury the status of an accomplice as a witness, and how his testimony should be viewed and considered, as required by Code Civ. Proc. § 2061, *held* harmless to defendant.

8. Criminal Law 🔑824(7) — Failure to Charge on Accomplice Testimony Not Error Where No Request Made.

Failure to instruct on accomplice testimony was not erroneous; defendant not having requested such charge and refusing assistance of attorney.

9. Criminal Law 🔑641(1) — Right of Representation by Counsel Not Denied.

A professional court interpreter, familiar with the methods of criminal jury trials, who, on his trial for obtaining money by false pretenses, himself managed and presented his defense, having announced ready for trial, was not deprived of his right, under Const. art. 1, § 13, to be represented by counsel, if he desired, having voluntarily failed to procure such assistance.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

William Rose was convicted of having obtained money by false pretenses. From the judgment, and an order denying his motion for a new trial, he appeals. Judgment and order affirmed.

Martin I. Welsh, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. By an information filed in the superior court of the county of Sacramento on the 31st day of March, 1919, defendant, William Rose, and one Nicholas Kinominas (whose name appeared later to be Kintominas) were charged with having obtained money by false pretenses from one Peter Hassouros (whose name also appears in the record as Hassouras). The defendant, Rose, had a separate trial, was convicted by a jury, and was sentenced to imprisonment in the state prison. He prosecutes this appeal from the judgment of conviction and from an order denying his motion for a new trial.

The prosecuting witness, Peter Hassouras, was in the restaurant business at 126 J street in the city of Sacramento. He testified that he first met the defendant about the 11th day of January, 1919, and got to know him fairly well. On the 31st day of January, 1919, Rose asked him to indorse a check, which he presented to him, and which was in the words and figures following, to wit:

"Garden City Fruit & Produce Co., Packers and Shippers.
"11 No. 198.
"(M) El Paso, Texas, Jan. 23rd, 1919.
"Pay to the order of George Pappas $200 00/xx two hundred and no/100 dollars.
"$203.77
"Not over two hundred 200
"For ......
"J. A. Sackler.
"To the El Paso Bank and Trust Company, El Paso, Texas."

Said check was indorsed: "George Pappas." Hassouras went with defendant to the California National Bank, both parties indorsed the check, the bank paid to Hassouras $200, and he handed the same to defendant. The check afterward came back unpaid.

1. It is first contended by appellant that the evidence was insufficient to establish: (1) An intent to defraud; (2) that an actual fraud was committed; (3) that false pretenses were used for the purpose of perpetrating the fraud; and (4) that those false pretenses were the cause which induced the owner to part with his money. We may also consider in this connection appellant's second point, which is stated to be:

> "That the prosecuting witness was not induced by representations of the defendant, Rose, to part with his money, but, on the contrary, relied upon the faith which he had in his own friends."

Peter Hassouras, a witness for the people, testified on direct examination:

> That, on the day he indorsed the check, Rose said to him: "I have a check, $200, and the bank here don't know me. Won't you indorse the check for me, to go and cash it?" Hassouras replied: "I don't think I will, because I don't know you."

The witness continued:

> "There was two other fellows, Greeks, friends of Rose, they introduced me to him—they know Rose for a long time—he was a good man; they said, 'We are responsible for it, if the check is not good;' and that is how I went to the bank and cashed the check, on account of these two other friends of mine. I didn't have to indorse the check on account of Rose, because I don't know him before—just met him in the restaurant. * * * Q. Why did he want you to cash it, and not the bank? What did he say? A. He said because he didn't have any money here—he isn't acquainted here in this town. Q. And did he tell you the check was good? A. Well, he said—yes."

The defendant, who was not represented by counsel at the trial, objected to the question as leading and the objection was sustained. The district attorney then asked:

> "What did he say about the check, when he asked you to cash it? A. He said: 'Mr. Hassouras, won't you indorse a check, $200, for me, because I am not known here in this—in Sacramento, and no bank will cash this check for me.' I said: 'I will, but I don't know you.' Mr. Rose, he said, there is two other parties, two or three other boys—they said: 'If the check is not good, Mr. Hassouras, we are responsible for it.' I know these other people—they was friends of mine for ten years, and honest people, and that is the reason I indorsed the check."

On cross-examination by the defendant, the witness testified:

> That defendant ate his meals in witness' restaurant nearly every day; that he was accompanied by his "partner," Kintominas, the codefendant, and some other men. He repeated that he said he could not indorse the check for William Rose because he did not know him, and that he also said, "But I will indorse the check for you boys." The witness testified that, at the preliminary hearing of the case, he had testified that on the day before he indorsed the check Kintominas told him "that William Rose has a check of $200 in his own possession, and the check is good to his own knowledge, and William Rose looking for you to indorse the check."

On redirect examination the witness said:

> That the first one who asked him to cash the check was a man by the name of Jim Ledgeropous. * * * "Q. Mr. Hassouras, at the time that you spoke about the check was first called to your attention in the place that morning, when the defendant, Rose, and those other men were there. I will ask you if, at that time and place, the defendant Rose at any time told you that the check was good? A. Yes."

In answer to a question by the defendant, he said:

> "At the time before we left the restaurant (to go to the bank), you and the two other fellows told me the check was so good."

Nick Kintominas, the codefendant, was called as a witness on behalf of the people and testified: That, from April 18 to August 14, 1918, he, his brother, George Morgan, and John Gust Constantine Sackler were doing a wholesale fruit and produce business in El Paso, Tex., under the name of the Garden City Fruit & Produce Company, with a branch store in Los Angeles; that J. A. Sackler was authorized to draw checks on behalf of the firm against its account in the El Paso Bank & Trust Company; that he last saw Sackler in Tulsa, Okl., in September, 1918; that Sackler had taken the balance of the firm's money, which caused it to cease business; that witness kept possession of the check book and other books of the firm.

The check book referred to was produced at the trial. In the body of the book are stubs numbered from 100 to 197, both inclusive, upon which are enumerated sundry amounts for which checks had been drawn. The stub of the check corresponding to No. 198 (the check in question) had been removed from the book. Checks 199, 200, and 201 had been removed from the book, and there are no entries upon the corresponding stubs. Checks 202 to 396, both inclusive, remain in said check book intact.

The witness testified that he met defendant, Rose, about two weeks before November 1, 1918, in Salt Lake, and that he met him after that time in Los Angeles; that he (witness) paid the railroad fares of himself and defendant to Sacramento; that they came to Sacramento on January 13, 1919, and were living together at a hotel, where witness paid the room rent; that the check book above mentioned was in witness' suit case in their room, and that defendant saw it about January 22d or 23d and asked what it was, to which witness replied, "This is book I have of El Paso, for our business;" that at that time checks numbered 198, 199, 200, and 201 were in the book. He said that Rose knew all about the members of the firm of the Garden City Fruit & Produce Company, and knew that Sackler signed checks for the firm. The witness testified that he was well acquainted with Sackler's handwriting, and that the signature, "J. A. Sackler," on the check in question, was not that of Sackler. He said that he first learned, on February 3 or 4, 1919, that a check had been taken from the check book and cashed. He testified:

> "Mr. William Rose came to me one night in the room, and he was walking in the room; he couldn't sleep. I say: 'Rose, why couldn't you sleep?' He say: 'I couldn't sleep. * * * I am in a hell of a fix. That check I cashed last week, Mr. Hassouras, is no good, so I can't sleep good.' Mr. Rose, he said: 'I take out from your own book the checks, too, and I wanted to cash it, because I needed the money.' I told him: 'I didn't know what you were doing, and what you are doing since; I didn't need no money; I have money.'"

The information, in substance, charges that the defendants, Rose and Kintominas, for the purpose of cheating and defrauding one Peter Hassouras, and thereby obtaining the money upon the check in question, did, at the time and place therein named, "willfully and unlawfully, knowingly and designedly, falsely and fraudulently pretend and represent to the said Peter Hassouras that a certain check and draft, in words and figures as follows, to wit: [following which is a copy of said check]—was worth the sum of $200; whereas, in truth and in fact the said check and draft was worth nothing, as they the said defendants then and there well knew;" that said Hassouras, believing said false and fraudulent representations to be true, was induced thereby to deliver and did deliver to said defendants the sum of $200, etc. The information was embraced in the court's charge to the jury and was first read to them, and then followed full and clear instructions as to the nature of the crime charged, the vital elements of which it consists, and a statement that it was incumbent upon the prosecution to prove each of the essential elements of the crime to a moral certainty and beyond a reasonable doubt. Among the instructions so given was the following:

> "To constitute the offense charged, four things must concur and four distinct averments must be proved: (1) There must be an intent to defraud; (2) there must be actual fraud committed; (3) false pretenses must be used for the purpose of perpetrating the fraud; and (4) the fraud must be accomplished by means of false pretenses made use of for the purpose, viz.: They must be the cause which induced the owner to part with his property."

[1, 2] The foregoing instruction, with sufficient clearness, states the facts necessary to be established to prove the commission of the crime here charged, and we think that a careful examination of the testimony, as taken at the trial and as disclosed by the record before us, will show that the jury were warranted in finding, as their verdict implies that they did find, that the facts essential to the consummation of the crime charged existed in this case.

[3] It may be conceded that Hassouras, in indorsing the check in question and thereby becoming responsible and liable to the bank for the integrity of that instrument, acted upon two considerations, viz.: (1) The fact that the defendant represented to him that the "check was good"; (2) that the friends of Rose, referred to by Hassouras, assured the latter that Rose was a reliable person and that, if the check proved to be spurious or worthless, or, as they put it, "not good," they would indemnify and reimburse him for any loss suffered by him from his indorsement thereof. But, even with this concession, it does not follow that, the jury was not warranted in finding that the inducing cause for his indorsement of the check was the representation made to him by Rose that the check was all that it purported to be upon its face. Indeed, we hold it to be our duty to assume from the evidence that the jury concluded that but for the representation by Rose to Hassouras that "the check was good," thereby conveying to the latter's mind the belief that the instrument was in all respects what upon its face it appeared to be, Hassouras would not have indorsed the check; for it is not reasonable to suppose (and the jury may be assumed to have taken the same view of the situation) that an honest and responsible person, in his right mind, would deliberately, by his act of indorsing a check for accommodation, impart to such instrument the force of his unqualified approval, if he believed, or even suspected, at the time of doing so, that it was fictitious or worthless, even though he received assurances from third parties that the holder of the check was an honest and reliable person and that they would make good the loss if any occurred from such indorsement. Therefore, we say that, while it might be true that Hassouras was to some extent influenced to indorse the check by the friends of Rose and their statement that Rose was a reliable and trustworthy person, the jury could have found, and it is our duty to assume that that was the theory upon which they predicated their verdict, that the cause inducing Hassouras to indorse the check was the representation by Rose that the check was good, or what it purported to be. In other words, there is evidence to justify the

theory that Hassouras acted upon the representation by Rose that the check was good for the sum of $200 and, in support of the verdict of conviction, we are authorized to presume that the verdict was predicated upon any theory deducible from the evidence, which will support the charge and the verdict.

The case of People v. Weir, 120 Cal. 279, 52 Pac. 656, is to some extent an authority sustaining the foregoing considerations. There the defendant became engaged to marry the prosecuting witness, and after the engagement he falsely represented to her that he had an opportunity of receiving employment with a prominent real estate firm, and that as a condition to such employment it was necessary that he should deposit with the firm the sum of $1,000. He further stated to her that he required the sum of $200 to make up the sum so required. His representation as to the employment and his representation as to the need of the $1,000, were false and untrue. He obtained the $200 from his fiancée upon those representations, and thereafter disappeared and was seen no more by her until his arrest and prosecution for obtaining from her the $200 by the false pretenses mentioned. He was convicted of said crime, and on appeal it was claimed in his behalf that the woman loaned him the money because of their engagement to marry, and not because of his representation as to his alleged employment and the necessity for a cash deposit. The Supreme Court thus disposed of the contention:

> "The engagement simply acted as a leaven in placing her mind in that plastic condition in which it would the more readily absorb the false representations made by defendant. Defendant also stated to the prosecuting witness that, if she would advance the $200, 'they then could be married right away.' It is now insisted that such statement was the superinducing cause which actuated the girl's mind in parting with the money. Again, we deem this a technicality of small dimensions, and the suggestions already made meet the contention. *Under any circumstances these questions were matters of fact for the jury to decide.*"

In People v. Gibbs, 98 Cal. 661, 664, 33 Pac. 630, it is in effect held that where, in a case of obtaining money or property by false pretenses, several different false representations are alleged, a verdict of guilty will stand if one only of the false representations be proved; and in 19 Cyc. p. 407, it is stated, upon the authority of the cases cited in the footnotes, that—

> "Although the pretense must be an inducing cause of the owner's parting with his property, it need not be the sole inducing cause. It is sufficient, if it had a material influence in inducing the owner to part with his property, although he was influenced in part by other causes."

In the present case well may it be said that the jury were warranted in finding that the assurances of Rose's friends to Hassouras that he (Rose) was a reliable man, and that they would stand good for the loss to him if the check proved to be worthless, merely had the effect of so influencing his mind as to have induced him the more readily to act upon the representation of Rose that the check was what he claimed it to be and what it appeared upon its face to be.

[4] That Rose knew, or at least that the jury were warranted in finding that he knew, that the check was worthless when he represented to Hassouras that it was good, is shown by the testimony of Kintominas, the substance of which is hereinabove produced. That witness, as seen, stated the circumstances under which Rose procured the check book of the Texas firm of which Kintominas was a member, and then told of Rose's confession to him that he had filled out the check in question and had procured it to be cashed, and explained, as he was worrying over his act, that he was "in a hell of a fix." It is, however, contended that Kintominas was an accomplice of Rose, and that his testimony was not corroborated. Whether Kintominas was such an accomplice was a question of fact for the jury. We may assume that they accepted his testimony as verity, so far as the facts detailed by him were concerned, and concluded that he had nothing to do with the transaction. But, conceding that Kintominas was an accomplice, there is ample corroboration of that portion of his testimony tending to show that Rose knew that the check was fraudulent and worthless, or not what it purported to be, in the general surrounding circumstances of the transaction. The fact that he brought acquaintances to Hassouras to assure the latter that he was an honest and reliable man, the fact that he insisted that the check was "good," and the fact that it proved to be worthless constituted circumstances corroborative of the testimony of Kintominas tending to show that the defendant at all times knew that the check was worthless or of no value. The corroboration in such a case need not be by evidence of itself sufficient to support the charge. If slight, and tending to connect the defendant with the commission of the crime charged, it is enough.

[5] In this connection we may consider the contention that there is no testimony that the defendant represented to Hassouras that the check was worth or of the value of $200. It appears from the record to be true that Rose did not, in so many words, or in express language, specifically represent that the check was worth or was of the value of $200; but he did represent it to be good when he presented it to Hassouras for his indorsement, and this statement necessarily carried with it the representation that the

check was good for what it appeared upon its face to be worth, viz. $200. Indeed, how could the check be good, within the natural meaning of the word "good," as so applied, unless it was good for the amount it purported to be for? The question answers itself. The officers of the bank, which honored and paid the check upon the indorsement thereof by Hassouras, testified that the check was fictitious and wholly without value, and that Hassouras, upon being notified of that fact, repaid the bank the amount it had given Rose on the check.

From the foregoing considerations, it appears with sufficient clearness that the jury, having accepted as correctly revealing the facts of the transaction relative to the check the testimony presented by the people, the salient portions of which are above considered, were justified in finding: (1) That the check was fictitious and worthless; (2) that Rose knew it to be so when he asked and induced Hassouras, by false and fraudulent pretences as to the integrity of said check, to indorse it and thus become liable as an indorser upon it; (3) that, acting upon Rose's false representation that "the check was good," or that it was what it appeared upon its face to be, Hassouras indorsed the check; (4) that Rose's representations to Hassouras as to the check were false and untrue, and were so made with the intent and the design fraudulently to obtain from and defraud Hassouras of the sum of $200, the face value of the check; (5) that, upon such false and fraudulent representations, he did defraud Hassouras of said sum, and thereby actual fraud was committed. Thus it is clear that all the elements constituting the crime charged were, upon what appears to be sufficient evidence, found by the jury to exist in the transaction out of which the charge alleged in the information grew.

[6] Of course, this court, even with the added powers vested in it with respect to the review of questions of fact by section 4½ of article 6 of the Constitution, cannot consider the evidence for the purpose of determining whether the witnesses upon whose testimony the jury presumptively predicated their verdict testified to the truth or not. In other words, the question as to the credibility of the witnesses is one which does not and cannot in the nature of the case come within the powers of a court of review, and the constitutional provision referred to cannot vest in such courts or clothe them with any such remarkable power. Indeed, no claim has ever been made, so far as we know, that the said section of the Constitution was intended to authorize a court of review to attempt so obviously an impossible act, and if any such claim should be made it could not and would not be sustained. Therefore, where the testimony from which a certain result at nisi prius has been reached is not inherently improbable, and is sufficient to support the conclusion arrived at, then, so far as is concerned the question whether the evidence supports the verdict or the findings, a reviewing court is powerless to interfere with the result arrived at below. In this case the testimony upon which the jury evidently founded their verdict is not inherently improbable, and, as above stated, it is upon its face sufficient to uphold the verdict arrived at. We cannot, consequently, interfere with the verdict on the ground that it does not derive from the evidence sufficient support.

It is next contended that the court erred to the prejudice of defendant's rights by its omission to instruct the jury with respect to the status under the law of an accomplice of the accused on trial, when such accomplice becomes a witness against the accused and the peculiar consideration which the law says must be given an accomplice's testimony. Section 2061 of the Code of Civil Procedure provides (among other things) that the jury are—

> "to be instructed on all proper occasions: * * * (4) That the testimony of an accomplice ought to be viewed with distrust," etc.

There was in this case some evidence from which it might be inferred that Kintominas was implicated in the crime charged against Rose. In fact Kintominas was jointly charged in the information with Rose with the commission of the crime of which the latter was convicted. The court gave no instruction based upon subdivision 4 of section 2061 of the Code of Civil Procedure, above adverted to. No such instruction was proposed by the defendant; but it is the contention that it was the court's duty to have given such instruction upon its own motion, and that its failure to do so was error.

[7, 8] It would have been well for the court, upon its own volition or initiative, to give an instruction explaining to the jury the status of an accomplice as a witness and how his testimony should be viewed and considered; but, under the circumstances of this case, its failure to do so cannot be held to have been prejudicial to the defendant. There is, as has already been shown, plenty of evidence, without that of Kintominas, the alleged accomplice, to sustain the verdict. As seen, the testimony of Kintominas was particularly important, in that it tended to show that Rose knew that the check was without any value whatever when he asked Hassouras to indorse it. But it will also be borne in mind Rose represented to Hassouras, without any qualifying language, that "the check was good." He was the holder and pretended owner of the check, and knew the circumstances under which he received it into his possession. He knew more about the check than did Hassouras or the other parties who attested to his (defendant's) honesty before and to Hassouras. The fact that the check proved worthless is a strong circumstance tending to show that he knew the check was fictitious and worthless when he induced Hassouras to indorse it, and the jury were authorized from that fact to find that he at all times was aware of the worthlessness of the check and that his design in securing the indorsement of the instrument by Hassouras was to obtain from the latter in that fraudulent way the amount of money the check purported to be for. Thus it is plain that with the testimony of Kintominas eliminated from the record, or wholly disregarded, the verdict would still have ample support. It follows that the failure to give the instruction under the circumstances of this case can hardly be said to be error, inasmuch as the defendant did not request the court to give it; but, if erroneous, it cannot be held to have operated prejudicially against the defendant or to have produced a miscarriage of justice. Article 6, § 4½, Const.

In People v. Lawlor, 21 Cal. App. 63, 131 Pac. 63, the defendant himself requested the court to give a like instruction, and the court there held that, while the request should have been granted and the instruction given, in view of the quantity and convincing character of the evidence tending to show the guilt of the defendant, the error was without prejudice, and consequently could not justly be held to have produced a miscarriage of justice. In view of this conclusion, the cases cited by the appellant in support of his contention that the court erred by failure to instruct the jury upon the law relative to accomplices are of no consequence here. It may be suggested, however, that in the following of those cases the instructions were proposed by the accused, but, although pertinent to the cases as made by the evidence, were disallowed by the court: People v. Bonney, 98 Cal. 278, 33 Pac. 98; People v. Silva, 121 Cal. 668, 54 Pac. 146. In the other cases cited, which were decided long before section 4½ was incorporated into article 6 of the Constitution, the peculiar circumstances thereof were such as to require it to be held that the refusal or the failure of the trial court to instruct upon accomplices constituted prejudicial error.

[9] It is lastly contended that the cause should be reversed for the reason that the defendant was without counsel to assist him in his defense. The argument on this proposition seems to be that a legal trial of a person charged with a public offense cannot be had, unless, at such trial, the accused has the assistance of an attorney at law in his defense; but, obviously, this is not so. The argument is based upon article 1, section 13, of the Constitution, which declares that—

> "In criminal prosecutions, in any court, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person *and with counsel.*"

That provision of the Constitution, in so far as it relates to the right of an accused to be represented at his trial by counsel, only declares and guarantees that right, and does and can do no more than that; for it still remains with the accused to determine for himself whether he will exercise the right and so be attended at his trial and defended therein by counsel. Of course, if he desires to be so represented and assisted in his defense by counsel, there cannot be a denial to him of that right, even though he be without the necessary means to employ and compensate the attorney. If, on the other hand, he does not desire an attorney to assist him in his defense, there is no law which can compel him either to employ one for that purpose or to accept the services of one assigned to him by the court, should the court adopt that course.

In this case the defendant, upon being arraigned upon the information, was asked by the court if he had or wanted counsel to conduct his defense, and he replied that he would himself attend to that matter. It does not appear that he thereafter asked or requested the court to appoint an attorney to defend him, and he appeared at the trial without an attorney, announced himself ready when the case was called for trial, and himself managed and presented at the trial his own defense. If, therefore, he thinks he now has reason to believe that he suffered by reason of having no lawyer to assist him in his defense, he, and not the court nor the law, is to blame. He testified that he was a professional court interpreter, and from this fact we may assume that he is a man of intelligence and had from his experience as such an interpreter become more or less familiar with the general rights of an accused on trial in the courts and with the methods of conducting jury trials. We can, therefore, see no ground for excusing his neglect to secure, either by employment or by appointment by the court, if he was unable to pay for the services of one, a lawyer to represent him at the trial and conduct his defense. It certainly, under the circumstances of this case, cannot be held a ground for a reversal of the cause because the defendant, for reasons best known to himself, elected to waive the assistance of a lawyer and to manage his own defense.

It may be added, in this connection, that the defendant appeared to understand the situation presented at the trial remarkably well, for he seems to have cross-examined the witnesses testifying against him with no little degree of cleverness. Moreover, we can justly say that the case was tried by the court fairly and impartially and with a just recognition of the rights of the accused.

We conclude that there has been presented here no legal reason for sending the case back, and therefore the judgment and the order appealed from are affirmed.

We concur: **CHIPMAN, P. J.; BURNETT, J.**

181 Cal. 174

WERNER v. GRAHAM et al. (L. A. 4952.)

(Supreme Court of California. Aug. 29, 1919.)

1. Covenants 🔑72 — Building Restrictions Released by Quitclaim.

Where lots had been sold subject to building restrictions, grantor's deed to purchaser of a lot, quitclaiming any interest in the lot, had the effect of releasing the restrictions as to the lot, so far as it was in the grantor's power to release them.

2. Deeds 🔑156—Provisions in Deed Conditions and Not Covenants.

If the provisions of a deed regarding building restrictions were in fact conditions, and not covenants, the defendants, owners of other lots with similar restrictions in deeds from a common grantor, were not entitled to enforce them as against plaintiff, where the reversion clause of plaintiff's deed ran in favor of grantor, his heirs and assigns, which does not include the defendants, since, under Civ. Code, §§ 768, 1046, by "assigns" must be meant assignees of the reversion or right of re-entry.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assigns.]

3. Covenants 🔑79(3)—No Privity of Contract Between Grantee in Deed With Restrictions and Grantees in Similar Deeds.

If the restrictive provisions of a deed, with regard to buildings, amounted to covenants as well as conditions, where neither the plaintiff, seeking to quiet title against the restrictions, nor any of the defendants, owners of other lots under similar deeds, were the original parties to the covenants, and plaintiff did not contractually assume the covenant obligations, and defendants did not acquire by assignment from the common grantor his rights as covenantee, there was no privity of contract between plaintiff and defendants.

4. Covenants 🔑81 — Building Restrictions Not Covenants Running With Land.

Where plaintiff seeks to quiet title against building restrictions on his lots against owners of other lots with similar restrictions in deeds from a common grantor, there is no privity of estate between the plaintiff and the defendants in the usual sense of the word, neither holding through or under the other or others, and the restrictions are not recognized by the common law as covenants running with the land, and are not for the benefit of the estate conveyed to plaintiff, but to its detriment.

5. Covenants 🔑69(2) — Restrictions in Deeds are "Equitable Easements" for Benefit of Dominant Tenement.

Building restrictions in a deed, frequently spoken of as "equitable easements," were unknown to the common law and are not among the servitudes enumerated by Civ. Code, §§ 801, 802, and the enforcement thereof is limited to those which directly concern and benefit the dominant tenement, and the instrument creating such servitude will be strictly construed; any doubt being resolved in favor of the free use of the land.

[Ed. Note.—For other definitions, see Words and Phrases, Equitable Easement.]

6. Covenants 🔑79(3)—Persons Entitled to Enforce Equitable Easement Created by Building Restrictions Determined.

As to the "equitable easement" of building restrictions claimed against a certain lot sold with building restrictions, there is, as to lots sold by the common grantor prior to his conveyance of such lot, no equitable servitude, since it cannot be said that the covenants in the deed to such lot were exacted by him for the benefit of lots he did not own.

7. Covenants 🔑79(3) — Equitable Easement of Grantor Created by Building Restrictions Lost by Quitclaim Deed.

Where lot was sold with building restrictions, but grantor later quitclaimed any interest therein, lots which such grantor sold subsequently had no servitude over such lot; such servitude having been surrendered by the grantor's quitclaim.

8. Covenants 🔑79(3) — Building Restrictions in Deeds Not Covenants Running With Land.

Where owner of tract sold a portion thereof with restrictions, but without a word indicating that the land conveyed was part of a larger tract, the balance of which the grantor still retained, or that the restrictions were intended for the benefit of other lands, or that their benefit was to inure to and pass with other lands, and without description or designation of the land which was to be the dominant tenement as to the equitable servitude created by the restrictions, and the only expression as to who might act in case of breach of the restrictions was that in such case the land should revert to the grantor, his heirs or assigns, it is not possible reasonably to construe the restrictions as covenants running, not to the grantor, his heirs or assigns, but to him as the owner of certain land not designated or described, and to his various successors in interest in such land, especially in view of Civ. Code, § 1468, although subsequently enacted, defining covenants running with the land as "expressed to be for the benefit of the land of the covenantee."

9. Covenants 🔑79(3) — Where Lots Are Sold With Building Restrictions, With No Reference to Common Plan in Deeds, Understanding of Parties Immaterial.

Where owner of a tract sells a lot therefrom with restrictions, but without express reference in the deed to a common plan of restrictions, or in any way indicating any agreement between grantor and grantee that the lot is taken subject to such a plan, it is immaterial, as affecting the question whether the restrictions run personally to the owner, and not to the owners of other lots in the tract, that the owner, in selling such lots from time to time, in each conveyance has exacted restrictive covenants evidently in accordance with a common plan, since not the grantor's intent alone, but

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the joint intent of the parties, must govern, and of such intent their deed constitutes the final and exclusive memorial.

10. QUIETING TITLE 🔑15—THAT PLAINTIFF SEEKS TO ESCAPE BUILDING RESTRICTIONS NOT EXISTING AS TO HIM NOT INEQUITABLE.

In a suit to quiet title against building restrictions, a judgment, not merely denying plaintiff relief, but affirmatively holding plaintiff's land subject to such restrictions, cannot be upheld on the ground that plaintiff's seeking to escape from the restrictions is inequitable, where such restrictions do not in fact exist so far as defendants are concerned.

Department 1.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by Fritz Werner against Mary M. Graham and others. From a judgment granting plaintiff less relief than demanded, plaintiff appeals. Reversed, with directions.

E. W. Sargent, W. G. Cooke, and John F. Keogh, all of Los Angeles, for appellant.

Valentine & Newby, of Los Angeles, for respondents.

OLNEY, J. This is an action to quiet title to real property; the purpose being to obtain a judicial determination that the land of the plaintiff is free of certain restrictions as to its use contained in a deed to a previous owner through whom the plaintiff claims. The land consists of one of the lots of a considerable tract, and the defendants are other lot owners within the same tract. The judgment of the lower court was that the plaintiff's title was, as to all the defendants, subject to the restrictions in question, and from this judgment the plaintiff appeals.

It appears that one Marshall was, in 1902, the owner of the whole tract which was at that time unimproved, and in that year he subdivided it into blocks and lots, and filed of record a map of the tract as so subdivided. This map showed no building lines, or anything else to indicate any purpose of restricting in any way the manner in which the different lots might be built upon or otherwise improved, or the uses to which they might be put. Immediately following the recording of the map, Marshall began to sell and convey the lots. There were 132 lots in all, and by October 21, 1905, he had sold and conveyed 116 of them, including the lot now owned by the plaintiff. In all of the deeds from Marshall appear restrictive provisions, which, while differing slightly in some instances, dependent upon the location of the particular lot, as, for instance, upon its facing east or west, are yet so uniform and consistent in character as to indicate unmistakably that Marshall had in mind a general and common plan which he was following. The restrictions in the deed by Marshall conveying the plaintiff's lot are typical and read:

> "Provided, however, that this conveyance is made upon and shall be subject to the following express conditions, to wit: That no building to be used as a saloon, or tenement houses known as flats, or livery stable, or store of any kind or nature whatever shall be erected or placed on said premises or any part thereof, nor shall any such business be conducted on said premises or any part thereof at any time within thirty (30) years from the date hereof; that no derrick for boring any oil well shall be erected or placed, nor shall oil be produced in any manner whatsoever, on said premises or any part thereof at any time within fifty (50) years from the date hereof; and also that any buildings to be used as dwelling houses which may be erected or placed upon said premises or any part thereof at any time within twenty-five (25) years from the date hereof, shall be located and placed as follows:
>
> "On lots numbered thirty-four (34), thirty-five (35), seventy-eight (78), seventy-nine (79), one hundred and twenty-two (122), and one hundred and twenty-three (123), facing east, and on lots numbered seventy-six (76), seventy-seven (77), one hundred and twenty (120), and one hundred and twenty-one (121), facing west. And the reasonable cost thereof shall not be less than three thousand ($3,000) dollars; and said dwelling and its appurtenances shall be located not less than forty (40) feet from the front property line of said premises, and not more than one house and its appurtenances shall be built or placed on each lot herein conveyed. If the said party of the second part, his heirs, assigns, or successors in estate, shall in any way fail to keep or perform the conditions above specified, or any one of them, in any respect whatsoever, then any and all right, title, interest, and estate hereby granted or conveyed shall revert to and become vested in the said parties of the first part, their heirs or assigns.
>
> "The said party of the second part accepts this deed and conveyance upon and subject to each and all of the said conditions herein set forth. It is further understood and agreed that each and all of said conditions and covenants shall run with said premises and shall be binding upon the heirs, assigns, and all successors in estate of the said party of the second part."

Some of the conveyances so made by Marshall were prior to his conveyance of the plaintiff's lot, and some of the defendants are now the owners of lots so previously conveyed. The larger number of conveyances were made subsequent to the deed through which the plaintiff claims title, and others of the defendants are now the owners of lots so subsequently conveyed.

[1] On October 21, 1905, when, as we have said, Marshall had sold 116 out of a total of 132 lots in the tract, Marshall quitclaimed to the then owner of the plaintiff's lot any interest in it. The effect of this deed was, of course, to release the restrictive provisions as to the plaintiff's lot, so far as it was in

the power of Marshall to release them. After the giving of this quitclaim deed, Marshall continued to sell lots until he had disposed of them all. The deeds for these lots likewise contain the restrictive provisions. It does not appear clearly whether or not any of the defendants are the present owners of lots conveyed by Marshall subsequent to his quitclaim deed, but we assume some of them are.

It also appears in evidence that in selling the lots Marshall represented to the respective purchasers that he was exacting the same restrictive provisions from all purchasers. Residences were built upon the tract from time to time by purchasers of lots, and the tract became, and has remained, an exclusively residence district of the better sort. It should also be mentioned that the immediate deed by which the plaintiff acquired title contained no restrictions. It is claimed by the defendants that he nevertheless had actual notice that all of the lots in the tract were subject to uniform restrictions according to a general and common plan. This the plaintiff denies, but in view of the conclusion we have reached it is of no importance whether he had such notice or not.

[2] It should also be noted that the restrictions are cast in the form of conditions, and not of covenants; that is, the conveyance by its terms is made upon the condition that so and so shall not be done, and, if it is done, the property conveyed shall revert. In the last paragraph of the restrictive provisions they are referred to as "conditions and covenants"; but this single expression is the only language of obligation, as distinguished from that of condition, and essentially the form is one of condition, and not of covenant. If the provisions are in fact conditions, and not covenants, the defendants are not entitled to enforce them against the plaintiff; for the reversion clause runs in favor of Marshall, his heirs and assigns, and does not include the defendants, since by assigns must be meant in this state assignees of the reversion or right of re-entry. Sections 768 and 1046, Civ. Code; Johnston v. Los Angeles, 176 Cal. 479, 485, 168 Pac. 1047.

[3] Assuming, however, for the purpose of discussion, that the restrictive provisions in the deed amount to covenants, as well as conditions, there is yet no privity of contract between the plaintiff and the defendants. Neither the plaintiff nor any of the defendants were original parties to the covenants, nor has the plaintiff contractually assumed their obligations, nor have the defendants acquired by assignment from Marshall his rights as covenantee. Marshall has in fact surrendered those rights.

[4] Likewise there is no privity of estate between the plaintiff and the defendants, at least in the usual sense of the word. The plaintiff does not hold under or through any of the defendants, nor any of them under or through him. It follows that the covenants are not covenants recognized by the common law as running with the land, such as covenants between lessor and lessee, or between grantor and grantee, for the benefit of the estate conveyed, as, for instance, warranties of title, for all of which a privity of estate is required. Furthermore, the covenants here involved are manifestly not for the benefit to the estate conveyed, but to its detriment.

[5] If, then, these covenants are to be given force, as between the plaintiff and the defendants, it clearly must be because: (a) The burden imposed by them was one upon the land conveyed and incident to its ownership, so that the plaintiff, when he acquired his lot, acquired it subject to such burden; and (b) the benefit of the covenants was an incident of the ownership of the other lots in the tract, so that when Marshall parted with them the benefit of the covenants passed with them as an incident of their ownership, and the defendants are now entitled to such benefit as the present owners of the lots. In other words, in order that the covenants have force, not merely as between the original parties, but as between the plaintiff and the defendants, it must appear that their insertion in the deed by Marshall was, in effect, the creation of what amounts to a servitude, to the burden of which the plaintiff's lot was subjected as the servient tenement, and to the benefit of which the remainder of the tract was entitled as the dominant tenement.

The enforcement of covenants restricting the use of one parcel of land for the benefit of another parcel, not merely as between the original parties, but as between their respective grantees, between whom no privity of estate or of contract can properly be said to exist, originated at a comparatively recent date in the chancery courts, and apparently without a clear appreciation of the fact that the enforcement of such covenants for and against grantees of the original parties was, in effect, the creating of servitudes. Such servitudes are frequently spoken of as "equitable easements." They were unknown to the common law and are not among the servitudes enumerated by our Code. Sections 801 and 802, Civ. Code. They are opposed to the rule that the owner of land may not create new and heretofore unknown estates, and while their validity—that is, the enforceable character of such covenants as against grantees of the original parties—is now too well established to admit of question, it has resulted that the covenants which will be so enforced are limited to those which directly concern and benefit what we may term the dominant tenement, and also that any provisions of an instrument creating or claimed to create such a servitude will be strictly construed, any doubt being resolved in favor of the free use of the land. Firth v. Marovich, 160 Cal. 257, 116 Pac. 729, Ann. Cas. 1912D, 1190; Berryman v. Hotel Savoy Co., 160 Cal. 559, 117 Pac. 677, 37 L. R. A. (N. S.) 5; Bresee v. Dunn, 172 Pac. 387.

[6] Viewing the facts of the present case in the light of what has just been said, and leaving out of consideration for the time being the element of a general and uniform plan of restriction, it is quickly evident that as to those lots, which Marshall had parted with prior to his conveyance of the plaintiff's lot, there is no equitable servitude. Marshall was no longer interested in those lots and by no possibility can it be said that the covenants in the deed to the plaintiff's lot were exacted by him for the benefit of lots which he did not own.

[7] In like fashion it is plain that there is no servitude over the plaintiff's lot in favor of those lots which Marshall still retained when he gave the quitclaim deed of 1905 and with which he parted subsequently. If a servitude had previously existed in favor of those lots, he, as their owner, had the right to surrender it, and undoubtedly did so by his quitclaim deed.

[8] The remaining question is as to the existence of a servitude in favor of those lots which Marshall still owned when he sold the plaintiff's lot, and with which he parted before he gave his quitclaim deed. This is purely a question of the construction and consequent effect of the deed by Marshall parting with the plaintiff's lot. The situation in this respect is that one, the owner of a tract of land, sells a portion of it, exacting of the grantee restrictive provisions as to its use, but without a word indicating that the land conveyed is part of a larger tract, the balance of which the grantor still retains, or that the restrictions are intended for the benefit of other lands, or that their benefit is to inure to or pass with other lands, and without any description or designation of what is an essential element of any such servitude as is claimed, namely, the land which is to be the dominant tenement. Servitudes running with the land in favor of one parcel and against another cannot be created in any such uncertain and indefinite fashion. It is true the nature of the restrictions is such that, when considered in connection with the fact that Marshall still retained the greater portion of the tract, it is not improbable that he exacted them for the benefit of the portion so retained. But the grantee's intent in this respect is necessary, as well as the grantor's, and the deed, which constitutes the final and exclusive memorial of their joint intent, has not a word of that effect, nor anything whatever which can be seized upon and given construction as an expression of such intent. If such was their intent, it has not been expressed. Omitting, as we must, any consideration of what the understanding was between Marshall and his grantees, except as shown by the instruments between them, and construing the deed in the light of the fact that Marshall was at the time the owner of a large number of other lots in the tract, it may yet well be that the grantee intended to obligate himself only to Marshall, his heirs and assigns. Certainly that is all that is said. It is also difficult to see how there can be any valid creation of what is practically a servitude, without some designation or description of what is an essential factor, namely, the dominant tenement. McNichol v. Townsend, 73 N. J. Eq. 276, 67 Atl. 938; Renals v. Cowlishaw, L. R. 11 Ch. Div. 866; Wagner v. Hanna, 38 Cal. 111, 116, 99 Am. Dec. 354. The fact, also, that the only expression in the deed as to who may act in case of a breach of the restrictions is that in such case the land shall revert to Marshall, his heirs or assigns, is strongly indicative of the fact that it was intended that Marshall, his heirs or assigns, should alone have the right to act. Clapp v. Wilder, 176 Mass. 332, 57 N. E. 692, 50 L. R. A. 120. It is not possible, in view of these considerations and the rule of strict construction very properly applicable, reasonably to construe the restrictions as covenants which run, not to Marshall, his heirs or assigns, but to Marshall as the owner of certain land, not designated or described, and to his various successors in interest in such land. This view is amply supported by authority. Los Angeles, etc., Co. v. Muir, 136 Cal. 36, 68 Pac. 308; Berryman v. Hotel Savoy Co., supra; Bresee v. Dunn, supra; Sailer v. Podolski, 82 N. J. Eq. 459, 88 Atl. 967; Hemsley v. Marlborough Hotel Co., 62 N. J. Eq. 164, 50 Atl. 14; Badger v. Boardman, 16 Gray (Mass.) 559; Skinner v. Shepard, 130 Mass. 181; Clapp v. Wilder, supra.

It is also in line with section 1468, Civil Code, which reads:

> "A covenant made by the owner of land with the owner of other land to do or refrain from doing some act on his own land, which doing or refraining is expressed to be for the benefit of the land of the covenantee, and which is made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with both of such parcels of land."

The restrictive provisions under consideration here are not, as required by this section, "expressed to be for the benefit of the land of the covenantee." The section was not adopted until 1905, after the deed in question was given, and is therefore not controlling; but it is an expression of what the necessary requirements should be in order that covenants of this character may run with the land.

[9] So far the case has been considered without reference to the fact that Marshall in all his deeds exacted similar restrictions, and clearly had in mind a uniform plan of restrictions which he intended to impose, and actually did impose, upon all the lots in the tract as he sold them. Does the addition of

this element make any difference? It is undoubted that, when the owner of a subdivided tract conveys the various parcels in the tract by deeds containing appropriate language imposing restrictions on each parcel as part of a general plan of restrictions common to all the parcels and designed for their mutual benefit, mutual equitable servitudes are thereby created in favor of each parcel as against all the others. The agreement between the grantor and each grantee in such a case as expressed in the instruments between them is both that the parcel conveyed shall be subject to restrictions in accordance with the plan for the benefit of all the other parcels, and also that all other parcels shall be subject to such restrictions for its benefit. In such a case the mutual servitudes spring into existence as between the first parcel conveyed and the balance of the parcels at the time of the first conveyance. As each conveyance follows, the burden and the benefit of the mutual restrictions imposed by preceding conveyances as between the particular parcel conveyed and those previously conveyed pass as an incident of the ownership of the parcel, and similar restrictions are created by the conveyance as between the lot conveyed and the lots still retained by the original owner. Of this character is Alderson v. Cutting, 163 Cal. 504, 126 Pac. 157, Ann. Cas. 1914A, 1.

The difference between such a case and the one at bar is that here there is no language in the instruments between the parties—that is, the deeds—which refers to a common plan of restrictions, or which expresses or in any way indicates any agreement between grantor and grantee that the lot conveyed is taken subject to any such plan. Is this difference material? This is the crux of the present case. It has been held that this difference is not material. There are decisions to the effect that, when it appears that the owner of a subdivided tract has sold various lots in it from time to time and in each conveyance has exacted restrictive covenants which, it is evident, when all the deeds are considered together, were exacted in accord with a common plan, it is enough, and that mutual equitable servitudes have been created, although in any single deed taken by itself there is nothing to indicate any intent to create such reciprocal rights. Parker v. Nightingale, 6 Allen (Mass.) 341, 83 Am. Dec. 632; Hopkins v. Smith, 162 Mass. 444, 38 N. E. 1122; Bacon v. Sandberg, 179 Mass. 396, 60 N. E. 936; Sayles v. Hall, 210 Mass. 281, 96 N. E. 712, 41 L. R. A. (N. S.) 625, Ann. Cas. 1912D, 475.

There is likewise authority to the contrary. Mulligan v. Jordan, 50 N. J. Eq. 363, 24 Atl. 543; Roberts v. Scull, 58 N. J. Eq. 396, 43 Atl. 583; Sharp v. Ropes, 110 Mass. 381; Judd v. Robinson, 41 Colo. 222, 92 Pac. 724, 124 Am. St. Rep. 128, 14 Ann. Cas. 1018.

An analysis of such a case, however, leaves, we believe, no reasonable doubt as to which line of authorities is correct. The intent of the common grantor—the original owner—is clear enough. He had a general plan of restrictions in mind. But it is not his intent that governs. It is the joint intent of himself and his grantees, and as between him and each of his grantees the instrument or instruments between them—in this case, the deed—constitute the final and exclusive memorial of such intent. It is also apparent that each deed must be construed as of the time it is given. It cannot be construed as of a later date, and, in particular, its construction and effect cannot be varied because of deeds which the grantor may subsequently give to other parties. Yet that is exactly what is done in the decisions holding that mutual servitudes exist in cases where all the deeds taken together, evidence a common plan of restrictions, although no single deed by itself evidences anything more than an intent to put particular restrictions on a particular lot. As a concrete instance, take the first deed given by Marshall. At that time there was nothing to evidence any general plan of restrictions, and if the question as to the effect of the deed had arisen then, it must necessarily have been construed as if no such general plan existed. If it must have been so construed at that time, it must be so construed now. Whatever rights were created by the deed were created and vested then, and the fact that it later appears that Marshall was pursuing a general plan common to all the lots in the tract cannot vary those rights. The same is true of each deed as it was given. Nor does it make any difference that, as claimed by the defendants, Marshall gave each grantee to understand, and each grantee did understand, that the restrictions were exacted as part of a general scheme. Such understanding was not incorporated in the deeds, and, as we have said, the deeds in this case constitute the final and exclusive memorials of the understandings between the parties. Any understanding not incorporated in them is wholly immaterial in the absence of a reformation. Long v. Cramer, etc., Co., 155 Cal. 402, 406, 101 Pac. 297; Sailer v. Podolski, supra; Sprague v. Kimball, 213 Mass. 380, 100 N. E. 622, 45 L. R. A. (N. S.) 962, Ann. Cas. 1914A, 431.

This whole discussion may in fact be summed up in the single statement that, if the parties desire to create mutual rights in real property of the character of those claimed here, they must say so, and must say it in the only place where it can be given legal effect, namely, in the written instruments exchanged between them, which constitute the final expression of their understanding. It follows that the additional element mentioned—that Marshall exacted similar restrictive covenants from all the grantees of lots in the tract—does not affect the matter, and cannot change the conclusion reached without it.

That conclusion, as before expressed, is that the restrictions in the deed by Marshall to the plaintiff's predecessor in interest ran personally to Marshall, and not to the other lots in the tract, and that the defendants, who claim wholly as lot owners, did not acquire the right to insist upon those restrictions.

[10] The point is made that a suit to quiet title, as this is, is a suit in equity and that the action of the plaintiff in seeking to escape from the restrictions in question is inequitable, and therefore relief in equity should be denied him. This is no justification of the present judgment, which goes further than denying the plaintiff relief, and affirmatively makes his title subject to the restrictions. It would also do the defendants little good to secure now a dismissal of the plaintiff's action, in view of what we have said as to the nonexistence of the restrictions as to the defendants. The plaintiff would be at liberty to use his lots without regard to the restrictions, and the defendants could not prevent him.

But, however this may be, the rule relied upon by the defendants has no application here. It may be very unneighborly and unfriendly for the plaintiff to put his lot to uses which will impair the residential character of the tract; but that is a very different thing from his seeking to clear his title of restrictions which are asserted against it, but which do not in fact exist, and which, so far as the defendants are concerned, never did exist, and that is all the plaintiff is seeking to do in this action.

The lower court found the substantial facts in the case. Upon those facts as found judgment should have been given for the plaintiff. The judgment is therefore reversed, with directions to the lower court to enter judgment for the plaintiff quieting his title as against the defendants.

We concur: SHAW, J.; LAWLOR, J.

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181 Cal. 783

PARKER v. KENWORTHY et al.
(L. A. 4914.)

(Supreme Court of California. Aug. 29, 1919.)

Department 1.

Appeal from Superior Court, Los Angeles County; Stanley A. Smith, Judge.

Action by John W. Parker against John F. Kenworthy and another. From a judgment for defendant Kenworthy, plaintiff appeals. Affirmed.

Valentine & Newby, of Los Angeles, for appellant.

Pendell & Gleason, E. W. Sargent, W. G. Cooke, J. F. Keogh, and G. Roy Pendell, all of Los Angeles, for respondent.

OLNEY, J. This is an action between the owners of lots in the same tract as that involved in Werner v. Graham (L. A. No. 4952) 183 Pac. 945, this day decided. The dispute is here, as there, as to the reciprocal rights of the present owners of lots in that tract. The material facts are identical. The only differences are: (1) That this is an action by certain lot owners against another, seeking affirmatively to enforce certain restrictions as to the use of the latter's lot, while in Werner v. Graham the position of the parties was reversed, and the plaintiff was seeking to free his lot of the claim of the defendants that they were entitled to enforce such restrictions; and (2) that in the present case the trial court held that the restrictions were not in force as between the present lot owners, while in Werner v. Graham the trial court held that they were. Our conclusion in Werner v. Graham accords with the result reached by the lower court in this action, and necessitates an affirmance of the judgment.

Judgment affirmed.

We concur: SHAW, J.; LAWLOR, J.

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40 Cal. App. 600

McGINN v. VAN NESS et al. (S. F. 8465.)

(Supreme Court of California. June 5, 1919.)

In Bank.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by George W. McGinn against T. C. Van Ness, Jr., and others. From a judgment for plaintiff, defendants, with the exception of D. L. Bienfield, appealed to the District Court of Appeal, which affirmed (181 Pac. 70), and the appellants apply for hearing in the Supreme Court. Application denied.

Wm. H. Chapman, of San Francisco (R. M. F. Soto, of San Francisco, of counsel), for appellants.

Fabius T. Finch, of San Francisco, for respondent.

PER CURIAM. The application for a hearing in this court, after decision by the District Court of Appeal of the First Appellate District, Division 1, is denied, without reference to any question of the correctness of what is stated in the opinion in the paragraph commencing with the words, viz.: "But, even if it were to be assumed that the assessment was defective in the respect claimed," etc.

All concur.

42 Cal. App. 659

BARNEBEE v. HUNSTOCK. (Civ. 3065.)

(District Court of Appeal, Second District, Division 2, California. Aug. 13, 1919.)

1. **Appeal and Error** ⚷612(2)—**On Appeal from Order Issued After Judgment, Judge Must Certify Proceeding.**

Where order appealed from is subsequent to the judgment, and arises on a record outside the judgment, it is not for the clerk, but for the judge who determined the motion, to certify the papers and proceedings on which the order appealed from was made.

2. **Appeal and Error** ⚷640—**On Defective Transcript, Order Appealed From Will be Affirmed.**

On appeal from order denying motion to vacate judgment, where transcript did not comply with Code Civ. Proc. § 953a, the proper procedure for District Court of Appeal is to affirm order appealed from.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Edna I. Barnebee against Robert H. Hunstock. From an order denying motion to vacate judgment against her, plaintiff appeals. Affirmed.

Frank C. Hoyt, of Los Angeles, for appellant.

Charles L. Hardy and G. C. De Garmo, both of Los Angeles, for respondent.

SLOANE, J. The plaintiff in this action appealed from an order of the trial court denying her motion to vacate a judgment against her. The matter is presented at this time on respondent's motion to affirm the order appealed from, on the ground that the record on appeal contains no bill of exceptions, nor reporter's transcript certified by the judge who tried the cause and made the order, as is provided by section 953a of the Code of Civil Procedure.

The record on appeal presented here consists of a clerk's transcript, containing the judgment roll, together with certain papers and records purporting to have been used in the proceedings subsequent to judgment on the motion to vacate. These additional records consist of plaintiff's notice of motion, minutes of the court reciting that "plaintiff's motion to vacate the judgment heretofore entered herein, having been heretofore argued and submitted, is now denied," and notice to clerk to prepare a transcript, which requests that, in addition to the judgment roll, there be inserted therein "a copy of plaintiff's notice of intention to move for vacation of judgment therein, and the proceedings and order of court denying said motion." This transcript is certified by the clerk, but not by the judge.

The grounds of the motion to vacate, as set out by the notice of motion to vacate, are specifications of the insufficiency of the findings of fact made on the trial to support the conclusions of law and judgment.

[1] The point in controversy is the sufficiency of this transcript. It is conceded that, if the issue presented on the appeal depended upon the judgment roll alone, the clerk's certificate would be sufficient to authenticate the record. But respondent urges that there is no authority of law, under the procedure prescribed by section 953a of the Code of Civil Procedure, to add any portion of the record of proceedings outside the judgment roll without the approval and certification of the judge before whom the proceedings were had. Such seems to be the plain interpretation of this section. After providing for the stenographic reporter's transcript of the trial, which is required to be authenticated by the judge, the section cited goes on to say:

> "If the judgment, order or decree appealed from be not included in the judgment roll, the party desiring to appeal shall, on the filing of said notice, specify therein such of the pleadings, papers, records and files in said cause as he desires to have incorporated *in said transcript* in addition to the matters hereinbefore required, and the same shall be included."

This language clearly refers to the transcript to be presented to and approved and certified by the judge. It is inconsistent with the limitation appellant seeks to place upon it, namely, that—

> "The only transcript which the judge is required or authorized to certify is that containing the testimony and other proceedings which are had in the trials of issues of fact."

The language quoted and the decision from which it is taken—and on which appellant relies—arose on the record of an appeal taken upon the judgment roll alone. Jaques v. Board of Supervisors, 22 Cal. App. 627, 135 Pac. 686. Where the order appealed from is subsequent to the judgment, and arises on a record outside the judgment roll, it is not for the clerk, but for the judge who determined the motion, to certify the papers and proceedings on which the order appealed from was made. Thompson v. American Fruit Co., 21 Cal. App. 338, 131 Pac. 878; Credit Clearance Bureau v. Weary & Alford Co., 18 Cal. App. 467, 123 Pac. 548; Totten v. Barlow, 165 Cal. 378, 132 Pac. 749; Richmond v. Julian Con. Min. Co., 176 Cal. 600, 169 Pac. 356.

[2] That an order affirming the order appealed from is the proper procedure on this motion is held on authority of Hibernia Sav. & Loan Soc. v. Doran, 161 Cal. 118, 118 Pac. 526, and Knox v. Schrag, 18 Cal. App. 220, 122 Pac. 969.

The order appealed from is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

42 Cal. App. 662

Ex parte AZEVEDO. (Cr. 849.)

(District Court of Appeal, First District, Division 1, California. Aug. 14, 1919.)

1. HOMICIDE 🔑354—MURDER IN SECOND DEGREE MAY BE PUNISHED BY IMPRISONMENT FOR LIFE.

Under Pen. Code, § 190, providing every person guilty of murder in the second degree is punishable by imprisonment for not less than 10 years, it was within the power of the trial court to sentence one convicted of murder in the second degree to imprisonment in the state prison for life.

2. HOMICIDE 🔑352—STATEMENT OF COURT IN PASSING SENTENCE MERELY DECLARATION OF OPINION.

Language of trial judge, in passing sentence of imprisonment for life, that he saw no way out of it except to punish defendant for the crime of murder, not of the second degree, but of the first degree, *held* merely a declaration that in his opinion, based on the evidence, defendant, who had been found guilty of murder in the second degree, merited punishment equal to that fixed for murder in the first degree.

3. HABEAS CORPUS 🔑30(3)—UNDUE SEVERITY OF SENTENCE NOT REVIEWABLE.

The complaint of defendant, convicted of murder in the second degree and sentenced to imprisonment for life, that his punishment is more severe than it should have been, is a matter which can be considered only by the proper authorities in the case of commutation of sentence, parole, or pardon, and not on defendant's application for writ of habeas corpus to secure his release on the ground that, convicted of murder in the second, he was in reality sentenced for murder in the first, degree.

In the matter of the application of Antone Azevedo for writ of habeas corpus. Application denied.

A. Q. Lomba, of Oakland, for petitioner.

WASTE, P. J. The petition on behalf of Antone Azevedo for a writ of habeas corpus discloses that he is now confined in the state prison at San Quentin, having been convicted of murder in the second degree. But one point is raised by the application.

The jury, by their verdict, found the defendant guilty of murder in the second degree, and recommended the defendant to the mercy of the court, yet he was sentenced to undergo imprisonment for life. In pronouncing sentence the trial court, after a review of the testimony, said to the prisoner:

> "I see no way out of it, Azevedo, except to punish you by imprisonment for the crime of murder, not of the second degree, but of the first degree; and it is therefore the judgment of the court, Azevedo, that you be taken hence and confined in the state prison at San Quentin for the period of your natural life."

The point made by the petitioner is that the court exceeded its jurisdiction, and in reality sentenced the defendant for murder in the first degree.

[1] There is no merit in the contention.

> "Every person guilty of murder in the second degree is punishable by imprisonment in the state prison not less than ten years." Pen. Code, § 190.

It was therefore within the power of the trial court to impose upon defendant the punishment pronounced. All the proceedings were in due and proper form. The commitment recites that—

> "Whereas, said Antone Azevedo has been duly convicted in this court of the crime of murder in the second degree, it is therefore ordered, adjudged, and decreed that said Antone Azevedo be imprisoned in the state prison of the state of California for the term of his natural life as a punishment in said case."

[2] The language of the judge, in passing sentence, amounted to no more than a declaration that in his opinion, based on the evidence in the case, which he had just reviewed, and which related to the killing of defendant's wife, the defendant merited punishment equal to that fixed for murder in the first degree.

[3] The defendant's complaint amounts only to a counter plea that his punishment is more severe than it ought to have been. That is a matter which can only be considered by the proper authorities in the case of an application for commutation of sentence, parole, or pardon. People v. Huff, 72 Cal. 117–119, 13 Pac. 168.

The application for the writ is denied.

We concur: RICHARDS, J.; BARDIN, Judge pro tem.

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42 Cal. App. 653

In re GRAHAM'S ESTATE. (Civ. 2909.)

(District Court of Appeal, First District, Division 2, California. Aug. 13, 1919.)

1. APPEAL AND ERROR 🔑694(1)—QUESTIONS OF FACT NOT REVIEWED WHERE EVIDENCE IS NOT IN RECORD.

On appeal from judgment roll alone, where there is no evidence before appellate court, court will not review findings on questions of fact.

2. WILLS 🔑99—WHEN CODICIL REFERS TO LAST WILL.

Codicil, not specifically referring to any will, must be taken to refer to the last executed will.

3. WILLS 🔑99—REFERENCE TO WILL BY CODICIL OR ATTACHMENT TO IT UNNECESSARY.

A codicil to an unrevoked will need not definitely refer to or be physically attached to such will.

4. WILLS ⚿99—MEANINGLESS PROVISION OF CODICIL DISREGARDED.

A provision in a codicil, not specifically referring to any will, revoking a bequest revoked by the last executed will, will be disregarded as meaningless, having nothing upon which to operate; but such provision does not invalidate the remainder of the codicil.

Appeal from Superior Court, Alameda County; William S. Wells, Judge.

In the matter of the estate of Margaret Graham, deceased. From an order and judgment admitting will to probate, contestants appeal. Affirmed.

Peter J. Crosby, of Oakland, and Samuel M. Samter, of San Francisco, for appellants.
F. A. Berlin, of Oakland, and L. R. Weinmann, of Alameda, for respondent.

LANGDON, P. J. This is an appeal from an order and judgment of the superior court for the county of Alameda, admitting to probate as the last will of Margaret Graham, deceased, two certain documents hereinafter described. The facts of the case are:

Margaret Graham died on July 9, 1917, leaving as her only heirs at law the appellants Bridget Pollock, Sarah Burns, and Mary Wall, sisters, and appellants Eva Schutte and Lillie Terwilliger, nieces, daughters of a deceased sister. Her estate was valued at about $9,000. She had previously executed three testamentary documents—two wills and a codicil. The two wills were executed on the same day—May 17, 1917—one in the morning and the other in the afternoon. The codicil was executed on June 25, 1917. The will executed in the morning and the codicil were filed for probate on July 12, 1917, and later, on November 13, 1917, an amended and supplemental petition for probate was filed, which stated that two wills and a codicil had been left by deceased, set out the second will, as well as the first will and codicil, and asked the court to admit to probate such of the documents as might be determined to be valid wills of the deceased. A contest was filed by the appellants upon several grounds, all of which were decided against the contestants, and the second will and the codicil were admitted to probate as constituting the last will of deceased.

[1] There were a number of grounds of contest, but as the appeal is taken upon the judgment roll alone, and no evidence is before us, we may not review the findings upon the questions of fact presented by the contest, and the condition of the record invites our consideration only to the question of law as to the correctness of the action of the trial court in admitting to probate the instrument entitled "Codicil to My Last Will." It is appellants' contention that the second will alone should have been admitted to probate, that it appears upon the face of the codicil that it was not a codicil to such will, and that it was therefore improperly admitted to probate.

The relevant facts with respect to these several documents are: The documents were all executed with proper formalities. In the first will the testatrix directs her executor to pay $500 to Rev. Father Galvin, $300 to Annie Fortman, $500 to St. Joseph's Church, $500 to the same church for prayers, $200 to R. B. Tappan, and the residue of the estate is devised to Maria Anderson, of San Francisco. By this will all former wills are revoked. By the second will the testatrix bequeathed $500 to Father Galvin, $200 to R. B. Tappan, $300 to Annie Fortman, $500 to St. Joseph's Church, and $500 to the same church for prayers, and by this instrument no disposition is made of the residue of her estate. All former wills are expressly revoked by this second will, and the statement is made:

> "I give nothing to my relatives, because of their neglect of me."

It will be observed that the substantial difference in the two wills is that in the first will Maria Anderson is named as residuary legatee, while in the second the residuary estate is not devised at all. The other document admitted to probate is entitled "Codicil to My Last Will." It bequeaths $50 each to the three sisters of the testatrix, who are appellants here, and then proceeds as follows:

> "I declare this to be a codicil to my last will. I strike out my bequest in my will to Maria Anderson—the residuary legatee. I strike out my bequest to Mrs. Annie Fortman, and make her the residuary legatee. I give her the residue of my estate."

[2] The contention of appellants is that this instrument was intended as a codicil to the first will, which had been expressly revoked by the second will, because it refers to and revokes the residuary bequest to Maria Anderson, who is named only in the first, and not in the second, will. In all other respects it might apply equally to the second as to the first will. Appellants contend that said codicil should not have been admitted as a codicil to the second will; that the second will should have been admitted to probate alone, and that, as said second will did not dispose of the residue of the estate, as to such residue the testatrix died intestate. The trial court has concluded that the codicil did not refer to the first will in a sufficiently specific manner to republish said will. Obviously, appellants are not complaining of this holding, because, if the first will had been republished by the codicil, the appellants would have had no interest in the residuary estate. Since the codicil did not specifically refer to the first will, nor specifically refer to any other will in existence, it must be taken to refer to the last executed will. A codicil must re-

fer to some will, and, if no express will is mentioned, it will be taken to refer to the will last in date. Woerner on Administration, vol. 1, p. 90, § 47; Crosbie v. Macdoual, 4 Ves. Jr. 610, 615.

[3, 4] It is not necessary, in order to support the judgment of the trial court, that this codicil should contain sufficient reference to the second will to republish said second will, because said second will was never revoked and required no republication. Exact and definite reference or physical attachment thereto becomes unnecessary. The provision in the codicil revoking the bequest to Maria Anderson may be disregarded, under well-established rules of construction. Matter of Estate of Wood, 36 Cal. 75, 81. It becomes meaningless, because it has nothing upon which to operate. This does not invalidate the remainder of the document, however. In all other particulars the two documents are harmonious and may be construed together. Section 1320, Civ. Code. The ruling of the trial court, and the operation of the two documents standing together, seem to be entirely consistent with the intent of the testatrix as it appears from the documents in evidence. The holding of the trial court is also in accord with the rule that a construction favorable to testacy rather than to intestacy should be indulged wherever possible.

The judgment is affirmed.

We concur: BRITTAIN, J.; HAVEN, J.

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42 Cal. App. 648

LANKTREE v. LANKTREE. (Civ. 2900.)

(District Court of Appeal, First District, Division 2, California. Aug. 13, 1919.)

1. Pleading 🔑214(1)—On appeal from order sustaining demurrer, facts alleged in complaint are binding.

On appeal from order sustaining demurrer to complaint, facts alleged in complaint are binding upon both parties and court.

2. Contracts 🔑111 — Not to contest divorce against public policy.

Husband's agreement to refrain from contesting wife's divorce suit, in consideration of wife's agreement to make settlement of property rights, *held* contrary to public policy.

3. Divorce 🔑56—Denied where collusion appears.

Under Civ. Code, § 111, subd. 2, and section 114, divorce must be denied where collusion appears.

4. Divorce 🔑165(3)—On collusion decree should be vacated.

If court has not lost jurisdiction, a collusive divorce decree should be set aside on suggestion, and may be set aside by court of its own motion.

5. Divorce 🔑165(3)—Collusive decree is final as to both parties in absence of fraud.

Where a collusive divorce decree has become final, equity will not interfere at the instance of either party, in absence of showing of coercion, imposition, or fraud upon complaining party.

6. Divorce 🔑165(3) — Collusive decree will not be set aside, after time for appeal, for husband's misrepresentations as to property.

Divorce decree, secured by wife pursuant to husband's agreement not to contest suit, in consideration of wife's settlement of property rights, will not be set aside after time within which to appeal and to move under Code Civ. Proc. § 473, has elapsed, upon wife's complaint that husband misrepresented valuation of his property and that he did not desire to marry another; the wife herself having been at fault in procuring collusive decree.

7. Equity 🔑65(3)—Amendment to bill to set aside collusive decree of divorce denied.

In wife's action to have divorce decree set aside, where complaint shows wife at fault in having procured collusive decree, court, in sustaining demurrer to complaint, will not permit amendment of complaint changing allegations regarding her contract; wife not having come into court with clean hands.

8. Equity 🔑65(1)—Parties to fraudulent transaction left where found.

Equity will leave parties to fraudulent transaction where they have placed themselves.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by Harriet C. Lanktree against Joseph B. Lanktree. From a judgment entered on an order sustaining without leave to amend, a general demurrer to her complaint, plaintiff appeals. Affirmed.

McWilliams & Hatfield, of San Francisco, for appellant.

W. J. Burpee and Donahue & Hynes, all of Oakland, for respondent.

BRITTAIN, J. The plaintiff appeals from a judgment entered upon an order sustaining, without leave to amend, a general demurrer to her complaint.

[1] For the purposes of this decision, the facts alleged in the complaint are binding upon both parties and the court. The question is not one of fact, but of law. If the plaintiff's allegations are true, is she entitled to relief? At the instance of a wife who alleges she has procured a collusive decree of divorce, will a court of equity set it aside because she also alleges in substance that she bartered her marital rights for a smaller sum than she might have exacted, if the other party to the collusive agreement had not misrepresented the amount of his property?

In the briefs authorities are not cited, nor is there any serious argument upon the legal effect of the plaintiff's allegations in regard to her having procured the collusive decree. The argument on one side is upon the policy of the law to uphold the marital relation; on the other, upon the principle that, to warrant a court of equity to set aside a former judgment, extrinsic fraud must be shown. The determination of the larger question concerning the fraud which the plaintiff avers she practiced upon the court renders unnecessary lengthy consideration of the other matters argued in the briefs.

[2-4] The plaintiff alleged that the parties were married in 1881 and continued to live together as man and wife for 36 years; that early in 1917 the husband requested his wife to enter into an agreement with him for the settlement of their property rights and for the wife to institute a divorce suit, which he should refrain from contesting; and that the plaintiff refused to consent to this agreement. Such an agreement is contrary to public policy. When collusion appears the divorce must be denied. Civ. Code, § 111, subd. 2; Civ. Code, § 114; Deyoe v. Superior Court, 140 Cal. 482, 74 Pac. 28, 98 Am. St. Rep. 73. If the court has not lost jurisdiction, such a decree should be set aside on suggestion, and may be set aside by the court of its own motion. Rehfuss v. Rehfuss, 169 Cal. 91, 145 Pac. 1020.

Subsequently the plaintiff alleged that the husband engaged in a series of acts and statements of a cruel nature, as a result of which the plaintiff suffered physical and mental breakdown, and that while in this condition she was induced to make the very agreement she had before rejected, which she in terms describes in her complaint as "said collusive agreement for the securing of a decree of divorce from the defendant." It is further alleged that pursuant to this agreement the parties entered into a lengthy contract, a copy of which is appended to the complaint in the present suit. Among many other matters it provided for certain money and property to be given by the husband to the wife. Two days after its date, it is alleged, in further pursuance of the prohibited oral agreement, the plaintiff commenced her action for divorce, in which the defendant defaulted, and the plaintiff procured the interlocutory decree in her favor. There was no appeal, and the time to appeal and to move under section 473 of the Code of Civil Procedure elapsed. The interlocutory decree became a final judgment at the expiration of 6 months. Nothing remained to be done in the original suit but to enter a formal decree of divorce. No action was taken by the plaintiff in the divorce suit, but on the day of, or the day after, the expiration of the year from the date of the interlocutory decree, the present suit was commenced.

The plaintiff further alleged that the defendant falsely represented to her that he did not desire to marry another, and that in connection with the written agreement for property to be delivered to her he falsely represented the amount of his property. The plaintiff seeks to have the alleged collusive decree of divorce vacated.

[5] Where a collusive decree has become final, courts of equity will not ordinarily interfere at the instance of either party. To warrant such action there must be a showing of coercion, imposition, or fraud upon the party complaining. Bancroft v. Bancroft, 173 Pac. 579, L. R. A. 1918F, 1029. Even though the alleged cruelty of the husband was such as to amount to coercion by which the plaintiff was induced to enter into the oral agreement to procure a collusive divorce, that coercion could not have acted upon her when she was represented by counsel, as she must have been to carry the prohibited bargain into effect. If she had told her attorneys or the court that she had been coerced into making the bargain, she might have been fully protected in regard to her marital rights. If she had sought a divorce because of her husband's cruelty, she might have had full disclosure made in regard to his property.

The only allegation of imposition or fraud in regard to the original agreement was the alleged statement that the husband did not desire to marry another. It is unreasonable to suppose the wife's will was so weakened by the husband's alleged cruelty that she consented to the agreement, but would have had strength to resist the bargain if this statement had not been made. The substance of the appellant's claim is that in the property settlement, after the alleged oral bargain and in pursuance of it, the husband deceived her in regard to the amount of his property, whereby she was induced to accept a ranch valued at $12,000, $250 in cash, and $40 per month so long as she remained unmarried during his lifetime, and an additional $35 per month for one year. The plaintiff alleged the husband represented that this agreement would be fair and equitable for her, and that it would leave him practically penniless and bankrupt. So long as she believed she was getting all it was possible for him to give, she was satisfied. She commenced a collusive suit, she fraudulently procured the interlocutory decree, she was willing to take the benefits of the decree, and she rested under it until it became final.

[6-8] The case does not appear to be one of equitable cognizance. The allegations of the complaint are not sufficient to move a court of equity to reopen a matter finally adjudicated. U. S. v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93. If the plaintiff had been without fault, and the facts had warranted it, deficiencies in the complaint might have been supplied by amendment; but the plaintiff was not free from fault. Her affirmative allegations regarding her own conduct cannot be changed by any proper amendment. By her own statements it appears her hands are not clean. Gunter v. Laffan, 7 Cal. 588. The agreement which the plaintiff alleges she made is one of the kind described by the Supreme Court in the case of Beard v. Beard, 65 Cal. 354, 4 Pac. 229:

> "It was a contract which contemplated the perpetration of a fraud upon a court of justice, and we think it the duty of courts to discountenance and discourage such transactions to the utmost limit of their power."

Equity will leave parties to fraudulent transactions where they have placed themselves. Mitchell v. Cline, 84 Cal. 409, 24 Pac. 164.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

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42 Cal. App. 593

NISSEN v. EHRENPFORT et al. (Civ. 2848.)

(District Court of Appeal, First District, Division 1, California. Aug. 8, 1919.)

1. ALTERATION OF INSTRUMENTS ⚷20—ALTERATION OF NOTE, CHANGING ITS MEANING, AVOIDS IT.

The alteration of a negotiable instrument, by which its meaning and effect is changed, avoids the instrument as to any nonconsenting party thereto.

2. GUARANTY ⚷54 — ALTERATION OF NOTE, CHANGING RATE OF INTEREST, DISCHARGES GUARANTOR.

Alteration of note, obligating maker to pay 7 per cent., instead of 6, as originally agreed to, without guarantor's consent, discharged guarantor's liability, under Civ. Code, § 2819, notwithstanding section 2820, providing that creditor's void or voidable promise does not alter obligation or suspend or impair creditor's remedy against principal, within former statute, providing that such alteration of obligation or impairment of remedy exonerates guarantor.

3. PRINCIPAL AND SURETY ⚷101(1) — DOCTRINE THAT AGREEMENT TO DISCHARGE SURETY MUST BE VALID DOES NOT APPLY TO ALTERATION OF INSTRUMENT.

The doctrine that the agreement by which an existing contract is changed must be valid and binding in order to discharge the surety has no application to a case where the agreement is by way of alteration of the original instrument.

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by James B. Nissen against G. W. Ehrenpfort and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Ross & Ross, of Redwood City, for appellant.

Reed, Nusbaumer & Bingaman, of Oakland, for respondent Ehrenpfort.

KERRIGAN, J. The plaintiff, as the assignee of the National Bank of San Mateo, brought suit against the defendants upon five promissory notes executed by defendant Lindeman in favor of said bank, and indorsed as guarantor by defendant Ehrenpfort. Lindeman answered, setting up that in a proceeding in bankruptcy he had been duly discharged from the payment of his indebtedness represented by said promissory notes. Judgment was rendered against him for the amount due thereon, but its execution was perpetually stayed. Defendant Ehrenpfort answered, and among other defenses pleaded that since the delivery of said promissory notes they had been materially altered by said National Bank of San Mateo without his knowledge or consent, by virtue of which alteration he had been discharged from liability upon said notes. The trial court found in accordance with this plea and rendered judgment in his favor. The plaintiff appeals from such judgment.

It is an undisputed fact in the case that the payee of said notes, through one of its officers, and at a time when said notes were overdue, wrote upon the margin of each of them, with the consent of their maker, Lindeman, but without the knowledge or consent of Ehrenpfort, the words, "Int. from Feb. 20, 1916, 7%. O. K.," and that Lindeman indicated his concurrence in said alteration by placing thereafter his initials. By the terms of the promissory notes as originally executed they bore interest at the rate of 6 per cent. only.

[1] It is well settled, not only in this state, but wherever the law merchant prevails, that the alteration of a negotiable instrument by which its meaning and effect is changed avoids the instrument as to any nonconsenting party thereto. Dealing with this subject in his work on Negotiable Instruments (6th Ed., vol. 2, § 1373), Mr. Daniels says:

> "Any change in the terms of a written contract which varies its legal effect and operation, whether in respect to the obligation it imports or as to its force as matter of evidence, when made by any party to the contract, is an alteration thereof, unless all the other parties to the contract gave their express or implied consent to such change; and the effect of such alteration is to nullify and destroy the altered instrument as a legal obligation, even in the hands of a bona fide holder, and whether made with fraudulent intent or not."
>
> "The alteration may consist in changing (1) its date, or (2) the time or (3) place of payment, or (4) the amount of principal or (5) interest to be paid. * * * And the alteration may be effected by adding to the instrument some new provision, or by substituting one provision for

another, or by obliterating or subtracting from it some provision incorporated in it." Id. § 1375.

Numerous authorities are cited by the author in support of the law as thus stated. The same doctrine is stated in almost identical terms in volume 3 of Ruling Case Law, at pages 966, 977, 1109, and 1113.

The rule, as it relates to a guarantor, has been incorporated into our statute law by section 2819 of the Civil Code, which provides:

> "A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended."

As said in Driscoll v. Winters, 122 Cal. 65, 54 Pac. 387, this is but a restatement of the common law rule.

[2] There can be no doubt that the writing of the words above mentioned upon the promissory notes upon which this action is based is such an alteration as is referred to in the authorities cited. The words in themselves, if written upon a separate piece of paper, would be meaningless as affecting any obligation of the maker of these notes. They acquire significance only when read in connection with the promise to pay the principal sum in said notes named, and their effect is, and was intended to be, that from the date mentioned Lindeman was obligated to pay to the Bank of San Mateo 7 per cent. interest, instead of 6, and such obligation arose from substituting those words in place of the words relating to the rate of interest appearing in the notes, so that each note thereafter constituted an obligation to pay its principal sum and 7 per cent. interest, instead of its principal sum and 6 per cent. interest.

Several cases are cited by the appellant, holding that a notation similar to that above set forth, when indorsed on the back of the note, is not such an alteration as to avoid it; but we think such cases are not in point, or, if they may be so considered, are against the great weight of authority.

The appellant refers us to section 2820 of the Civil Code, providing that—

> "A promise by a creditor, which for any cause is void, or voidable by him at his option, does not alter the obligation or suspend or impair the remedy, within the meaning of the last section" (section 2819, Civ. Code, hereinbefore quoted).

[3] We think it clear that this section of the Code has no application to the facts of the present case. It refers to cases in which the promise or agreement of the creditor is for any reason invalid or not enforceable against him. In such cases it is held that the obligation of the pre-existing contract, as to which the subsequent promise or agreement is made, is not altered, and consequently that the guarantor is not exonerated. The doctrine that the agreement by which an existing contract is changed must be valid and binding in order to discharge the surety has no application to a case where the agreement is by way of alteration of the original instrument. Stillwell v. Aaron, 69 Mo. 539, 33 Am. Rep. 517, 518. See, also, Driscoll v. Winters, 122 Cal. 65, 54 Pac. 387; Pelton v. San Jacinto Lumber Co., 113 Cal. 21, 45 Pac. 12.

The appellant also discusses the question as to whether the payment of interest in advance, as found by the trial court, implies a promise of forbearance on the part of the creditor, thus impairing his remedy, and also the effect of an indefinite extension of time of payment; but in view of the conclusion we have reached that the guarantor was released by the alteration of the promissory notes on which he was otherwise liable, it is unnecessary to follow the appellant in the discussion of those questions.

For the reasons given the judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

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42 Cal. App. 580

KRENWINKEL et al. v. HENNE et al.

SUCK v. SAME.

(Civ. 2931.)

(District Court of Appeal, Second District, Division 2, California. Aug. 8, 1919.)

1. MECHANICS' LIENS ⚷277(6)—ON FAILURE TO ANSWER DEFENDANT ESTOPPED TO RAISE QUESTION OF VARIANCE.

In actions to foreclose mechanics' liens, defendants, having failed to answer, and thus to put in issue all material allegations of the complaint, particularly those setting forth the contents of the liens, thus having admitted the truth of the allegations, *held* estopped to raise the question of variance between the claim of lien and the proof.

2. MECHANICS' LIENS ⚷157(1)—STATEMENT OF PRICE IN FIRST CLAIM NOT A VARIANCE FROM SECOND CLAIM FOR REASONABLE PRICE.

Under Code Civ. Proc. § 1187, as amended in 1911, in actions to foreclose mechanics' liens, the statement in the second claims of lien that there was no contract price, and that the reasonable price was being charged for the work done, *held* not a fatal variance from the first claims of lien, stating the contract was agreed upon and was payable on completion.

3. MECHANICS' LIENS ⚷75(1)—OWNER SILENT IN FACE OF IMPROVEMENT WORK RESPONSIBLE THEREFOR.

Under Code Civ. Proc. §§ 1187, 1192, one who stands by and sees another improve his property without putting him on notice of the true ownership of the property, must be held responsible for the value of the improvements, not being an innocent party under the conditions.

4. Mechanics' liens ⚷132(1) — Contractors working with owner's consent have 90 days to file claims.

Under Code Civ. Proc. §§ 1187, 1192, where contractors did work on a building with the knowledge, consent, and permission of the owners, no notice of completion of the work having been filed, the contractors had 90 days within which to file their claims for lien.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Consolidated actions by Fred A. Krenwinkel and others against Jane Louise Henne and others, and by Leo Suck against Jane Louise Henne and others. From judgment for plaintiffs, defendants appeal. Affirmed.

Walter M. Campbell and Campbell & Moore, all of Los Angeles, for appellants.

G. C. De Garmo and Robert Whitson, both of Los Angeles, for respondents.

THOMAS, J. These two actions, brought for the foreclosure of mechanics' liens against defendants and appellants, were consolidated in the superior court and tried as one. The liens claimed were for labor done and materials furnished in making certain alterations and improvements in a storeroom in the Henne building occupied by Naumann & Schill, Inc., as tenants of the defendants and appellants, who were the owners.

Each lien claimant was an original contractor, and all the work done and materials furnished was at the instance of said tenants, and without the actual knowledge of appellants. The evidence was conflicting as to the knowledge of the employés of R. A. Rowan & Co., as shown and admitted to be the agent of appellant for the collection of rents and care of the building. Each of these respondents, except Suck, filed two claims, the first one in each case being filed within 60 days after completion of their contract, and the second within 90 days after completion, but more than 60 days thereafter. No notice of the completion of any of the work was filed in the recorder's office. Respondent Suck alleged that he was employed by appellants Jane Louise Henne and Jane Louise Henne, as guardian of the person and estate of Christian Henne, a minor, through their agent, Naumann & Schill, Inc., to do certain work and to furnish certain materials. Appellants, by their joint answer to each complaint, deny specifically any knowledge upon their part of any of said alterations or improvements until the completion thereof, and deny, for lack of information or belief, the allegations with reference to the contract for the work and performance thereof. Naumann & Schill, Inc., allowed default to be taken against it.

Upon the consolidation of the cases as aforesaid, the trial of the issues thus presented was had, and the court found in favor of the plaintiffs and respondents here. Findings were thereafter filed, and judgment entered foreclosing the liens. The defendants, appellants here, appeal "from so much of the judgment entered in the above-entitled consolidated actions on the 11th day of March, 1916, as affects in any manner the interests of the said defendants, and of each of them, in and to the real property described therein, and particularly from so much of said judgment as enforces liens in behalf of each of said plaintiffs against said real property and against the interests of each of these defendants therein."

Appellants urge the following points of law as bases for the reversal of the said judgment: That the court erred (1) in admitting in evidence the claims of lien because of a variance between the claims of lien and the allegations of the complaint and the testimony offered in support thereof, in that the claims of lien state an agreed price for the work etc., whereas, as alleged and proven and found by the court, no price for the work was agreed upon; (2) in admitting in evidence the second claims of lien in said cases, because the same were recorded more than 60 days after the completion of the work; and (3) in admitting in evidence the claim of lien of respondent Suck because of a material variance between the statements of the claim of lien to the effect that the work was done by and for the appellants, whereas the allegations of the complaint and the evidence offered in support thereof are to the effect that the work was done for Naumann & Schill, Inc., a tenant of appellants. These may be narrowed down to two points: (1) Error of the court in the admission of evidence, and (2) a material variance between the allegations and the proof. We are unable to agree with appellants on the points raised or either of them.

[1] As to the latter contention, we think the appellants, having failed to answer and thus put in issue all the material allegations of the complaint, particularly those which set forth the contents of the liens, and by such failure having admitted the truth of the allegations, are estopped to raise the question of variance between the claim of lien and the proof. By such failure the appellants, as a matter of law, admitted that respondents' liens contained a statement of the terms, time given, and conditions of the contract entered into between plaintiffs and said Naumann & Schill, Inc., and the claims of lien introduced, therefore, are not vulnerable to the objection that they are at variance with the proof. This applies to all respondents.

[2] In the first claims of lien filed by re-

spondents it was stated that the contract was agreed upon and was payable upon the completion of the contract, while in the second it was stated that there was no contract price, and that the reasonable price was being charged for the work done. Appellants contend that this constitutes a fatal variance. But does it? Respondents admit that such would be the case under section 1187 of the Code of Civil Procedure as it formerly read, but not as amended in 1911. Respondents contend, and we think correctly so, that "before being amended the section required the lien claimant to state 'the terms, time given, and conditions of his contract'; but in 1911 the Legislature amended this section by providing that the lien should contain a statement of 'the price, if any, agreed upon for the same, and when payable, and of the work agreed to be done, and when the same was to be done, if agreed upon.' It is apparent that the Legislature by this amendment was seeking to simplify the preparation of claims of lien, and to relieve the lien claimant of the burden of setting out the nature and terms of the contract under which he was employed on the building, and requiring instead a statement of the price he was to receive for his work. In the absence of any particular agreement the law fixes the compensation at the reasonable value thereof, and when respondents stated in their lien claims that the price agreed upon was a certain definite amount, and that this was the reasonable value of such services, they were stating the facts correctly. There is a wide difference between a statement of the 'terms, time given, and conditions' of a contract and the 'price.'" Appellants admit that the claims of lien first filed were filed in time. As to them the only point urged was that of variance. This objection has now been ruled upon. The contention is without merit. Jarvis v. Frey, 175 Cal. 687, 166 Pac. 997.

[3, 4] This, therefore, brings for our consideration the claims of lien filed after the 60-day period, but within 90 days after the completion, which are admitted to be in due form, but which appellants claim were not filed within time. So far as this point is concerned, sections 1187 and 1192 of the Code of Civil Procedure, we think, control. These sections must be read together. When so read and construed, is there any room for doubt as to the intent of the Legislature? We think not. In our opinion there is no question of knowledge by the "owner" before us for decision. The court finds as a fact "that all of the work described in plaintiffs' complaints and hereinafter described was done by and with the knowledge, consent, and permission of the defendants herein." This finding is not attacked. There is no question, then, that the evidence supports the finding. Hence, in the light of the two sections above referred to and the record before us, we think that one who stands by and sees another improve his property, without putting him on notice, must be held responsible for the value of such improvements. Under such conditions the owner is not an innocent party. There is no principle or authority, we think, for the contention of appellants that the terms "owner" or "reputed owner" refer to anything but the owner of the fee. To vitalize appellants' contention here would be to make the court vulnerable to the charge of being guilty of having enacted "judicial legislation"—the reading into the act of something entirely foreign to the minds of the legislators at the time the said statutes were enacted.

Respondents ask: "Under these conditions, why should one who has contributed his labor toward the construction of a building, at the request of one whom he possibly believes to be the owner, be entitled to only 60 days as to the owner, and 90 days as to the reputed owner, for filing his lien?" Is not the answer obvious? Section 1192, supra, places the noncontracting owner in the position of a party to the contract, in that it creates a conclusive presumption that the work was done at his instance and request. This works no hardship upon him, as he must be advised as to what is being done in the way of improving his property before the presumption arises. Appellants argue: "Manifestly, then, the owners could not be expected to file a notice of completion. Nor could they be estopped by a state of facts of which they knew nothing." We question the soundness of this argument, as it seems to us obvious that, if the owners knew nothing of the improvements, their interests could not be subject to lien. In view of the court's finding that the work was done as already set forth, and no notice of completion having been filed, respondents would have 90 days within which to file their claims. It follows, then, that the second claims for liens, filed by respondents, were filed within the statutory time.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

42 Cal. App. 628

ROYAL INDEMNITY CO. v. MIDLAND COUNTIES PUBLIC SERVICE CORPORATION. (Civ. 2772.)

(District Court of Appeal, First District, Division 2, California. Aug. 12, 1919. Rehearing Denied by Supreme Court Oct. 9, 1919.)

1. ELECTRICITY 🔑14(2) — POWER COMPANY MUST MAKE GUY WIRES SAFE UNDER EXISTING CIRCUMSTANCES.

The duty of an electric power company was not absolutely to insulate or otherwise make safe its guy wires in any particular manner, but to make them safe under all the exigencies offered by the surrounding circumstances.

2. ELECTRICITY 🔑14(2)—PRECAUTIONS TO BE TAKEN TO RENDER GUY WIRES HARMLESS.

In reaching conclusion as to whether a power company was negligent in not guarding against the breakage of guy wires at the top as well as at the bottom, the jury should consider the nature of the country in which the pole was situated, the occupations of the persons living thereabouts, and the usual precautions taken under similar circumstances.

3. ELECTRICITY 🔑19(13)—INSTRUCTIONS IN ACTION FOR INJURIES BY DANGEROUS GUY WIRES SUFFICIENT.

In an action against a power company to recover by subrogation for damages for personal injuries received by another than plaintiff, plaintiff being a workmen's compensation insurer and having paid the loss, instructions *held* to cover the point that in determining the company's negligence, in relation to its maintenance of a pole and high-power wires, the jury should consider the surrounding circumstances, etc.

4. ELECTRICITY 🔑19(5) — EVIDENCE SUFFICIENT TO SHOW NEGLIGENCE IN MAINTENANCE OF GUY WIRE.

Evidence *held* to justify finding that defendant electric power company should have anticipated that the guy wire supporting a pole carrying high-power wires might be subjected to sufficient strain, by contact with the usual instrumentalities employed in farming operations, to cause a breaking or tearing away of the strands of the wire, and a consequent sagging, and should have insulated such wire so as to avoid injury to one working on the land.

5. ELECTRICITY 🔑19(5)—EVIDENCE SHOWING REASON TO ANTICIPATE INJURY THROUGH BREAKING OF GUY WIRE.

In view of the physical conditions of the place where the pole was situated, and the use to which the land was put, that of farming, jury *held* justified in finding that defendant electric power company had reason to anticipate injury to one working on the land near the base of the pole when a horse straddled a guy wire and struggled in being backed off, causing the strands of the wire to break.

6. ELECTRICITY 🔑18(1)—CONTRIBUTORY NEGLIGENCE.

One working in a barley field at the foot of a pole of an electric power company *held* not guilty of contributory negligence in attempting to back a horse off a guy wire to the pole which such horse had straddled, the action resulting in a breaking of the strands of the wire and a consequent shock to the person through the horse.

7. MASTER AND SERVANT 🔑401—PLEADING SUFFICIENT TO ENFORCE SUBROGATION OF INSURER TO RIGHTS OF INJURED EMPLOYÉ.

Allegations that plaintiff by its policy of insurance insured one and his employés, and that policy was written under the terms of the Workmen's Compensation, Insurance and Safety Act, *held* to carry with it an implied allegation that plaintiff was an insurance carrier entitled to be subrogated to the rights of an injured employé against party causing injury.

8. PLEADING 🔑37 — OMISSION OF IMPLIED ALLEGATION IMMATERIAL.

Omission of an allegation necessarily implied from other allegations is immaterial.

9. MASTER AND SERVANT 🔑405(6)—RIGHT TO SUBROGATION BY WORKMEN'S COMPENSATION INSURER SHOWN BY EVIDENCE.

Evidence of plaintiff, insurance carrier under the Workmen's Compensation Act, *held* sufficient to show that a lawful claim had been made by an injured employé and paid by plaintiff, to entitle it to be subrogated to employé's rights against party causing injury.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Royal Indemnity Company, a corporation, against the Midland Counties Public Service Corporation, a corporation. From judgment for plaintiff, defendant appeals. Affirmed.

Short & Sutherland and Carl E. Lindsay, all of Fresno, for appellant.

Everts & Ewing and M. K. Wild, all of Fresno, for respondent.

LANGDON, P. J. This is an appeal from a judgment rendered on a verdict of a jury in favor of the plaintiff in the sum of $13,000. The plaintiff claims to be subrogated to the rights of one A. J. Bellah to recover for personal injuries alleged to have been received by him by reason of the negligence of the defendant. The injured man was a farm hand and was in the employ of one Max Flentge at the time of the accident. It is claimed by the plaintiff that the employer and employé were within the provisions of the Workmen's Compensation Act, and that the plaintiff was the insurance carrier of the employer and paid the claim of the employé and in consequence succeeded to his rights against the defendant.

[1-4] The facts of the case, in so far as they involve the merits, are as follows: The defendant was a public service corporation engaged in the business of generating and transmitting electricity in the county of

Fresno and elsewhere. It had a line of poles running along the county highway into the town of Coalinga, on which poles ran the high-power lines of the company. The pole involved here was situated on the land leased and cultivated by the employer and along the line of the county road about 8 or 10 feet inside the line. It was guyed by wires running from a point near the top of the pole to the ground on either side. Some of the wires on this pole were dead, but the lower wires, with which we are concerned here, were carrying a load of 10,000 volts of electricity. The guy wires were insulated at a point where, had they broken near the ground and fallen in a perpendicular line from the top of the pole, the insulation would have been below the lowest live wire and the electricity could not have traveled down their length to the injury of any one upon the ground. On the day of the accident, A. H. Bellah, the injured man, was working in company with another man, Wagner, in mowing around the edge of a field of barley. He had a team of horses, as also had his companion. Desiring to eat their luncheon at the place where they found themselves at the noon hour, they unhitched their horses and allowed them to graze, and retired themselves to the shade of the wagon to rest. One of Bellah's horses was a "snorting" colt, and he hitched it to an older horse. The older horse in some way got astraddle of the guy wire of the defendant. Bellah attempted to back it off of the wire. There is conflicting testimony regarding the amount of strain put upon the wire by the horse during Bellah's attempt to release it. One witness testified that the horse was plunging and kicking, but Bellah testified that he was not plunging. But, at any rate, while Bellah was attempting to push and back the horse off of the wire, and had placed the bit in its mouth and was holding on to the ring thereof, several of the strands of the guy wire became detached from the top of the pole, causing the guy wire to sag and come in contact with a live wire at a point below the insulation; the electricity was conveyed down the guy wire into the body of the horse, which was killed by the shock, and Bellah, who was holding on to the bit, received a severe shock which threw him violently to the ground, and as a result he has sustained very serious and permanent injuries. It appears that, when the strands in the guy wires became loosened and it sagged against the live wire, said guy wire remained at approximately the same angle from the pole as it had been originally placed, and the insulation was not, while it was held at such an angle, below the lowest live wire. The plaintiff insists that a breakage or pulling loose of the strands of the guy wire where it was attached to the pole should have been anticipated by the defendant, and that it was its duty to have so insulated the guy wire that, under any conditions which would cause a sagging of the wire, the insulation would nevertheless be at a point below a place of possible contact with the live wires. Appellant argues that there is no absolute duty upon defendant to insulate its guy wires in any particular manner, but that it is possible for the guy wires to be made so strong and to be placed so firmly in their position at a safe distance from the live wires that insulation would be unnecessary; in other words, that the relative positions of the wires themselves may furnish insulation by means of the intervening air. This is tacitly admitted by the respondent, who contends, however, that whether in the particular case the porcelain insulation was necessary and its absence negligence was a question of fact which was submitted to the jury under proper instructions, and that the jury has found by its verdict that the defendant was guilty of negligence in not insulating the guy wires at a point below the live wires in the same manner in which said guy wire was insulated at a point above the lowest live wire. Our conclusion is in agreement with this contention of the appellant. The duty of the appellant was not an absolute duty to insulate or make the wires safe in any particular manner. Its duty was to make the wires safe under all the exigencies offered by the surrounding circumstances. The strands of the guy wire were obviously either insufficient in strength or insufficiently attached to the pole to retain the guy wire at the proper angle from the live wires under the circumstances presented. Perhaps it was impracticable to make them sufficiently strong or sufficiently securely attached, but, if so, then appellant should have guarded against their breakage. Appellant realized this duty in guarding against breakage at the bottom, and yet it is apparent that the wire gave way more easily at the top than at the bottom when subjected to pressure from the bottom, the point at which it would seem most likely that pressure would be exerted. It therefore appears that this possibility should also have been anticipated and guarded against.

True, in reaching this conclusion the jury should take into consideration the nature of the country in which the pole was situated, the occupations of the persons living thereabouts, the usual precautions taken by electric companies under similar circumstances, and such matters. Fairbairn v. Amer. River Electric Co., 170 Cal. 115, 148 Pac. 788. The jury was instructed, however, in a manner which we think covered this matter. It was instructed at the request of defendant that the owner or operator of an electric plant is not an insurer against injury to other persons; that it has done all the law requires it to do if it has exercised the care in the matter of the construction and maintenance, operation, and inspection of its plant necessary so that the same will not be a source of danger or injury to persons lawfully in the pursuit of their business or pleasure; and that the care which the law exacts from any corporation engaged in operating such an instrumentality is always in proportion to the degree of danger reasonably to be apprehended from the use of the means employed. The jury has followed this instruction, we must presume, and has found that the danger of these strands breaking above or becoming detached from the pole was a danger reasonably to be apprehended. The jury had before them the testimony of Rudolph W. Van Norden, a consulting engineer, who stated that he was familiar with the usual custom of equipment, erection, and maintenance of power pole lines carrying high-tension currents, such as the lines of the defendant; that he was familiar with the construction of guy wires used in connection with such equipment; that there are ways and methods known to electrical men, especially electrical engineers, to guy poles in such a way that there is no danger to persons or property at the foot of the guy wire; and that methods of properly insulating wires were generally known to people skilled in the business before the 21st of April, 1916; that the danger of contact with a guy on which there is a circuit such as the circuit in this case, carrying 10,000 volts, would be obviated by inclosing a breaker or insulator in that guy wire at such a point that if contact between the guy wire and the circuit should occur from any cause whatever, the current could not follow down the guy wire and pass through a person in contact with the guy wire; that if the insulator were not at a point where the guy wire could not touch any power wire, so that there would be a continuation of the circuit to the ground, it would cease to be a safety device. It also appears from the record that the pole is located in a field planted with barley, and that the barley was planted right up to the line of the pole. The barley was being cut and horses were being used in connection with the cutting—all of which is a usual and necessary use of the land on which the pole is situated. We think that the jury was justified in concluding that the defendant should have anticipated that the guy wire might be subjected to sufficient strain by contact with the usual instrumentalities employed in farming operations, to cause a breaking or tearing away of the strands of the wire and a consequent sagging of the wire, and should have insulated its guy wires so as to avoid injury to others in the event of such an occurrence.

[5] Counsel for appellant very ably argues that, even though the negligence of the defendant in not insulating its guy wires be admitted, yet such negligence was not the proximate cause of the injury to Bellah, and that such negligence would not have caused any injury to Bellah except for an independent intervening cause over which the defendant had no control, which was the struggles of the horse during Bellah's attempt to back him off of the wire, causing a breakage or detachment of the strands of the guy wire. We shall consider some of the authorities relied upon by appellant. In the case of Polloni v. Ryland, 28 Cal. App. 51, 151 Pac. 296, the court said, quoting from a federal case:

> "An injury that is not the natural consequence of negligence, and which would not have resulted from it but for the interposition of some new, independent cause that could not have been anticipated, is not actionable."

It is said in the case of Bank of Savings v. Murfey, 68 Cal. at page 462, 9 Pac. at page 847, quoting from Beach on Contributory Negligence:

> "An act is the proximate cause of an event, when, in the natural order of things and under the circumstances, it would necessarily produce that event, when it is the first and directed power producing the result, the causa causans of the schoolmen."

Also, quoting from Cooley on Torts:

> "If the wrong and resulting damages are not known by common experience to be usually and naturally in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated, as cause and effect, to support the action."

Was the entanglement of the horse in the wire an "independent cause that could not have been anticipated," as said in the federal case; or was it "in the natural order of things under the circumstances," or would the damage "in the ordinary course of events follow from the wrong," as said by our own Supreme Court? Appellant argues that it had no reason to anticipate such a happening. We think, in view of the physical conditions of the country where the pole was situated and the use to which the land was put, the jury was justified in finding that the defendant had reason to anticipate an accident of the general nature of the one that occurred in this case. It is not necessary that the defendant should have anticipated this precise accident. City of Dixon v. Scott, 181 Ill. 116, 54 N. E. 897. The question of proximate cause was submitted to the jury under proper instructions.

[6] We cannot agree with the appellant that Bellah was guilty of contributory negligence. He had the right to assume that the guy wire was safe, either by reason of its strength or by reason of proper insulation. He was doing nothing unusual or foolhardy

for a man charged with his duties and performing his work, in assisting the horse in disentangling itself from the wires.

[7, 8] Appellant further contends that the complaint has no express allegation that the plaintiff is an insurance carrier, and that it is only by such an allegation that plaintiff can bring itself within the terms of the law subrogating it to the rights of Bellah. The amended complaint alleges that prior to the 21st day of April, 1916, the plaintiff, by its policy of insurance in writing, did insure the said Max Flentge and his employés at the time of the making of the policy; that said policy was written under and in conformity with the terms of a certain act of the Legislature, designated as the "Workmen's Compensation, Insurance and Safety Act," etc. (St. 1913, p. 279). This allegation, under the law respecting insurance companies, carries with it an implied allegation that the plaintiff was an insurance carrier. The omission of an allegation necessarily implied from other allegations is immaterial. Richter v. Union Land, etc., Co., 129 Cal. 367, 62 Pac. 39.

[9] Appellant also contends that there was a failure on the part of the plaintiff to prove that the policy of insurance which was introduced in evidence had been properly executed by the plaintiff company, and that therefore there was a failure of proof of the allegation that Bellah had made a lawful claim to the insurance company which is necessary, under the compensation act, to work a subrogation of the insurance carrier. The question arose over proof of the making of a lawful claim by Bellah. If it be true that proof of the execution of the policy was insufficient, there is yet sufficient proof that the company ratified its policy and paid the money to Bellah under said policy. Bellah's claim would be a lawful claim whether made under a policy which had been properly issued in the beginning, or which had been defectively executed by the agents of the company and afterwards ratified by said company. In either event the policy would be good, and the claim would be lawful. We think there was sufficient proof that a lawful claim had been made by Bellah and paid by the plaintiff company, to entitle the plaintiff to be subrogated to the rights of the injured man.

The other objections of the appellant we consider to be without merit and to require no discussion here. Counsel for appellant conceded upon the oral argument that if defendant was liable under the law the judgment was not excessive. It therefore appears that substantial justice has been done between the parties.

The judgment is affirmed.

We concur: BRITTAIN, J.; HAVEN, J.

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42 Cal. App. 687

TODD v. ORCUTT. (Civ. 2919.)

(District Court of Appeal, Second District, Division 2, California. Aug. 14, 1919.)

1. Negligence 🔑85(1)—Defense of contributory negligence applies to children.

The defense of contributory negligence may be invoked in actions on behalf of children who are of an age sufficient to exercise discretion for the avoidance of an injury to themselves, the age of discretion depending on the circumstances and the intelligence and capacity of the child.

2. Negligence 🔑142—Finding as to child's contributory negligence not required by pleadings.

Where the complaint on behalf of an infant run down by a motorcar alleged that he was a child of tender years, but did not allege that he was non sui juris in so far as legal accountability for contributory negligence is concerned, no such issue was tendered, and no finding thereon was necessary.

3. Infants 🔑102—In actions by guardian ad litem pleading must allege and court find infant's age.

In action by guardian ad litem of an infant, it is proper for the complaint to allege, and the court to find, the age of the infant; for, unless the infancy exists, suit could not be brought by guardian ad litem.

4. Appeal and error 🔑931(1)—Correct rule as to contributory negligence of infant presumed applied by courts.

In an action by infant for injuries where the court trying case without a jury found against the infant, it will be presumed on appeal that the court applied the correct rule of law as to contributory negligence.

5. Negligence 🔑85(2)—Care required of child depends on age and circumstances.

A child is only required to exercise the degree of care expected from a child of his age and capacity under like circumstances.

6. Negligence 🔑111(1)—General averment of negligence sufficient.

A complaint charging negligence in general terms is sufficient.

7. Trial 🔑404(4)—Findings construed as a whole.

Findings are to be read as a whole, and, if possible, are to be interpreted so as to uphold the general judgment, and, unless there is an irreconcilable conflict between the general and special findings, the general ones will govern.

8. Highways 🔑184(6)—Motorist not conclusively negligent though driving on wrong side of highway.

Under the Motor Vehicle Act in force at the time an infant was struck by an automobile (St. 1913, p. 646, § 20), a motorist, though he was driving on the left side of the highway, the right being occupied by the tracks of a trolley, cannot be conclusively presumed negligent and to have been violating the act, though there was no express finding that it was not practicable for him to drive on the right side of the road.

9. HIGHWAYS ⚷184(6)—GENERAL AND SPECIAL FINDINGS IN ACTION FOR INJURIES BY AUTOMOBILE NOT CONFLICTING.

In an action on behalf of an infant run down on a highway by a motorcar, *held*, that the general finding that the motorist was not guilty of negligence was not in conflict with a special finding that he was driving on the left-hand side of the road, it being found that the right-hand side was occupied by a trolley line, for it may well be assumed in favor of the general finding that it was not practicable to drive a motorcar on the right-hand side of the road, and so the motorist did not violate the Motor Vehicle Act.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Harold Todd, infant, by I. J. Todd, his guardian ad litem, against W. W. Orcutt. From a judgment for defendant, plaintiff appeals. Affirmed.

Drew Pruitt, John F. Imel, and C. C. Caswell, all of Los Angeles, for appellant.

Duke Stone, of Los Angeles, for respondent.

FINLAYSON, P. J. A boy nine years of age, brought this action by his guardian ad litem, to recover damages for personal injuries caused by an automobile driven by defendant. The case was tried by the court without a jury. Judgment was given for defendant, and plaintiff appeals therefrom.

The accident occurred on Monte Bella road, which, east of the city limits of the city of Los Angeles, is an extension of Stephenson avenue and runs in an easterly direction from the city limits. It is crossed by Bonnie Beach place. It was at a point 30 to 40 feet east of the easterly line of Bonnie Beach place, and approximately in the center line of Monte Bella road, that defendant's automobile collided with plaintiff. The complaint alleges the negligence in general language, as follows:

> "On the 3d day of June, 1915, the defendant * * * operated, guided, ran and conducted said automobile in such a careless, negligent, reckless, wrongful and unlawful manner that said automobile * * * ran into, upon and over the plaintiff."

It also is alleged in the complaint that—

> "At the time of said accident, said plaintiff was a child of tender years, and it was without any fault on his part that caused or contributed to said injury."

Defendant, answering, denied the negligence as alleged, and also denied that the injury was without any fault on plaintiff's part contributing thereto. As a special defense, defendant alleged that whatever injuries were sustained by plaintiff were due to his own contributory negligence in running in front of the automobile. In its findings the court found that, at the time of the accident, defendant was operating his automobile "in a proper and careful manner, and without any negligence on his part"; also, that plaintiff "was guilty of negligence which proximately caused his collision with defendant's automobile." The case comes to us on the judgment roll without any bill of exceptions or transcript of the evidence.

[1] Appellant complains of the findings because the court did not specifically find whether or not plaintiff "was sui juris and chargeable with contributory negligence which would preclude a recovery of damages for his injury." Every minor is, of course, non sui juris in the broad acceptation of the term. But counsel, we assume, by their use of the language just quoted from their brief, intend that the term should be taken in a narrower sense and mean to be understood as claiming that the findings are insufficient merely because the court did not specifically find that plaintiff's age was such that he could not entirely escape all legal accountability.

An infant may be so very young that, like an idiot or a lunatic, no negligence may legally be imputed to him. But not all infants are in that class. "It is," says Mr. Beach, "a question of capacity, and it has been found a very difficult question, and has been, in many cases, a very fruitful source of controversy as to what age is sufficient to constitute an infant sui juris. Unless the child is exceedingly young it is usually left to the jury to determine the measure of care required of the particular child in the actual circumstances of the case. Where there is no doubt as to the capacity of the child, at one extreme or the other, to avoid damage, the court will decide it as a matter of law." Beach on Contributory Negligence, § 117. It has been held that a child seven or eight years of age is capable of taking ordinary care of himself, and may be guilty of negligence. Gillespie v. McGowan, 100 Pa. 144, 45 Am. Rep. 365; Messenger v. Dennie, 137 Mass. 197, 50 Am. Rep. 295. The rule is that the defense of contributory negligence may be invoked in actions by or on behalf of children who are of an age sufficient to exercise discretion for the avoidance of injury to themselves. The law does not fix this age of discretion. It may depend upon the character of the injury, the circumstances under which it occurred, and the size, intelligence, and capacity of the child.

[2-5] The complaint here, while alleging that plaintiff was nine years of age at the time of the accident, did not allege that he was non sui juris, in so far as legal account-

ability for contributory negligence is concerned. No such issue was tendered, and no such finding was necessary. The complaint does allege, and the answer admits, that at the time of the accident plaintiff was "a child of tender years." It was not necessary nor proper to allege or find that, because plaintiff was a child of tender years, he was not sui juris or chargeable with contributory negligence. It, of course, was proper for the complaint to allege, and the court find, the age of plaintiff. This was necessary in order to show that it was proper for him to appear by a guardian ad litem. But with respect to the question of negligence on his part, his age was only a probative fact, as much so as if, had he been an adult, he were blind or deaf. The ultimate question of fact is: Was he guilty of contributory negligence? And we must assume that, in solving that question, the court applied the correct rule of law, which is that plaintiff was required to exercise the same degree of care, no more and no less, than would be expected from a child of his age, or which children of his years ordinarily exercise under like circumstances, taking into consideration, not only the boy's age, but his capacity for understanding. Studer v. Southern Pacific Co., 121 Cal. 400, 53 Pac. 942, 66 Am. St. Rep. 39; George v. Los Angeles Ry. Co., 126 Cal. 357, 58 Pac. 819, 46 L. R. A. 829, 77 Am. St. Rep. 184; Quill v. Southern Pacific Co., 140 Cal. 268, 73 Pac. 991; Cahill v. Stone Co., 167 Cal. 126, 138 Pac. 712.

[6, 7] Appellant contends that the judgment is not suported by the findings. The basis for this claim is that the details of the accident, as disclosed by the court's findings, show, according to appellant, that respondent was guilty of negligence and that appellant was not. As already pointed out, the complaint charged defendant's alleged negligence in general terms, as, indeed, plaintiff had the right to do. Stephenson v. Southern Pacific Co., 102 Cal. 143, 34 Pac. 618, 36 Pac. 407; Pigeon v. Fuller, 156 Cal. 691, 105 Pac. 976; Stein v. United Railroads, 159 Cal. 368, 113 Pac. 663. The negligence, thus pleaded, was the ultimate fact. Upon this issue the court found against plaintiff, in a finding that directly traverses the negligence as alleged in the complaint. The court might have stopped with this finding negativing negligence on the part of defendant as alleged in the complaint, but it went on and found, in more detail, certain other facts—facts which appellant claims are inconsistent with the court's findings that defendant was not, and that plaintiff himself was, guilty of negligence. Findings are to be read as a whole, and, if possible, are to be interpreted so as to uphold the judgment. And unless there is an irreconcilable conflict between the general finding that defendant was not negligent and the findings as to the particulars upon which appellant relies, the judgment must be affirmed.

[8, 9] The court found that at the place where the collision occurred the street, from curb to curb, is 56 feet wide; that on the south side of the street are two interurban street car tracks; that the most northerly rail is 5 or 6 feet south of the center line of the street; and that "by reason of these said street car tracks and the condition of the street on the south side of said street, the traffic, both east and west along said Stephenson avenue, is confined almost entirely to the northerly half of said street." Defendant was driving in an easterly direction. So that, ordinarily, it would have been his duty to keep to the south of the center line of the street—that is, on the right-hand side of the highway. The court further found that, at the time of the collision, defendant was driving his automobile along the right-hand side "of said traveled portion of said roadway," i. e., along the right-hand side of that portion of the highway that lies to the north of the most northerly rail; that he was operating his automobile in a careful manner; but that plaintiff, while attempting to cross from the north to the south side of the street, suddenly emerged from behind a vehicle, and before defendant was aware of his presence so as to avoid a collision, ran against defendant's automobile and was injured.

It is provided by the Motor Vehicle Act then in force (section 20, Stats. 1913, p. 646), that the driver of an automobile, "wherever practicable, shall travel on the right-hand side" of the highway. The court did not find, in so many words, that it was not "practicable" for respondent to drive on the right-hand side of the road. Appellant contends, therefore, that because the court found that respondent was not driving on the right-hand side of the road, negligence must conclusively be presumed in the absence of a finding expressly declaring that it was not practicable for him to drive to the right of the center line of the street. It does not clearly appear from the findings that respondent's automobile was wholly to the left of the center line of the road. We shall, however, resolve the doubt in appellant's favor and assume that the automobile was wholly to the left of the center line. But even so, the findings do not disclose any irreconcilable conflict between the general finding of an absence of negligence on respondent's part and the more particular details of the accident as disclosed by the other findings. If the court had expressly found that, at this particular place, it was "practicable" for respondent to drive on the right-hand side of the street, there then would have been a basis for the claim of a direct antagonism between the general finding that defendant was not negligent and the other facts found by the court. But the findings do not say that it was practicable for respondent to drive on the right-hand side of the highway at the place where the accident happened. There is therefore no irreconcilable conflict in the findings of the court. Furthermore, from the facts found it may well be that, at the place where the accident happened, it in fact was not practicable to drive on the right-hand side of the highway, and that it was proper to drive, as the court found respondent did, on the right-hand side of the "traveled portion," i. e., on the right-hand side of that part of the street which lies north of the most northerly of the interurban street car rails. The greater portion of the southerly half of the road seems to have been occupied by the interurban street car tracks. It is possible there were ties between the rails that stood up above the general surface of the road. At any rate, the findings state that it was because of "the condition of the street on the south side," as well as by reason of the presence of the street car tracks, that traffic, both east and west, was "confined almost entirely to the northerly half of said street." If, as is quite possible, there were large ties, above ground, between the rails, almost all of the southerly half of the highway would have been unsuitable for ordinary vehicular travel, and its use by automobiles may not have been practicable. Under such circumstances, negligence cannot be conclusively presumed from the fact that defendant was driving on the right-hand side of that part of the street along which horse-drawn and motor vehicles, going in either direction, ordinarily travel. See Stohlman v. Martin, 28 Cal. App. 338, 152 Pac. 319.

Judgment affirmed.

We concur: SLOANE, J.; THOMAS, J.

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42 Cal. App. 612

DODGE v. CHAPMAN et al. (Civ. 2926.)

(District Court of Appeal, Second District, Division 2, California. Aug. 11, 1919.)

1. LANDLORD AND TENANT ⚷33 — PAROL AGREEMENT IF WITHOUT CONSIDERATION INEFFECTUAL TO MODIFY LEASE.

Checks given by tenants for a reduced amount of rent, and receipts given therefor by the landlord in full payment, were not evidence of any contract on the landlord's part to reduce the rent; the landlord's agreement, therefore, to receive a reduced rent for a limited time, was not in writing, and, being without consideration, was ineffectual to modify the lease.

2. PRINCIPAL AND SURETY ⚷99—SURETIES FOR TENANTS NOT RELEASED BY LANDLORD'S ACCEPTANCE FOR A TIME OF REDUCED RENTAL.

Sureties on the bond of tenants were not released as for any alteration of the tenant's contract by the landlord's act in accepting for several months amounts of rent less than was due under the lease, for which he gave receipts in full.

3. PRINCIPAL AND SURETY ⚷88 — ACCEPTANCE FOR A TIME OF REDUCED RENT NOT DISCHARGE OF SURETIES IN LEASE.

Acceptance by a landlord from his tenants of a reduced rent for several months, for which he gave receipts in full, in no way altered or extended the liability of the sureties on the tenants' bond in the penal sum of $3,000 to work their discharge.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by S. C. Dodge against J. W. Chapman, W. L. Altenburg, and others. From judgment against plaintiff as to the named defendants, he appeals. Reversed, and case remanded for new trial as to the named defendants.

W. J. Ford and Ford & Hammon, all of Los Angeles, for appellant.

Arthur Wright and George W. Somerville, both of Los Angeles, for respondents.

SLOANE, J. The plaintiff, Dodge, executed a lease of a rooming house property to one Plevros. The lessee was not privileged to assign without lessor's written consent. An agreement was made whereby plaintiff consented to an assignment negotiated by Plevros to the defendants Chas. D. Chapman and Anna E. Chapman, husband and wife, on condition that the Chapmans furnish a bond in the penal sum of $3,000 for their faithful performance of the conditions of the lease. The Chapmans furnished such bond, with themselves as principals, and the defendants J. W. Chapman and W. L. Altenburg as sureties. The assignment was made by the original lessee, and accepted by the assignees; and the lessor, plaintiff here, indorsed on the lease his written consent to the assignment. The lease was for a term of several years, and the stipulated rent for the period covered by this action was $485.75 per month, payable in advance. The rent payments were kept up for a considerable time, but ultimately became in arrears in the sum of $1,863; whereupon the lessor, Dodge, brought this action against the Chapmans, assignees under the lease, and J. W. Chapman and W. L. Altenburg, sureties on the bond. The assignees and principals on the bond, Chas. D. Chapman and Anna E. Chapman, defaulted, but the two sureties answered, setting up against their liability as guarantors, among other defenses, that the plaintiff, lessor, had entered into an agreement with their principals subsequent to the execution of the bond, whereby the obligation for which they were guarantors had been changed, and that they were thereby exonerated from liability thereon. The trial court found against them as to the other defenses, but made a finding in their favor as to exoneration by reason of unauthorized modification of the lease contract. Judgment was for the plaintiff against the defaulting principals, but against him as to the sureties on the bond. From this latter part of the judgment plaintiff appeals.

As the findings were against the respondents on the other grounds of their defense, and they are not appealing, the only question to be considered here is whether the evidence justified the findings of the trial court that they were exonerated from liability as guarantors by a subsequent alteration of the lease contract.

[1, 2] The alleged alteration or modification of the obligations under the lease rests on the following undisputed facts: After the assignees under the lease had been in possession for a few months, they complained to the plaintiff, their lessor, that they were, during the dull summer months, unable to pay the full stipulated monthly rental of $485.75, and the lessor orally consented to remit from the amount the sum of $50 per month, for the months of June, July, and August of that year, and to accept $435.75 for each of these months in full satisfaction of the rentals for that period. This arrangement was made on the 2d of June, 1914, and thereupon the assignees of the lease gave him, their lessor, a check for $435.75 for the month of June, and he in turn gave them a receipt for the month's rent, designating therein the full monthly rental of $485.75. This procedure was repeated for the months of July and August, and was continued for two or three months thereafter, when the assignees of the lease defaulted in, and entirely discontinued, the payment of any rent at all, resulting in the arrears of rentals which form the basis of this action. There was no consideration to plaintiff for the reduction of rent granted, and the agreement to make the reduction was not in writing. The trial court found that this agreement was an alteration of the lease contract, and that it was "partly oral and partly written"; but to reach this conclusion the court erroneously, we think, construed the checks given for the reduced amount, and the receipts given therefor in full payment, as being memoranda or writings constituting part of such an agreement. These instruments may be evidence tending to show that the plaintiff received a less amount than the lease called for in full payment of the monthly rental, but they do not evidence any contract to reduce the rent. The receipt, which was the only writing signed by the plaintiff relating to this matter, on its face, in fact, indicates that the full amount of the rents was collected. The checks drawn by the assignees of the lease merely constitute an instrument of payment of a certain sum of money, and have no more evidentiary force than would bank bills received in payment under the same circumstances. The agreement, then, to receive for a limited time, a reduced monthly rental was not in writing, and was supported by no consideration. As an agreement in modification of the lease, it therefore was without force or effect. There was no period of time, under the lease, when any installment of rent was due and unpaid, that the terms of the lease could not have been enforced for the full amount. In legal effect, then, we have merely this condition: For a period of several months the lessor accepted, without any binding agreement or obligation to do so, a less amount than the lease called for in full satisfaction of the rentals for that period. Conceding that the obligation to pay the stipulated monthly rental was satisfied by these payments, yet the contract was not altered any more than it would have been if the full amount had been paid. It was no concern of the sureties how these payments were made. The landlord could have taken his pay in "chips and whetstones" if he saw fit. He could have given back to his tenants the whole amount of the rents received, had he wanted to, without changing the obligations of the lease.

Section 2819 of the Civil Code provides that "a guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended." It might just as reasonably be argued that the acceptance, when due, of the full amount of monthly rentals called for by the lease, "alters" the original obligation of the principal, and "impairs and suspends the rights of the creditor against the principal," as to make such contention as to the acceptance of a partial payment in full satisfaction. Either way it does, in a sense, alter the obligation. It terminates it. But the terms of the contract have not been changed. If the lessor had entered into a binding and enforceable agreement changing the terms of the lease as to the monthly rentals, a different question would be presented. But here the verbal agreement on which the reduced payments were received was invalid. "A promise by a creditor, which for any cause is void, or voidable by him at his option, does not alter the obligation or suspend or impair the remedy," within the meaning of section 2819. (Civ. Code, § 2820). The acceptance of a lesser amount in satisfaction of the monthly installment then due was a matter outside of, and entirely independent of, the lease contract. The alleged oral agreement never had any executory force as a contract modifying the lease, however effective the payments may have become after their acceptance in full satisfaction of the rent installments.

Such seems to have been the effect of the ruling of the Supreme Court in Sinnige v. Oswald, 170 Cal. 55, 148 Pac. 203, and in Estate of McDougald, 146 Cal. 196, 79 Pac. 875. In the former of these decisions, where it was claimed that the lease was changed by the acceptance of a reduced rent, the court says:

> "The finding that there was no change in the terms of the lease in the alleged particular of reducing the rent is sustained by the evidence. Concessions of the kind that were shown by the defendants, when supported by a consideration, are valid to the extent that a lower rent has been tendered and accepted as satisfaction in full of the installments thus paid. They are not sufficient to establish a change in the written contract so as to affect the amount of future installments."

In the case just cited there was also involved the liability of guarantors, as in the case at bar; but the guarantors there did not raise the question of exoneration by the alleged change in the terms of the rentals. That such voluntary reductions in rent do not discharge guarantors is held in the following decisions: Preston v. Huntingdon, 67 Mich. 139, 34 N. W. 279; Dodd v. Vucovich, 38 Mont. 188, 99 Pac. 296; Ullmann Realty Co. v. Hollander, 66 Misc. Rep. 348, 123 N. Y. Supp. 772. The rule contended for by respondents, and laid down by section 2819 of the Civil Code, that any unauthorized alteration in the terms and obligations of the contract secured releases the sureties, and this irrespective of whether or not the sureties are injured or benefited by the change, is conceded. They have a right to stand on the precise contract guaranteed by them, and are bound by no other. But, as already pointed out, the alteration must be one that affects the executory character of the contract.

We find that most of the authorities presented by respondents are not applicable here, for the reason that they deal with a state of facts which show that valid and enforceable alterations in the obligation under consideration had been made. Perhaps the strongest case presented by respondents is that of Driscoll v. Winters, 122 Cal. 65, 54 Pac. 387, where the guarantor was exonerated because of a change in the contract for which he had pledged himself, which was for the payment by his principal for 16 three-gallon cans of milk daily for the period of one year. It appears in that case that "the contract was modified to the extent that Winters [the principal] should purchase only 13 cans of milk daily." Just how this change in the obligation of the principal was effected does not appear; but the court finds that the contract was altered in this respect, and we are bound to presume that it was done in such a way as to make a valid and binding change in the terms of the contract. Respondents rely, also, on the rule laid down in Tuohy v. Woods, 122 Cal. 665, 55 Pac. 683; but in that case the creditor gave a written extension, for a valuable consideration, on the liability covered by the guaranty. As against this we find, in the case of Stroud v. Thomas, 139 Cal. 274, 72 Pac. 1008, 96 Am. St. Rep. 111, where the surety claimed his discharge by reason of an extension of time of payment of the liability for which he had become a surety, that there was no exoneration of the surety by reason of the fact that the agreement for extension was invalid and unenforceable for want of consideration. The court says:

> "The principal defense in the case is that arising upon the extension of time. The court finds that on August 1, 1898, after the note became due, the plaintiff received $150 on account of overdue interest, and thereupon agreed to extend the time of payment one year, and that the agreement was without consideration. * * * This payment * * * merely satisfied to that extent the debt due, and did not constitute a consideration for the agreement. A promise made without any consideration is not binding. Consequently the agreement for the extension of time was not a valid promise, and would not bind the plaintiff to forbear suit upon the note during the time specified in the agreement."

It is true that the sureties' liability arose here on the original instrument, and was not an independent contract of guaranty; but the principle involved is applicable, as the surety would have been discharged from liability if the agreement extending time to the principal obligor had been enforceable. "An agreement for forbearance founded on an unenforceable agreement, even though carried out by the creditor, will not discharge the surety." Brandt on Suretyship (4th Ed.) § 376; 24 Am. & Eng. Enc. of Law, pp. 826, 829; Halliday v. Hart, 30 N. Y. 474; Ingels v. Sutliff, 36 Kan. 444, 13 Pac. 828.

[3] There is no merit in respondents' argument that the reduction in the rent in this case extended the liability of the sureties. The $3,000 named in the bond is the amount of the penalty of the bond, and the liability of the sureties extended to any unpaid rents during the term of the lease, not exceeding the aggregate amount of $3,000. The acceptance of a reduced rent, when taken in full satisfaction of the amount due, in no way changed the liability on the bond. We think the trial court misapprehended the effect, as evidence of a written agreement, of the checks and receipts exchanged between the parties in the reduced payment of the monthly rentals.

Appellant asks for an order directing judgment in his favor against the sureties on his bond. This we cannot do under the findings.

The judgment is reversed, and the case remanded for a new trial as to the defendants J. W. Chapman and W. L. Altenburg.

We concur: FINLAYSON, P. J.; THOMAS, J.

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JUDSON MFG. CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

(S. F. 9039.)

(Supreme Court of California. Sept. 26, 1919. Rehearing Denied Oct. 23, 1919.)

1. MASTER AND SERVANT 🔑375(2) — WORKMEN PERFORMING "SERVICE" ON ARRIVAL AT PLACE OF WORK.

An employé, who has arrived at his employer's premises and is thereon for purpose of immediately commencing his actual work, is performing "service" incidental to his employment, within Workmen's Compensation Act, relative to right of compensation for his injury then occurring.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Service.]

2. MASTER AND SERVANT 🔑375(2)—INJURY TO WORKMEN CROSSING TRACKS IN PLANT "ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

Accident to employé on his way to work, by being struck by another's train, in use of a necessary mode of ingress, across railroad tracks, provided and required by the employer, and as between employer and employés constituting part of the employer's plant, arose out of and occurred in the course of his employment, within Workmen's Compensation Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

Shaw and Melvin, JJ., dissenting.

In Bank.

Prosperina Gallia was awarded compensation by the Industrial Accident Board for death of Felice Gallia, and the Judson Manufacturing Company, employer, and the California Casualty Indemnity Exchange, insurer, apply for certiorari. Award affirmed.

Rehearing denied; SHAW and MELVIN, JJ., dissenting. ANGELLOTTI, C. J., votes for rehearing.

Redman & Alexander, of San Francisco, for petitioners.

Michele Cimbalo, of San Francisco, for respondent Gallia.

Christopher M. Bradley, of San Francisco (A. E. Graupner and Warren H. Pillsbury, both of San Francisco, of counsel), for other respondents.

LENNON, J. Certiorari to review the action of the Industrial Accident Commission in awarding compensation for the death of one Felice Gallia, who, on April 1, 1918, was struck and killed by an engine operated by the Southern Pacific Company while he was pursuing his way to work along a path crossing the latter's tracks.

Gallia was a laborer in the employ of the Judson Manufacturing Company; his duties consisting in attending an open-hearth furnace. The furnace and factory of the company are situated on the east shore of San Francisco Bay. The premises are bounded on the west by the bay shore and on the east by the right of way on which the Southern Pacific Company maintains numerous tracks for its through and local trains. A path crossing this right of way, and leading from the end of a public street at its eastern extremity directly to the gate of the factory yard at its western extremity, was the sole means of ingress and egress for the employés of the Judson Manufacturing Company to and from its factory and furnace. It was, moreover, the means of access required and authorized by the company. This path was not a public highway. The crossing was, in fact, dominant as to user in the employer, servient to its purposes, and intimately associated with its plant as a part of its necessary establishment. The company had, indeed, even claimed a lawful easement over the crossing for the purposes of the plant. At the time of his injury and death, which occurred about five minutes before the beginning of his shift, Gallia was proceeding from his residence to the factory, and had reached a point on the path in question about 20 feet east of the factory gate.

The Industrial Accident Commission found that Gallia's death resulted from an injury arising out of his employment and received while he was performing a service growing out of, incidental to, and in the course of that employment. Petitioner insists that the facts do not support the finding.

[1, 2] The right to compensation is by no means restricted to those cases where the injury occurs while the employé is actually presently manipulating the tools of his calling. It would be unnecessary to the decision

of this case to attempt to formulate a precise and comprehensive definition of the term "service," as used in the statute now under consideration. It seems to us, however, that when an employé has arrived at the premises of his employer, and is thereon for the purpose of immediately commencing his actual work, he is performing service incidental to his employment. The facts stated above show that as between the employer and his employés the path across the Southern Pacific Company's right of way was in fact a part of the employer's plant, and that at the time of his death Gallia was there solely in the line of his duty as an employé. It would be a harsh and indefensible rule that would withhold compensation from an employé engaged in traversing a dangerous pathway in his employer's building on his way to his own particular place of work therein, on the ground that he had not yet entered upon the real work of his employment. We can perceive no difference in principle between such a case and the case at bar.

There have been a great number of cases in other jurisdictions in which the question here involved has been discussed—namely, as to the point at which a person who has been injured while away from his actual place of work leaves his employment. The line is a very fine one. Mole v. Wadworth, 6 B. W. C. C. 129; Richards v. Morris, [1915] 1 K. B. 221; Gane v. Norton Hill Co., 2 B. W. C. C. 42; Moore v. Manchester Liners, 3 B. W. C. C. 527; In re Sundine, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318—in which compensation was awarded. De Constantin v. Pub. Serv. Com., 75 W. Va. 32, 83 S. E. 88, L. R. A. 1916A, 329; Nelson R. Constr. Co. v. Ind. Com. of Ill., 286 Ill. 632, 122 N. E. 113; Ocean Accident, etc., Co. v. Ind. Acc. Comn., 173 Cal. 313, 159 Pac. 1041, L. R. A. 1917B, 336—in which compensation was denied.

In the case last cited we find a statement to the effect that all those accidental injuries which occur while the employé is going to or returning from his work are excluded from the benefits of the act. This sweeping dictum was not necessary to the decision of the case. The accident there considered occurred, it is true, while the deceased was attempting to reach his place of employment; but the mode of ingress which he undertook to use was not one provided and required by his employer, it was in no sense a part of the premises where his work was to be performed, and, finally, it was not in fact a mode of ingress to his work at all. As remarked by Lord Loreburn in Walters v. Staveley Co., 4 B. W. C. C. 305:

> "In applying this act one has to look to the words of the act itself. * * * Other cases are only useful as illustrations of the way in which these words are applied, and nothing, I think, is more fruitless than to attempt to argue by analogy from one set of facts to another set of facts."

This very danger is illustrated by the citation of that case in support of the dictum in the Ocean Accident, etc., Co. Case. It appears from a careful reading of the opinions of their lordships that their decision in the Walters Case was rested solely upon the ground that the contract of employment there involved did not contemplate the use of the pathway where the injury occurred as a necessary incident to gaining access to the place of employment. The facts, in other words, failed to show that as between the company and its employés the path was in fact a part of the company's plant. Gilmour v. Dorman Co., 4 B. W. C. C. 279, also cited in the Ocean Accident, etc., Co. Case, is similarly distinguishable from the case at bar. On the other hand, it appears from Moore v. Manchester Liners, supra, and from other cases cited by the court in the Ocean Accident, etc., Co. Case, as well as from the additional cases which we have cited, supra, that an injury due to the necessary means of access to the employer's premises, required by the employer and contemplated in the employment, is compensable.

We are of the opinion that the facts here disclosed warranted the finding that the accident by which Gallia met his death arose out of and occurred in the course of his employment. It follows that the applicant is entitled to compensation.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LAWLOR, J.; OLNEY, J.

SHAW, J. I dissent. The Constitution authorizes the Legislature to create a liability for compensation to be made to an employé, by the community at large through the medium of the employer, for an injury to such employé incurred in the course of his employment. Const. art. 20, § 21, as adopted in 1911; Western I. Co. v. Pillsbury, 170 Cal. 694, 707, 151 Pac. 398. To this the Legislature has added the condition that the injury must be one that was sustained by accident arising out of the employment. Workmen's Compensation Law 1913 (St. 1913, p. 283) § 12(a); Act 1917 (St. 1917, p. 834) § 6(a). Gallia was employed to work in the factory of the plaintiff. The only entrance to the factory was a gate on the easterly side. From this gate a pathway extended easterly across the adjacent tracks of the Southern Pacific Railroad Company into the end of a public street. This path was commonly used for access to the factory by all persons desiring to enter, and there was no other way or means of access. In going from his home to the factory Gallia was crossing the tracks aforesaid upon this path, and while so doing he was struck by a Southern Pacific engine and killed.

His contract of employment did not provide that he was to be considered in service while going to the factory from his home, nor did it require him to perform any service while crossing said tracks along said path. It did not specify the route he was to travel in going to and from the factory. At the time he was struck he was not engaged in any work or service for the plaintiff; he had not yet reached the place of employment or the factory, but was still on his way thereto. The engine belonged to the Southern Pacific Company, and was in no way connected with the business of the plaintiff or the work Gallia was to do.

The accident had no more to do with his employment than would an accident which occurred any place on the public street by which he reached the path. His act in going there may have been a thing done "in the course of his employment," according to a few rather strained constructions of that phrase in some of the decisions; but that meaning is against the weight of authority. Bradbury's Workmen's Compensation Law (3d Ed.) p. 468. But I know of no case which holds that an injury from an accident so occurring is one "arising out of" the employment. It could be said to do so only upon the theory that the employment created the necessity of going to the place of employment and that this necessity was the cause or occasion of his being in the place of danger. But exactly the same thing could be said if he had been injured anywhere in the street along his usual and proper route from his home to the factory. And so it might be said that almost anything that occurs to the employé while absent from the place of work arises directly or in natural sequence out of his having been, or being required to be, at the place of employment. But the authorities are unanimous that the phrase does not have this comprehensive meaning. I can see no substantial distinction between this case and our decision in Ocean, etc., Co. v. Industrial Accident Commission, 173 Cal. 313, 159 Pac. 1041, L. R. A. 1917B, 336, and the many similar cases cited therein, and in Bradbury's Workmen's Compensation Law, above cited, to the effect that the employer is not liable for an injury to the employé during his journey to or from his place of work.

I concur: MELVIN, J.

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181 Cal. 280

SOUTHERN P. CO. v. RICHARDSON, State Treasurer (three cases). (S. F. 8912–8914.)

(Supreme Court of California. Sept. 24, 1919.)

1. TAXATION ⚷148—RAILROAD NOT LIABLE TO TAX ON RECEIPTS FROM SEPARATE FERRY PLANT.

The gross receipts of a railroad company from operation of a ferry, entirely separate and distinct from its railroad business and unconnected therewith, were not taxable by the state board of equalization at 5¼ per cent., under Const. art. 13, § 14.

2. TAXATION ⚷144 — RAILROAD PROPERTY USED EXCLUSIVELY IN ITS OPERATION ONLY SUBJECT TO TAX.

Const. art. 13, § 14, subd. (a), providing that all railroad companies shall annually pay a tax on their franchises, roadways, rolling stock, "and other property or any part thereof, used exclusively in the operation of their business in the state," refers by the phrase "all railroad companies" and "other property or any part thereof," etc., only to the kinds of business which are declared to be so taxable in the opening paragraph of section 14, and includes only property used exclusively in the operation of such business.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Three actions by the Southern Pacific Company against Friend W. Richardson, Treasurer of the State of California. From judgments for plaintiff, defendant appeals. Affirmed.

U. S. Webb, Atty. Gen., and Raymond Benjamin and Frank L. Guerena, Deputy Attys. Gen., for appellant.

Henley C. Booth, of San Francisco, for respondent.

SHAW, J. In each of these cases the defendant appeals from a judgment in favor of the plaintiff. Each case is an action to recover taxes paid to the state under protest for a single fiscal year ending on June 30th. Case No. 8912 was for $21,415.26, paid for the year ending in 1916; case No. 8913, for $23,507.98, paid for the year ending in 1917; and case No. 8914, for $25,920.31, paid for the year ending in 1918.

These taxes were levied by the state board of equalization, under the assumed authority of section 14, article 13, of the Constitution. The sole question for determination is whether or not the state board was correct in the position that the plaintiff was liable, under this section, for the taxes upon the gross receipts from operation of the particular property upon which these several amounts were assessed. The Southern Pacific Company, as is well known, operates an extensive system of railways within the state. As adjuncts thereto, at its Oakland and Alameda rail terminals it operates a number of ferryboats, connecting with its railway lines, to carry its freight and passengers between said terminals and the city of San Francisco, in order to complete the carriage from its different lines of railway to that city.

In addition to these railroad lines and connecting ferry lines, it operates a system of ferryboats between San Francisco and Oakland, known as the "Creek Route." These boats carry passengers and freight from a slip on the San Francisco side to a point in the estuary between Oakland and Alameda near the foot of Broadway in the city of Oakland. They do not connect with any railroad line of the plaintiff, nor with any other railroad line. So far as its business is concerned, it could as conveniently be operated by any other company, since it has no connection whatever with the railroad system operated by the plaintiff. An account of the receipts from this business is kept separate and distinct from the receipts from railroad lines and other ferryboats above mentioned belonging to the plaintiff. They are paid into the general treasury of the plaintiff, and are used by it for any purpose it sees fit. Under the direction of the state board, the plaintiff reported thereto for the year ending 1916 that its gross receipts from the operation of the said Creek Route during said fiscal year amounted to $407,909.82. Said report also included other sums as the gross receipts from the railroad lines and other ferryboats above mentioned. The state board computed the sum of 5¼ per cent. upon said sum as the amount of taxes to be assessed against said plaintiff on account of the gross receipts from said Creek Route, which sum the plaintiff thereupon paid under protest. A similar process took place with respect to the other cases.

The decision of the case depends upon the interpretation to be given to the language of section 14, above referred to. The contention on behalf of the state is that it authorizes an assessment of the fixed percentage upon the gross receipts from operation of the plaintiff company upon every kind of business which it carries on, whether a railroad business or of some other character not necessary for its railroad business, nor connected therewith. The plaintiff, on the other hand, insists that the section authorizes such tax only upon its railroad property, and the necessary or convenient adjuncts thereto. In order to clearly exhibit the question, we quote the parts of the section which relate thereto, as follows:

> "Sec. 14. Taxes levied, assessed and collected as hereinafter provided upon railroads, including street railways, whether operated in one or more counties; sleeping car, dining car, drawing room car and palace car companies, refrigerator, oil, stock, fruit, and other car-loaning and other car companies operating upon railroads in this state; companies doing express business on any railroad, steamboat, vessel or stage line in this state; telegraph companies; telephone companies; companies engaged in the transmission or sale of gas or electricity; insurance companies; banks, banking associations, savings and loan societies, and trust companies; and taxes upon all franchises of every kind and nature, shall be entirely and exclusively for state purposes, and shall be levied, assessed and collected in the manner hereinafter provided. The word 'companies' as used in this section shall include persons, partnerships, joint stock associations, companies, and corporations.
>
> "(a) All railroad companies, including street railways, whether operated in one or more counties; all sleeping car, dining car, drawing room car, and palace car companies; all refrigerator, oil, stock, fruit and other car-loaning and other car companies, operating upon the railroads in this state; all companies doing express business on any railroad, steamboat, vessel or stage line in this state; all telegraph and telephone companies; and all companies engaged in the transmission or sale of gas or electricity shall annually pay to the state a tax upon their franchises, roadways, roadbeds, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, and other property, or any part thereof used exclusively in the operation of their business in this state computed as follows: Said tax shall be equal to the percentages hereinafter fixed upon the gross receipts from operation of such companies, and each thereof within this state."

[1] The theory advanced on behalf of the state is, in effect, that if any railroad company or person, operating a railroad within this state, should engage in the business of operating another and separate public utility within the state, not of a character taxable exclusively or at all for state purposes under section 14, and not necessary, or convenient for the operation of its or his railroad, nor in any manner connected therewith as an adjunct thereto, the gross receipts from the operation of such separate public utility must be included with the gross receipts from the operation of the railroad system and connections, and the fixed percentage computed upon the whole sum. If this is correct, it would necessarily follow that the property used exclusively in operating such separate public utility would be exempt from local taxation for municipal or county purposes. The interpretation contended for would enlarge section 14 by bringing such separate public service business within its scope, in all such cases, although it is not of a class mentioned therein. It would do more. Section 1 of article 13 of the Constitution provides that all property in the state shall be taxed in proportion to its value, except as otherwise provided in the article. The property of the separate public utility would not be within the exception and it would, under section 1, be subject to local taxation for municipal and county purposes; whereas, under the interpretation claimed for the state, it would be excluded therefrom. This would not only be putting into section 14 a provision not contained in it, and inserting in section 1 an exception not there contained, but it would also be establishing a peculiar and unreasonable discrimination with respect to public utilities or kinds of business of a class not declared to be taxable for state purposes.

To make the proposition clear, if further exposition is necessary, we may take the very case here presented. Ferries are not mentioned in section 14; therefore the property used in the operation of a ferry is not taxable exclusively or at all for state purposes under that section, but is subject to local taxation in proportion to value, under section 1. It will be conceded that all ferries not operated by a railroad company which is also operating a railroad are thus subject to local taxation. Local taxation of all such ferries is authorized by section 3643 of the Political Code, and if they connect more than one county, the stationary property shall be taxed in the county in which it is situated and the intangible property and water craft assessed in equal proportions in the respective counties. But under this claim the mere fact that the Creek Route ferry happens to be operated by the Southern Pacific Company, which is also operating a railroad within the state, would cause the property of this particular ferry to be excluded from taxation for local purposes in the city and county of San Francisco, the county of Alameda and the city of Oakland, and make it taxable exclusively for state purposes under section 14, while all other ferries operating between said counties not owned by a railroad company or operating in connection with a railroad would be taxed only for local purposes. Also, it would follow that, if the Creek Route ferry should hereafter become the property of some other corporation which was not operating a railroad, its property would again become subject to local taxation. Such uncertain and unusual results were clearly not within the contemplation of the framers of section 14 of article 13 of the Constitution.

[2] The appellant argues that since subdivision (a) of section 14, which declares the duty to pay the taxes provided for in the opening paragraph, begins with the phrase, "all railroad companies," and, in describing the kinds of property to be so taxed, closes with the phrase, "and other property, or any part thereof used exclusively in the operation of their business in this state," it must follow that persons or corporations carrying on any business of a kind mentioned in the opening paragraph must be taxed in the same manner, and for state purposes exclusively, upon property which they may have and use exclusively in the operation of a separate public utility business in this state which otherwise would not be so taxable. If the meaning of the phrase "their business in this state" is to be enlarged so as to include any business other than the kinds made taxable by the first paragraph of the section, it could as well be said to include any kind of business carried on by such person or company, such, for example, as a farm, or a dry goods store. This would be absurd and the appellant does not so contend. The argument is not sound. The entire context implies the contrary. The only reasonable interpretation is that the phrase refers only to the kinds of business which are declared to be so taxable in the opening paragraph and includes only the property which is used exclusively in the operation of such business. It was so held, in effect, by this court in Lake Tahoe, etc., Co. v. Roberts, 168 Cal. 551, 143 Pac. 786, Ann. Cas. 1916E, 1196. We do not mean to suggest that ferryboats and the necessary adjuncts used only to connect separate parts of the railroad line, such as those at Port Costa, or those used only to connect its rail lines with its terminals at San Francisco, are not to be taxed for state purposes only as provided in section 14.

It is ordered that the judgment in each of the above-entitled cases be affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; MELVIN, J.; WILBUR, J.; LAWLOR, J.; LENNON, J.

(181 Cal. 253)

BURROWS et al. v. PETROLEUM DEVELOPMENT CO. (L. A. 4256.)

(Supreme Court of California. Sept. 24, 1919. Rehearing Denied Oct. 23, 1919.)

1. CONTRACTS 🔑169 — TO BE CONSTRUED WITH RESPECT TO SITUATION OF PARTIES.

A contract should be construed with respect to the situation in which the parties were at the time it was made.

2. CONTRACTS 🔑213(1) — CONSTRUCTION OF AGREEMENT TO DRILL OIL WELL DILIGENTLY.

Contract whereby defendant oil development company agreed to drill diligently during the life of plaintiff's options on the land involved *held* not to require defendant to reach 2,500 feet depth within the period of the options, even if oil were not found, but merely to drill diligently during the life of the options until 2,500 feet depth was reached, or oil in specified quantities found.

3. CONTRACTS 🔑170(2) — CONSTRUCTION BY PARTIES OF OIL WELL DRILLING AGREEMENT.

Defendant oil development company, obligated to drill diligently only during the life of plaintiff's options, or until a depth of 2,500 feet was reached, *held* not to have construed its contract otherwise by continuing to drill after the period of the options had expired; action referable to its desire to realize on its own investment.

4. CONTRACTS 🔑241 — CONTRACT TO DRILL OIL WELL DURING OPTIONS ALTERED BY TAKING UP OF OPTIONS.

Obligation of defendant oil development company under its contract with plaintiff to drill diligently on land covered by plaintiff's options during the period of the options, or until a depth of 2,500 feet was reached, or oil in specified quantities found, *held* not changed by defendant's action in taking up the options.

In Bank.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by F. R. Burrows and others against the Petroleum Development Company, a corporation. From judgment for plaintiffs, defendant appeals. Reversed.

E. W. Camp, U. T. Clotfelter, M. W. Reed, and Robert Brennan, all of Los Angeles, for appellant.

John T. Thornton, of San Francisco (F. W. Henshaw and Henshaw, Black & Goldberg, all of San Francisco, of counsel), for respondents.

OLNEY, J. This is an appeal by the defendant from a judgment against it for $40,000 as damages for a breach of contract. The contract was one between the plaintiff Burrows and the defendant, and the other two plaintiffs are interested only as assignees of Burrows of partial interests under the contract. For simplicity in discussion, we shall treat the action as one by Burrows as sole plaintiff. The facts are:

In May, 1909, Burrows held five options for the purchase of adjoining tracts of land in the vicinity of the Kern county oil field. The land had not been explored for oil. Each of the options specified the amount to be paid as purchase price and the time within which it had to be paid. One of the options, which we may call option A, contained no provision for drilling; but each of the others provided as a condition of its continuance during the term specified that the option holder should immediately begin and diligently prosecute the drilling of a well on the land covered by option A.

Shortly after acquiring these options, Burrows assigned them to the defendant under the contract involved here. That contract provided, in effect, that the defendant should immediately begin and diligently prosecute the drilling of a well on the land covered by option A to a depth of at least 2,500 feet, unless oil in certain specified quantities should be sooner found. The alleged breach of contract for which damages are here claimed is the failure of the defendant to drill a well to this depth of 2,500 feet. If oil were not found within this depth in the quantity specified, the contract provided that the defendant had the right to terminate the agreement. On the other hand, if oil were found, the defendant was obligated to exercise the option and purchase the lands, in which case it was to convey certain specified portions thereof equal to three-eighths of the acreage to the plaintiff. The contract also provided that the well should be sunk at a point on the land included in option A to be designated by the plaintiff, but that neither the well nor the governmental subdivision on which it was located should be conveyed to the plaintiff.

Following the making of the contract the defendant began the drilling of a well at a point designated by the plaintiff and proceeded diligently with it. When the well had reached the depth of nearly, but not quite, 2,500 feet, a showing of oil was found, but not in the quantity specified by the contract as relieving the defendant of its obligation to continue drilling, or as imposing on it the obligation to take up the options. The time, however, of option A, which had been extended, was about to expire. It was the key option, as the well was on the land covered by it, and the other options were conditional on drilling a well on that land. The plaintiff and defendant, acting through the plaintiff, attempted to secure a further extension of option A, but were refused. Thereupon, although, as we have said, the defendant was under no obligation to do so, it took up the options and conveyed to the plaintiff the portion of the land which he was to receive.

The defendant continued with the work on the well, but the greatest depth reached was either 2,465 or 2,485 feet, or 35 or 15 feet, as the case may be, short of the specified distance. At this point, through some mishap, which it is not claimed was not reasonably incident to such operations, the well was spoiled. The defendant thereupon promptly started another well, and proceeded with its drilling until a depth of 800 feet or thereabouts was reached, when this well also was spoiled. The defendant then refused to drill again, and this refusal is the alleged breach of contract relied on. There is no allegation or claim that up to this time the defendant had not been proceeding diligently with the drilling as required by the contract. The time when the second well was spoiled, and the defendant ceased drilling, was something over a year and a half after the expiration of the prescribed time of option A as last extended.

The only allegation of damage in the complaint is that the cost of drilling a 2,500-foot well at the point fixed by the contract—such point being on the defendant's, not the plaintiff's, land—would be $40,000. The only proof of damage at the trial was proof of this cost, and this cost is the amount allowed the plaintiff by the judgment of the trial court.

Two questions arise upon the foregoing facts. The first is: Did the refusal of the defendant to go on with drilling after the failure of the second well, and at a time subsequent to the expiration of the period of the options, constitute a breach of its contract? The second is: Assuming a breach, is the cost of such well, as distinguished from its value to the plaintiff—that is, its beneficial effect upon the value of his land, he having no direct interest in the well—the correct measure of damages?

[1, 2] In order to determine whether or not there has been a breach of the contract, it is necessary to determine just what the obligation was which it is claimed was broken. The contract should, of course, be construed with respect to the situation in which the parties were at the time it was made. That situation was that the plaintiff held options merely on the land to be drilled, and that these options would expire at the end of a fixed and rather short period. Under these circumstances the contract transferred the options from the plaintiff to the defendant upon the conditions that the latter was to drill on the land, and, if oil were found in paying quantity, such quantity being specified, it was to take up the options, and that, if the options were taken up, a certain portion of the land was to be conveyed to the plaintiff. The portions of the contract with reference to the defendant's obligations to drill and to take up the options, which are the portions particularly material here, are as follows, epitomizing them in part:

> "First. That the company [the defendant] on or before 22d of May, 1909 (the contract is dated May 8, 1909), shall commence the work of" drilling a well at a designated point, "and will thereafter prosecute the drilling of such well diligently to a depth of at least 2,500 feet unless crude petroleum" in certain specified amounts should be developed sooner. "Accidents, breakage of machinery, and other casualties incident to the drilling of such well shall be excepted in determining whether such well is being or was drilled diligently.
>
> "Second. That if crude petroleum shall be developed in said well in the quantities above stated, the company shall exercise all or any (and every?) of said options and purchase all or any of said lands in accordance with their terms from the givers of said options if the latter or any of them can convey a title thereto free and clear of incumbrances."

In agreeing upon the foregoing provisions, the parties must have had in mind that the right to drill would expire with the expiration of the options, and that the only way they had as of right to extend this time was to take the options up. Nevertheless, the only provision in the contract requiring their taking up is the one quoted that they shall be taken up if oil in certain quantities is found, in which case the defendant is no longer obliged to continue drilling. It is apparent, therefore, that the parties contemplated both that drilling should cease upon the expiration of the options if they were not taken up, and also that the defendant was under no obligation to take them up unless oil in paying quantities were found before that time.

Nor is there anything in the contract requiring the defendant to reach a depth of 2,500 feet *within the period of the options*, even if oil were not found. Its obligation is to drill diligently, and the provision relative to reaching a depth of 2,500 feet is merely that the defendant can stop when this depth is reached, even if oil be not found. It is a limitation on the obligation, not an imposing of an affirmative and most drastic burden. There is a very great difference between agreeing to drill diligently during a limited and fairly short time until a depth of 2,500 feet is reached and agreeing absolutely to reach such depth within that time. There is nothing whatever in the contract to support the view that the defendant insured a well 2,500 feet deep within the period of the options, unless oil were found sooner, diligence or no diligence; but, on the contrary, the express language of the obligation is only that the defendant shall "prosecute the drilling of such well diligently."

The necessary construction of the contract, the thing which the parties must of necessity have had in mind, was, therefore, that the defendant's obligation to drill diligently would cease with the expiration of the options, unless sooner terminated by reaching a depth of 2,500 feet or finding oil, and that there was no obligation resting on it to reach that depth within that time, provided only that it drilled diligently. This conclusion can be tested by assuming in this case that the defendant did not take up the options, as it was not required to do, and had gone on, without reaching a depth of 2,500 feet or finding oil, drilling diligently until the options expired and it could no longer drill. Could it be claimed under these circumstances that the defendant had not fulfilled its contract to the letter? It is certain that it could not.

We have devoted this much time to what seems to us a very apparent proposition, namely, that the defendant's obligation to drill was only to drill with diligence during the period of the options, because we believe it is the essential point in the case. The defendant did drill diligently during the entire period of the options, and in fact for more than a year and a half after, and no claim is made here that it did not. The claim is that long afterwards it refused to continue further.

But, it may be said, the options did not expire, the defendant took them up, and its right to continue drilling for the benefit of itself and the plaintiff was therefore not lost. But the question here is not one as to the right to continue, but as to the obligation to continue; and that obligation must be determined, as it must have been understood at the time the contract was made. At that time the parties must clearly have understood that the defendant's obligation would expire with the period of the options. It would be indeed a remarkable construction to put upon the contract to say that it meant that if the defendant, voluntarily and without any obligation so to do, should take up the options for the joint benefit of itself and the plaintiff at an expense of $33,500, it would do so only under penalty of being obligated to continue indefinitely, no matter what the time and expense might be, to drill until either a well 2,500 feet deep was obtained or oil was found. Yet this action, unwittingly in all probability, is nothing more than an attempt to impose just that penalty. The defendant was under no obligation to take up the options. All it had to do at the time it took them up was to go on diligently with the well, as it was doing and did, and let the options expire, and it would be free and clear of any reasonable possibility of claim. It would be wholly unreasonable to hold that by taking them up it assumed any obligation different or more extensive than the contract originally provided for, particularly one so different and so much more burdensome as the absolute obligation here insisted on. The taking up of the options worked no detriment to the plaintiff, and could work none, but quite the contrary. It could only work a benefit to him, and did so. Its sole effect has been that the plaintiff has acquired without cost to him several hundred acres of land, which he would otherwise not have received, and has had the benefit, if there be any, of continued exploration by the defendant for a very considerable period longer than it was contemplated by the contract such exploration without discovery would continue. Such a change of position, wholly beneficial to the plaintiff, cannot reasonably be made a ground for imposing on the defendant an obligation which most certainly it did not otherwise assume.

It may be said, also, that if the options had been extended, instead of being taken up, the defendant's obligation to drill would have continued during the time of such extension, and the effect of taking them up was to secure such extension. The key option, option A, was in fact extended twice, and it was only on the approach of the expiration of the second extension that the land was purchased. It is probably true that by these extensions, obtained at its instance, or at the joint instance of itself and the plaintiff, the defendant's obligation to drill was likewise extended, and that the same would have been true, if further extensions had been similarly obtained. But the defendant's obligation in the case of extensions merely of the options would still remain essentially the same. It would be still an obligation to drill diligently during a certain time, and as such might fairly come within both the scope of the contract and the original contemplation of the parties. But to give the same effect to a taking up of the options, is, as we have said, to impose a wholly different obligation. The time element is removed, and the defendant's obligation is no longer one merely to drill diligently, but is one to insure a well 2,500 feet deep, unless oil be found at a less depth, from which no amount of diligence will excuse it. So different an obligation cannot be said to come within the scope of the contract or the original contemplation of the parties.

[3] It may be said, also, that the defendant, by continuing to drill after the period of the options had expired, itself put a construction on the contract that it was obligated so to continue. This can be truly said only if the natural inference from the fact of its continuing is that it did so because it believed itself obligated. It is only in case the defendant's action in continuing to drill can be reasonably explained only on the supposition that it believed itself bound to do so that it can be said that its action evidences a belief on its part that it was so bound. But this is not the fact. There is another and most apparent explanation. The defendant was then the owner of several hundred acres of possible oil lands. It had invested in them some $33,500 as their purchase price, plus the cost up to that time of the well it was drilling. This cost was in the neighborhood of $25,000 more. Under these circumstances, the most natural thing for the defendant to do was to continue its exploration, whether it was obligated so to do or not, in order to develop the property it had acquired and to realize on the investment it had made. Its action in continuing exploration is fully explainable on this ground, and does not give rise to any inference that the defendant continued because it believed itself bound to continue. Bound or not bound, the natural thing for it to do was to continue.

Finally, it is argued that the terms of the several deeds by the defendant to the plaintiff made as each of the options was taken up and conveying to the plaintiff the portion of the land he was to have, indicate that the obligation of the defendant to drill was to continue. The language relied on varies slightly as between the different deeds, but the variations are immaterial. Taking the language in one as typical, it consists in a recital that the deed is made by the defendant "in fulfillment of a *part* of its obligations" to the plaintiff under the contract here involved. The answer to this argument is that the recital is strictly accurate under any theory of the case. Each deed—conveying only a part of the land the plaintiff was to have—was by itself of necessity in part fulfillment only of the defendant's obligation, no matter what view may be taken of the contract.

[4] Summing the discussion up, it seems to us that the fair construction of the contract—in fact, the only possible reasonable con-

struction—is that the defendant's obligation under the contract at the time the parties made it was to drill diligently through the period of the options, unless within that period a depth of 2,500 feet was reached or oil in the paying quantities specified by the contract found. It also seems to us clear that this obligation was not changed by the taking up the options, and in particular it was not transformed into the very different obligation of guaranteeing either a well 2,500 feet deep or the finding of oil. Such being the obligation of the defendant, its refusal to continue drilling long after the expiration of the period during which it was required to drill was not a breach of its contract.

It follows that plaintiff has no cause of action on the pleadings and proof presented. This conclusion renders unnecessary a consideration of the question as to the measure of damages.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; LAWLOR, J.

WILBUR, J. (concurring). I concur in the judgment for the reasons stated in the main opinion, and for the further reason that if we assume, as the respondent contends, that the agreement required the appellant to sink the well to a depth of 2,500 feet, the damages for breach of such an agreement, under the circumstances stated, are too speculative to justify a recovery of substantial damages. In this case the well was sunk within 15 feet of the required depth, oil was struck, and property values were correspondingly enhanced, and upon the strength of that showing the appellant exercised the options and conveyed to the respondent all the land it was required to convey in the event that the well had been completed or oil struck in paying quantities. If the well had been sunk 15 feet deeper, it would either have enhanced or depreciated the value of the surrounding property, and the question of whether it would enhance or decrease such value is purely speculative. Escondido Oil Co. v. Glaser, 144 Cal. 494, 77 Pac. 1040; McComber v. Kellerman, 162 Cal. 749, 124 Pac. 431; Taylor v. N. P. C. R. R. Co., 56 Cal. 317.

I concur: LENNON, J.

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181 Cal. 286

HAMBEY v. WOOD et al. (S. F. 8299.)

(Supreme Court of California. Sept. 24, 1919.)

1. Landlord and Tenant 🔑63(1, 2)—Right of Tenant to Set Up Acquired Title as Defense to Specific Performance Against Landlord.

Though tenant at will by written agreement between him and purchaser of property terminated tenancy at will and became purchaser's tenant for a term certain, he was not precluded from acquiring title from the original owner, nor in the purchaser's action for specific performance is he precluded from setting up any title he may have so acquired; the purchaser not seeking to recover for the use and occupation under the lease, but having put the title in issue.

2. Vendor and Purchaser 🔑228(4)—Notice of Prior Contract Voidable Under Statute of Frauds Does Not Affect Title of Vendee.

That a purchaser of land took it with notice of a prior contract of sale, voidable under the statute of frauds, does not affect his title unless the case comes within some exception recognized by equity.

3. Frauds, Statute of 🔑119(1)—Equity Will Relieve Against It Where It Would Place Party Resisting in Inequitable Position.

Equity is bound by the statute of frauds, and general relief against it is given only where to allow it to be set up would be to secure to the party relying on it the fruits of actual fraud, or where it would place the party resisting it in an inequitable position; it appearing further there is evidence as good as a writing between the parties.

4. Frauds, Statute of 🔑129(12)—Possession by Tenant on Oral Sale of Land Insufficient.

Possession of land by buyer under oral contract effected by the technical possession of a tenant, who for long before the creation of his tenancy under the buyer had been occupying the land as tenant at will of the seller, *held* not the character of possession which would take the oral contract of sale out of the statute of frauds, not rendering the buyer liable to an action for trespass, and not evidencing clearly the new ownership.

Shaw, J., dissenting in part.

In Bank.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by Richard Hambey against Webster Wood and others. From judgment for defendants, plaintiff appeals. Affirmed.

C. F. Lacey, of Salinas, for appellant.

Alex Webster, of Paso Robles, and Chas. B. Rosendale, of Salinas (Cullinan & Hickey, of San Francisco, of counsel), for respondents.

LENNON, J. The facts upon which this appeal is based are stated as follows in the opinion prepared by Mr. Justice Beasly, sitting pro tempore as a member of the District Court of Appeal for the First Appellate District:

"This action was brought to obtain a decree of specific performance of an oral contract for the conveyance of real property. The record consists of the judgment roll alone. From the findings it appears that on March 12, 1916, plaintiff entered into an oral agreement with defendant Wise for the purchase of the property in question for the sum of $1,000, and that said defendant authorized and directed the plaintiff to take possession of the property, which was distant about one hundred miles from the place where the agreement was made. Prior to, and at the time of the making of this agreement, the property was in the possession of one Webster Wood, who is also a defendant in the action. Wood occupied the land from the fall of 1913 to the fall of 1915 as a tenant of defendant Wise, the owner. Wise had refused to make a further lease of the premises to Wood, but entered into an oral agreement with him, by the terms of which it was stipulated that Wood might buy the land for the sum of $1,400, and pay for it later out of the proceeds of the sale of a crop of grain that he then had on hand, and in the meantime he might retain possession of the land. Wood sold the grain, but did not avail himself of the option of purchase up to the time of plaintiff's agreement. He entered into the possession of the land, however, and began the cultivation thereof, and in the fall of 1915, or in the spring of 1916, but prior to March 12, 1916, when the agreement here involved was entered into, he seeded about fifty acres to barley, which was growing upon the lands at the time plaintiff and defendant Wise entered into their oral agreement of sale, and plaintiff was familiar with this fact. Five days after this oral agreement, and on March 17, 1916, the plaintiff told defendant Wood that he had purchased the real property, and that he had a deed thereto which was of record. The statement, in so far as it related to the deed, was false. The same day plaintiff and defendant Wood entered into a written agreement by the terms of which defendant Wood leased from plaintiff the land in question, together with 820 acres of other land all in one body, from March 17, 1916, to November 1, 1916. Thereafter, on March 25, 1916, while negotiating with Wise relative to the purchase of said land, defendant Wood received notice of all the terms of the agreement between plaintiff and Wise. Upon learning that the agreement of sale was an oral one, and that it had not been concluded, Wood induced Wise to convey him the property for a consideration of $1,400, the deed conveying the same being immediately recorded by Wood. Thereafter plaintiff tendered Wise the sum of $1,000, his purchase price, and upon Wise's refusing to convey, this action was brought."

It further appears, as found by the trial court:

"That the defendant Wood, during the period from March 17, 1916, until the conveyance of said real property by defendant Wise, to defendant Wood, continued to remain in possession of said premises as follows: By continuing to exercise dominion over said premises and to have growing thereon the crop of grain referred to, but during said time did not make any physical entry upon or into said premises."

"In its conclusion of law the trial court holds that the plaintiff never took actual possession of the premises agreed to be conveyed, and that there was no part performance of the agreement sufficient to take the agreement out of the statute of frauds or to enable plaintiff to specifically enforce the same. This conclusion is based upon the finding 'that the plaintiff did not go physically upon the said described real property, and did not take any possession thereof other than by the execution of said lease to the defendant Wood.'"

[1] Even if it be conceded that on March 17, 1916, Wood was a tenant at will holding under Wise, and that, by the written agreement entered into on that date between Wood and Hambey, Wood terminated the tenancy at will and became the tenant of Hambey for a term certain, nevertheless Wood was not precluded from acquiring title to the property from Wise, nor is he precluded from setting up in this action any title he may have so acquired, inasmuch as Hambey is not seeking to recover for the use and occupation of the land under the lease, but has put the title itself in issue. Jochen v. Tibbells, 50 Mich. 33, 14 N. W. 690; McKie v. Anderson, 78 Tex. 207, 14 S. W. 576. It follows that Hambey is entitled to compel a conveyance from Wood only in event the latter acquired title under circumstances rendering it unconscionable for him to keep the land. In other words, the single question presented upon this appeal is whether or not Wood purchased the land in good faith, it not being denied that he paid value.

[2] It is well settled that the fact that a purchaser of land took it with notice of a prior contract of sale, avoidable under the statute of frauds, does not affect his title thereto, unless the case falls within some exception which equity recognizes. 39 Cyc. 1772, and cases cited. It is necessary, therefore, for us to determine whether or not the facts of the case disclose any circumstance serving to lift Hambey's oral contract of purchase out of the statute of frauds on or before the date of the conveyance to Wood.

[3] Hambey contends that his possession of the land was such a part performance of the contract as to take it out of the operation of the statute. As pointed out by Lord Blackburn in Maddison v. Alderson, L. R. 8 A. C. 467, the cases allowing possession given and received to suffice to take a contract for the sale of an interest in land out of the statute of frauds have, in effect, construed the statute relative to agreements for the sale of land as if it contained the words "or unless possession of the land shall be given and received." This construction of the statute has been adopted in California. Calanchini v. Branstetter, 84 Cal. 249, 24 Pac. 149; Moulton v. Harris, 94 Cal. 421, 29 Pac. 706. It only remains to consider whether or not the nature of Hambey's possession was such as to satisfy the requirement of the statute. In considering this question, it is not to be forgotten that equity is after all bound by the statute of frauds, and that in general relief is given against the statute only in two classes of cases, first, where to allow the stat-

ute to be set up would be to secure to the party relying upon it the fruits of actual fraud, and, second, where to allow the statute to be set up would place the party resisting it in an inequitable position, it appearing further that there is evidence just as good as a writing of the agreement between the parties. Fry on Specific Performance (5th Ed.) §§ 584, 585. In the absence of actual fraud, the question here presented is whether or not Hambey's possession of the land at any time before the conveyance to Wood was such as to place him in an inequitable position if precluded from proving his oral contract and whether or not it was also such as to furnish evidence just as good as a writing of the agreement between himself and Wise. The inequitable situation which is contemplated by the cases holding that the vendee's possession will suffice to take a contract for the sale of land out of the statute of frauds is the vendee's liability to an action for trespass if he is not allowed to prove his oral contract. The evidence just as good as a writing contemplated by those cases is the visibility and notoriety of an actual possession manifesting clearly and unequivocally a new and distinctive ownership. Charpiot v. Sigerson, 25 Mo. 63; Ackerman v. Fisher, 57 Pa. 460; Arguello v. Edinger, 10 Cal. 150; Fulton v. Jansen, 99 Cal. 587, 34 Pac. 331. This court, in Davis v. Judson, 159 Cal. 121, 132, 113 Pac. 147, 152, expressly holding that a nominal or merely technical possession was not sufficient, laid down the rule that—

> The "possession which must be taken in order to meet the equitable requirement of part performance, and warrant specific performance of the contract, is actual possession by the vendee. The ground upon which possession, as constituting part performance and authorizing specific performance, is supported, is that the vendee would be exposed to liability as a trespasser, if he could not invoke the protection of the contract. The uniform rule, however, is that such possession must be an actual possession by the vendee; there must exist the physical fact of possession in him; a possession visible, notorious, and exclusive, such as manifests definitely and clearly that the vendee is claiming and asserting a distinctive ownership of the property, which is inconsistent with the right of possession or ownership in any other person. Less than this could not constitute a vendee a trespasser, and hence this actual possession must, under the authorities, exist to constitute such part performance as warrants the equitable interposition of a court to decree specific performance."

Even more directly to the point in the present case is the rule stated in Browne on the Statute of Frauds (5th Ed.) § 473:

> "To allow a mere technical possession, not open to the observation of the neighborhood, and capable of being proved only by select and confidential witnesses, to be sufficient for obtaining a decree to enforce the contract, would manifestly afford an opportunity for and an encouragement to dishonest testimony. Thus, where the vendor, having at the time a tenant in possession, makes a verbal sale of the premises, it has been held that, the tenant remaining in possession, and merely attorney to the purchaser, there was no such open and notorious change of possession as would justify a court of equity in enforcing a contract, and that, at any rate, the attornment must be formal, public, and explicit."

In support of the text the author cites Brawdy v. Brawdy, 7 Pa. 157, and Johnston v. Clancy, 4 Blackf. (Ind.) 94, 28 Am. Dec. 45.

[4] Hambey never entered into physical possession of the land. Moreover, conceding that between March 17 and March 25, 1916, Wood's possession was the possession of Hambey, the fact remains that during that time Wood did not make any physical entry upon the premises. Hambey's possession, if it may be called such, was technical possession by a tenant who for a long period of time prior to the creation of the tenancy had been occupying the land as the tenant of the vendor. It is clear that this possession had not the essential character of the possession which will suffice to take an oral contract for the sale of land out of the statute of frauds. Neither by himself nor by his tenant did Hambey enter into a possession such as would render him liable to an action for trespass. No inequitable situation would therefore have been created by refusing to allow him to set up the contract of purchase. Neither by himself nor by his tenant did he enter into a visible and notorious possession manifesting clearly and unequivocally a new and distinctive ownership. There was therefore a total absence of any act referable to the contract such as, when coupled with the inequitable situation, gives a court of equity jurisdiction to enforce an oral contract for the sale of an interest in land. The facts of the case, accordingly, disclose no circumstance serving to lift Hambey's oral contract of purchase out of the statute of frauds on or before the date of the conveyance to Wood. It follows that Wood, having purchased the land in good faith and for value, does not hold title as an involuntary trustee for Hambey.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; MELVIN, J.; WILBUR, J.; LAWLOR, J.

SHAW, J. I concur in the judgment, but I do not fully agree with all the reasons advanced by Justice LENNON. The rule is that the possession of land by the vendee, under an oral contract, in order to constitute part performance and render the contract enforceable, must be such as would make him liable for trespass, if he could not justify his possession except by the void oral contract of sale. This rule was adopted in equity when the common-law forms of action for trespass were in use. Under the common law, one who entered on land through his tenant to whom he had let the land for a term was liable, after recovery in ejectment by the true owner, to an action of trespass for mesne profits, and the fact that he had not personally entered on the land would not excuse him. Nor would it excuse him in an action of trespass for breaking and entering, if he had leased the land and authorized his tenant to enter thereunder. Therefore the fact that one was in possession by his tenant would make him liable for trespass and would sufficiently answer that part of the equity rule in actions for specific performance. In this case both Hambey and Wood would have been liable to Wise for mesne profits if the sale to Hambey and Wood's possession under the lease could not have protected them.

It is clear also that this should be the rule. There are many cases as of property built for rental purposes, where the only possession ever taken or contemplated by the parties to a sale is a possession accomplished by the attornment of the tenant in possession to the new owner. It has never been supposed that possession of such property, when so taken, could not constitute a sufficient part performance. In so far as the main opinion is inconsistent with the above I do not agree with it.

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181 Cal. 294

ANDERSON v. ARONSOHN et al.

(S. F. 8581.)

(Supreme Court of California. Sept. 26, 1919. Rehearing Denied Oct. 23, 1919.)

1. ACKNOWLEDGMENT 🔑22 — PERSONAL KNOWLEDGE AS TO IDENTITY OF PERSONS MAKING ACKNOWLEDGMENTS NECESSARY.

Notary *held* not legally justified in stating in certificates of acknowledgment that persons who appeared before him to acknowledge the instruments were known to him, as required by Civ. Code, § 1185, unless the identity of the individual making the acknowledgment is established by the oath of a credible witness.

2. ACKNOWLEDGMENT 🔑48—STATEMENT BY NOTARY IN CERTIFICATE GUARANTY OF GENUINENESS OF INSTRUMENT.

A notary's act, in stating in certificates of acknowledgment that the persons who appeared before him were known to him, made the certificates guaranties of the genuineness of the instruments acknowledged, in view of Civ. Code, § 1185.

3. ACKNOWLEDGMENT 🔑22 — WHAT CONSTITUTES PERSONAL KNOWLEDGE OF NOTARY AS TO IDENTITY OF PERSON.

Personal knowledge by a notary of the person making an acknowledgment, such as will justify the notary in stating in the certificate that the person is known to him, involves something more than an introduction by another person and casual meetings following it, and must be based on circumstances surrounding the person, tending to show he is what he purports to be.

4. ACKNOWLEDGMENT 🔑22 — INTRODUCTION UNDER OATH NOT PERSONAL KNOWLEDGE OF PERSON MAKING ACKNOWLEDGMENT.

Merely because a person is introduced to a notary under oath as the one who is to make an acknowledgment, the notary is not legally in possession of such personal knowledge of the person as justifies his making certificate to the acknowledgment.

5. ACKNOWLEDGMENT 🔑48—NOTARY REQUIRING OATH AS TO IDENTITY RELIEVED FROM LIABILITY IF DECEIVED.

If a notary takes all due precautions in taking an acknowledgment, and fully complies with Civ. Code, § 1185, in the absence of personal knowledge of the person, by requiring the oath of a credible witness, he will not be held liable if he is deceived in the identity of the person.

6. ACKNOWLEDGMENT 🔑48—NEGLIGENCE OF NOTARY IN TAKING ACKNOWLEDGMENT AS PROXIMATE CAUSE OF LOSS.

The negligence of a notary in taking an acknowledgment cannot be considered the proximate cause of loss sustained by a lender through the procuration by such lender's agent of loans to false parties, whose acknowledgments were taken by the notary.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Steven Anderson against Martin Aronsohn and others. From a judgment for defendants, plaintiff appeals. Reversed, and cause remanded for a new trial.

Carl W. Mueller, of San Francisco, for appellant.

Marshall B. Woodworth, of San Francisco, for respondents.

McCutchen, Olney & Willard, of San Francisco, amici curiæ.

LENNON, J. This is an appeal from a judgment in favor of the defendants in an action against a notary public and his sureties on his official bond to recover for damages alleged to have resulted from the negligence of the notary.

It appears from the findings that a few days prior to April 19, 1916, one Ambrose, a real estate agent and loan broker, through whom plaintiff had previously loaned money, called upon the plaintiff to secure a loan of $900 upon certain real estate in the city and county of San Francisco owned by Louetta A. Pilliken, for whom Ambrose purported to act. The plaintiff having decided to make the loan, a note and deed of trust were given to Ambrose for execution by Mrs. Pilliken and her husband. Ambrose returned the document, signed and acknowledged in proper form before the defendant Aronsohn, a notary public, and, upon presentation of an order purporting to be signed by the Pillikens, Ambrose received the amount of the loan in currency. At no time during the transaction did plaintiff deal with any one save Ambrose. In May of the same year, through a similar transaction, plaintiff advanced to Ambrose the sum of $700 upon property owned by one Mary French. Plaintiff subsequently discovered that the owners of the properties in question, the Pillikens and Mary French, had never signed the notes or deeds of trust, or received the money, and that confederates of Ambrose had impersonated these parties before the defendant notary. The certificates of acknowledgment of both deeds of trust were each to the effect that the subscribing parties were "known" to the notary to be the persons whose names are subscribed to the instruments. The question presented upon this appeal is whether or not Aronsohn was legally justified in stating in the certificate of acknowledgment that the persons who appeared before him to acknowledge the instruments were known to him.

It appears that on September 8, 1915, the persons who represented themselves to be the Pillikens were introduced to Aronsohn by Ambrose on the occasion of their assignment of an interest in a mining claim. Aronsohn acknowledged the instrument, and certified to the identity of the parties under the oath of Ambrose, who was personally known to him. He made a record of this transaction in his books. We shall here quote the evidence concerning the further acquaintance of Aronsohn with these parties.

> "Q. Now, did you after this transaction have occasion to meet these two Pillikens again? A. Yes. Q. Frequently or otherwise? A. Yes, five or six times. Q. And where? A. Met them the following day at the Fair, 1915, Native Sons of the Golden West Day, Admission Day, also at cafeteria, on streets, also was at my office. Q. When were they at your office? A. Shortly before April 19, 1916. Q. For what purpose? A. Mr. P. called at my office and asked me where he can get a loan on a note, and I suggested him to wait until Morris Plan Bank open business, as they were advertising loans at 6 per cent.," etc.

It also appears that on March 2, 1915, the person who represented herself to be Mary French was introduced to Aronsohn by his former teacher, Henry Frank. He took an acknowledgment of the signature of this woman, Frank acting as identifying witness. Aronsohn also made a record of this transaction in his books. The following is the evidence of his further acquaintance with this Mary French:

> "Q. When did you again see Mrs. Mary French, if at all, previous to May 6, 1916? A. December 2, 1915. Q. What was the occasion of your meeting Mary French on December 2, 1915? A. She was at my office with Mr. Ambrose, who requested me to acknowledge a document.
>
> "The Court: Did Mr. Ambrose request you to acknowledge a document, or Mrs. French request you to acknowledge a document? A. Mrs. French."

[1, 2] Basing its conclusion upon these facts, the trial court has decided that Aronsohn was legally justified in stating in the certificates of acknowledgment that the persons who appeared before him to acknowledge the instruments in question were known to him. With this conclusion we are unable to agree. The statutes prescribing the duty of a notary in ascertaining the identity of an acknowledger are not uniform. In some states the notary must either "know" or have "satisfactory evidence" that the person making the acknowledgment is the individual described in the instrument. Under such a statute some courts have held that it is sufficient if the officer's conscience is satisfied. Wood v. Bach, 54 Barb. 134, overruling Jones v. Bach, 48 Barb, 568. Other courts have held the notary to the care and diligence of a reasonably prudent man. Barnard v. Schuler, 100 Minn. 289, 110 N. W. 966. The California statute, however, provides that, unless the person making the acknowledgment is known to the officer to be the individual described in and who executed the instrument, his identity must be established by the oath of a credible witness. Civ. Code, § 1185. As stated by this court in Joost v. Craig, 131 Cal. 504, 509, 63 Pac. 840, 842 (82 Am. St. Rep. 374):

> "This makes the certificate upon personal knowledge a guaranty of the genuineness of the instrument. * * *"

[3] The question presented for our decision relates to the degree of acquaintance which will authorize the notary to certify that he has personal knowledge. The acquaintance of Aronsohn with the confederates of Ambrose subsequent to the time of their introduction to him was not such as to furnish any rational basis for personal knowledge of their identity. Such knowledge, in our opinion, involves such an acquaintance, derived from association with the individuals in relation to other people, as establishes their identity with at least reasonable certainty. Such an acquaintance cannot in its very nature depend upon the mere word of one or two or three individuals, but must be based upon a chain of circumstances surrounding the persons in question, all of which tend to show that they are what they purport to be. That there is nothing to arouse suspicion is not enough. Something affirmative in the nature of evidence of identity must appear during the course of the acquaintanceship, which would not normally appear if the persons were other than they purport to be, before it can be said that their identity has become a matter of

personal knowledge; that is to say, personal knowledge involves something more than the casual meetings which followed Aronsohn's original introduction to the confederates of Ambrose.

[4] The question then remains whether or not Aronsohn can be said to have acquired such personal knowledge of the parties upon their introduction under oath as to justify the making of the certificate. Such an introduction is not enough. Hatton v. Holmes, 97 Cal. 208, 212, 31 Pac. 1131; Joost v. Craig, supra. As stated by the court in Homan v. Wayer, 9 Cal. App. 123, 126, 98 Pac. 80, 81:

> "A certificate of personal knowledge is not justified by swearing the person who executed the instrument *or any other person*." (The italics are ours.)

The reasons for this view are admirably expressed in State v. Meyer, 2 Mo. App. 413, 420. Without perhaps indorsing all that was stated in the opinion, this court quoted with approval from that decision in Joost v. Craig, supra. Speaking for the St. Louis Court of Appeals, Mr. Presiding Justice Gantt said:

> "It is not easy to give a definition of what will constitute 'personal knowledge.' Every one knows that two intimate friends, who have known each other from childhood to mature age, living in the same neighborhood all that time, may, in the fullest and most unreserved sense, be said to have such 'personal knowledge' of each other. But, if a stranger be introduced by a respectable person into any company, it is generally safe to assume that he is what he professes to be, although the person making the assumption has nothing for it but his reliance on the habits of accuracy of the introducer, who, in his turn, may be relying on similar habits in some one else, on whose information he has made the last introduction. It is obvious that, when an officer taking an acknowledgment and making a certificate assumes any such fact, he does it at his own risk. The law warns him, when he has not 'personal knowledge' of his own, to resort to certain observances which the law supposes to be sufficient in practice to prevent imposition. The very lowest of these observances is proof by two witnesses who possess such personal knowledge of the identity of the cognizor with the grantor; for the statute says, cautiously, 'at least two credible witnesses.' Hence we see that, in a case of any doubt, it is not only permissible, but imperative, that the number of witnesses should be increased; that not only their number, but their credit, must be looked to by the officer; that, as their testimony is to be taken, they must be sworn; and that, to secure them for future reference, their names and places of residence must be stated in the certificate. An officer taking all these precautions may, of course, be still deceived, and so be led to make a certificate that is calculated to mislead. But such a certificate is infinitely less likely to deceive or mislead than a declaration that the party making the acknowledgment is well known to the officer making the certificate. It puts all persons upon inquiry, and furnishes a clew for conducting it, and it complies with the law. If, after all, the party making the acknowledgment proves to be an impostor, the officer would, we think, if acting in good faith, stand excused. But we are of the opinion that the noncompliance with the formalities enjoined by the statute, and the assumption of any fact which afterwards proves to be no fact at all, will subject the officer to all the risks attendant on the negligent performances of official duty. It may be very courteous to waive all such formalities; it may be disagreeable to speak plainly, and tell a party that one is not willing to assume that he is not falsely personating another; but no one is at liberty to practice courtesy or gain popularity, to indulge his own indolence, or avoid unpleasant things at the expense of others. If these others sustain loss by his laxity, it is impossible to listen to assurances from him that he meant well, and really did not know better, where it was his plain duty to probe the matter to the bottom, and not to certify at all until he knew what he was talking about. It is perfectly idle for him to protest that he did not know or suspect that his certificate was false. *That* may be granted; but it is nothing to the purpose. His business was *to know that it was true*."

[5] Respondents place great reliance on the statement in Joost v. Craig, supra, that—

> "A notary may take all due precautions, and fully comply with the statute and still be deceived. In such case he would not be held liable; but if he has not fully complied with the statute, the rule announced above [in State v. Meyer, supra] is not a whit too stringent."

In view of the context in which this statement is found, and in view of the context in the Meyer Case from which it was paraphrased, it affords the respondents slight comfort. The meaning of the court is clear. It is that if the notary takes all due precautions and fully complies with the statute *by requiring the oath of a credible witness*, he may still be deceived, and in that event, he will not be held liable, but that, if he has not complied with the statute by requiring such an oath, but has, on the contrary, certified that he has personal knowledge of the identity of a person whom he knows merely through the introduction of another, it is not a whit too stringent to hold that he does so at his own risk.

[6] The respondent contends that Ambrose was the agent of Anderson for the purpose of transacting the loans. Were this in fact the case, the negligence of Aronsohn could not, of course, be considered the proximate cause of the loss sustained by Anderson. Overacre v. Blake, 82 Cal. 77, 22 Pac. 979. But the trial court did not find, and the evidence does not show, that Ambrose did act in the matter as the agent of Anderson.

The judgment is reversed, and the cause remanded for trial anew.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SHAW, J.; LAWLOR, J.; MELVIN, J.

Mr. Justice OLNEY, deeming himself disqualified, does not participate in the foregoing decision.

181 Cal. 261

FAVORITE et al. v. SUPERIOR COURT OF RIVERSIDE COUNTY et al.

(L. A. 6096.)

(Supreme Court of California. Sept. 24, 1919.)

1. PLEADING 🔑214(1) — DEMURRER ADMITS FACTS ALLEGED.

Where a cause was submitted on demurrer to a petition for a writ of prohibition against the superior court and judge thereof, the facts alleged are admitted.

2. PROHIBITION 🔑20—PETITION TO RESTRAIN JUDGE FROM ACTING BECAUSE DISQUALIFIED INSUFFICIENT.

A petition for a writ of prohibition, restraining the judge of the superior court from making any order in a cause in which a corporation was a party other than to transfer the same, *held* insufficient to show that any direct liability of the judge as a former stockholder of the corporation existed at the time the application for change of place of trial was made.

3. COURTS 🔑207(5)—DISTRICT COURT OF APPEAL CAN RESTRAIN JUDGE FROM ACTING IN EQUITY SUIT.

Under Const. art. 6, § 4, a District Court of Appeal has jurisdiction of an application for a writ of prohibition to restrain a judge of the superior court from making any order in an equity suit, other than to transfer the same, although appeals in equity causes are taken direct to the Supreme Court.

4. VENUE 🔑49(1) — ON DISQUALIFICATION, ERROR TO REFUSE CHANGE OF VENUE AND CALL IN ANOTHER JUDGE.

If a judge of the superior court was disqualified to hear a case in which a corporation was a party, because his wife was a stockholder, it was improper for the judge to deny a motion to change place of trial, and then call in another judge to hear the case, but he should have directed a change as provided by Code Civ. Proc. § 398; there being but one judge of the superior court of the county.

5. CORPORATIONS 🔑506—STOCKHOLDER NOT A PARTY TO ACTION AGAINST CORPORATION.

A stockholder of a corporation is not a party to an action in which the corporation itself is a party.

6. JUDGES 🔑43—DISQUALIFICATION BECAUSE OF OWNERSHIP OF STOCK BY WIFE OF JUDGE.

That the wife of a judge of the superior court owned stock in a corporation which was a party to the suit does not, under Code Civ. Proc. § 170, subds. 1, 2, declaring that no judge shall sit in any proceeding to which he is a party or is interested, or when he is related to any party, or to an officer of a corporation which is a party, disqualify him.

7. JUDGES 🔑43—DISQUALIFICATION BY INTEREST AFTER SALE OF CORPORATE STOCK.

Where it appeared on application for writ to prohibit judge of superior court from trying a cause against a corporation, that the judge had disposed of his stock in the corporation a considerable period before application was made, without more, it cannot be presumed that he was interested, so as to be disqualified, even though the liability of a stockholder for the debts of a corporation is, under Const. art. 12, § 3, direct, etc.

In Bank.

Application by O. J. M. Favorite and another for a writ of prohibition, to be directed against the Superior Court of Riverside County and Honorable Hugh H. Craig, Judge thereof. Writ denied.

Geo. B. Bush and D. B. Chapin, both of Riverside, for petitioners.

Adair & Winder, of Riverside, for defendants.

SHAW, J. This is an application for a writ of prohibition to prevent the superior court of Riverside county from proceeding in a cause pending in said court wherein the said petitioners are plaintiffs and the Security Investment Company and others are defendants. This proceeding for prohibition was begun in the District Court of Appeal for the Second District and after decision there was transferred to this court for rehearing. The original petition was filed on December 16, 1918. An amended petition was filed on December 19, 1918.

Hon. Hugh H. Craig is the regularly elected judge of the superior court of Riverside county, before whom the cause originally came on for disposition. On December 9, 1918, the petitioners here, without notice to the other party, presented to Judge Craig, ex parte, a paper purporting to set forth a motion to change the place of trial in the action. The sole ground for the motion was stated therein as follows: "On account of the disqualification of yourself to try the same." The fact which caused the disqualification referred to was not stated. Petitioners did not then file said paper, or any papers in the case, but stated to the judge that they would renew the motion on the following day. On December 10, 1918, the petitioners filed an application to change the place of trial of said cause on the sole ground that the wife of the judge was a stockholder in the said corporation, and that Judge Craig was for that reason disqualified to try the cause or make any order therein, other than to change the place of trial, as prescribed by section 398 of the Code of Civil Procedure. The attorneys for the defendants appeared to this motion, and the hearing was postponed to December 12, 1918, on which day the parties appeared, the motion was argued by the respective attorneys, and was denied by the court. It was made to appear that the wife of Judge Craig had disposed of her stock in the corporation on December 10, 1918. On the same day Judge Craig requested Hon. J. W. Curtis, judge of the superior court of San Bernardino county, to sit for him on the following day for the purpose of disposing of the said cause. On December 13, 1918, Judge Curtis presided in the said court, and the said cause was called for further proceedings. Thereupon the petitioners objected to any further proceedings therein, and moved the court to change the place of trial thereof, upon the ground that the wife of Judge Craig was a stockholder in the defendant corporation during the pendency of the action at all times prior to December 10, 1918; that on December 9, 1918, the petitioners had made the application above mentioned to Judge Craig; that they had filed a motion for change of place of trial on December 10, 1918, as above stated; that the matter was heard on December 12, 1918, at which time it had been denied by Judge Craig. This application was heard by Judge Curtis, then presiding in the court, and, after argument, was denied. Thereupon, as before stated, this proceeding in prohibition was instituted against said superior court, and also against Hugh H. Craig, as presiding judge thereof. The object of the proceeding is to restrain the said court from making any order in the said cause, except an order changing the place of trial to the nearest or most accessible superior court, the judge of which is not disqualified from trying the same.

[1] The cause was submitted on a demurrer to the petition. The facts alleged are therefore admitted to exist. But other facts, though pertinent to the prayer of the petition, cannot be considered.

[2] Upon the argument here, it was stated that Judge Craig had been the owner of stock in the corporation defendant prior to June 13, 1917, and it was urged that he was and continued thereafter to be disqualified by reason of such fact, so long as his direct liability as a stockholder continued to exist. On this point we need only say that neither in the petition nor in the notice of motion is it alleged that he ever owned any stock in said corporation. The mere recital of the fact that Judge Craig had stated "that he had disposed of all his stock in said corporation to his wife" is not an allegation of the fact of ownership. It cannot be regarded as such allegation, and particularly in view of the fact that it is not assigned, either in the petition or in any motion addressed to the superior court, as ground for the application to change the place of trial. Nor can statements made by counsel in argument, or statements in an affidavit filed in behalf of the respondent, cure the lack of a material allegation in the petition. This court, therefore, cannot consider the effect of such ownership, if, as a matter of fact, Judge Craig ever did own such stock. The decision of the case must depend wholly on the effect of the alleged and admitted fact that his wife was the owner thereof at the time the application was made to the court, when Judge Craig was presiding therein, to change the place of trial.

[3] There is no merit in the motion of respondent to quash the writ of prohibition issued by the district court. The motion was based on the claim that the case before the superior court was an action in equity—a case in which appellate jurisdiction is, by the Constitution, lodged in the first instance in the Supreme Court alone (Const. art. 6, § 4), from which fact, it is argued, an original proceeding in prohibition to prevent action by the superior court in such a case is cognizable only in the Supreme Court. This assumption is not correct. The same section of the Constitution gives equal and concurrent jurisdiction to the District Courts of Appeal and to the Supreme Court to issue writs of prohibition in all proper cases. So far as jurisdiction to do so is concerned, the questions of appellate jurisdiction and of the nature of the action in which the act sought to be prohibited is threatened are entirely immaterial. As a matter of policy and practice, both this court and the District Courts of Appeal respectively, have at times refused to take jurisdiction of an original proceeding, where the case involved was in the superior court and was originally appealable to the other court. Collins v. Superior Court, 147 Cal. 264, 81 Pac. 509; Estate of Turner (App.) 177 Pac. 854. But this practice was not adopted because of any want of original jurisdiction in such cases in either court. This was expressly stated in the Collins Case.

[4] If the fact that the wife of Judge Craig owned stock in the corporation on December 10, 1918, when the application was filed and presented to him as judge of the superior court, is sufficient to disqualify him from sitting or acting as judge in that action, there is no doubt, under our decisions, that it was his duty, upon the fact being established, to grant the application and make an order transferring the case as provided in section 398 of the Code of Civil Procedure. Livermore v. Brundage, 64 Cal. 299, 30 Pac. 848; Krumdick v. Crump, 98 Cal. 119, 32 Pac. 800. There was but one judge of the superior court of Riverside county, and hence the rule stated in Oakland v. Oakland, etc., Co., 118 Cal. 249, 50 Pac. 268, that an action could be retained and tried by another judge of the same court, does not apply. If his disqualification depends upon a fact not within the knowledge of the judge, as might be the case, power to determine from the evidence whether or not the fact existed would be implied from the necessity of the case, but, when established, the mandate of section 398 would certainly apply and be imperative, as was held in said cases, leaving him no discretion in the matter. It is true, as was said in Paige v. Carroll, 61 Cal. 215, that if, before the motion was made, the disqualified judge had called in another judge, not disqualified, to sit for him in the cause, the judge so called in could properly deny the motion to change the place of trial. But in this case

Judge Craig did not call in Judge Curtis to sit in the cause until after he had denied the motion, and therefore, as said in Upton v. Upton, 94 Cal. 28, 29 Pac. 411, it was "his duty to grant it," instead of denying the motion and thereafter calling in the judge. See, also, Barnhart v. Fulkerth, 59 Cal. 130; Finn v. Spagnoli, 67 Cal. 330, 7 Pac. 746. The first question presented on the merits, therefore, is whether or not the ownership of the stock by his wife at the time the motion was regularly presented to him operated to disqualify him from trying the case.

[5, 6] The claim that the fact that the wife is a stockholder disqualifies the husband from trying the case as judge rests upon the following language of section 170 of the Code of Civil Procedure:

> "No justice, judge, or justice of the peace shall sit or act as such in any action or proceeding: (1) To which he is a party or in which he is interested; (2) when he is related to either party, or to an officer of a corporation which is a party, or to an attorney, counsel, or agent of either party, by consanguinity, or affinity, within the third degree, computed according to the rules of law."

A provision follows for the waiver by the parties of such disqualification under subdivision 2. It is not material here. The argument is that the wife, as holder of corporate stock, is the owner of an interest in the corporation; that the corporation represents her in such action, and acts for her protection and benefit, and consequently that she is a "party" to the action, within the meaning and scope of the first clause of subdivision 2. That a stockholder is not technically a party cannot be doubted.

> "Where a corporation sues or is sued in its corporate name, the action is by or against the corporation itself as a legal entity, and its members are not in any legal sense parties to the action." 1 Clark & Marshall, Corp. p. 15.

It is only where the corporation defendant refuses to defend the action, or, having begun a defense, it is made to appear that it will not prosecute the defense in good faith, that a stockholder may, upon a proper application showing the facts, be allowed to become a party and defend on behalf of the corporation. He must show that he cannot induce those in control of the corporation to do that which is right in the matter. Waymire v. San Francisco, etc., Ry. Co., 112 Cal. 650, 44 Pac. 1086; 2 Clark & Marshall, Corp. p. 1690. Hence the use of the word "party" in the clause relied on does not signify that the ownership of stock by a person related to the judge within the prohibited degree disqualifies the judge from trying a case against the corporation.

The succeeding clause clearly indicates that the Legislature intended that it should not have that effect, for that clause states the fact which the Legislature must be presumed to have considered necessary to disqualify the judge where a corporation is a party. It limits the disqualification to cases where the relative is an officer of the corporation. The rule of construction that the expression of one thing excludes all others applies, and it is therefore to be presumed that the Legislature did not intend to create a disqualification by reason of the relationship of the judge to any person connected with the corporation except an officer thereof. That this is the proper construction of a statute prohibiting action by one who is related to a party to the suit is well established. It was directly held under a statute precisely like ours in this respect that the judge was not disqualified by his relationship to a stockholder. Searsburgh T. Co. v. Cutler, 6 Vt. 322. And a statute prohibiting a sheriff or constable from serving process in a case to which he is a party, or is related to a party, does not apply to prevent him from serving process in a case where a corporation is a party and he is a stockholder therein. Adams v. Wiscasset Bank, 1 Me. 365, 10 Am. Dec. 88; Merchants' Bank v. Cook, 21 Mass. (4 Pick.) 415. The Supreme Court of Maine in the above case stated the reasons in very apt and convincing language as follows:

> "The argument arising from inconvenience is very strong. * * * Shares are continually changing owners; and a corporation of this kind, if disposed to be evasive, might, by frequent and secret transfers, abate every process commenced against them."

These reasons apply with greater force to the present case. If the corporations of this state could disqualify a judge and obtain a change of the place of trial whenever some relative of the judge within the third degree was or should become a stockholder of such corporation, it might be made very difficult, as against many corporations, to find a judge or a court where the cause to which such corporation was a party could be tried. No great effort of the imagination is necessary to perceive the consequences of such a rule. In many cases it would operate to defeat justice. We are satisfied, therefore, that the subdivision should not be construed so as to include the stockholder as a party where the corporation only is named as such.

The petitioner relies on the decision in Howell v. Budd, 91 Cal. 342, 27 Pac. 747, in support of his position. In that case the sons of the judge were the vendees of certain persons claiming heirship to an estate under an executory contract by which such heirs agreed to convey to the sons an interest in the estate, in consideration of their services as attorneys in establishing the heirship. The decision in the case would settle the question of such heirship. The sons were therefore as much interested in the controversy as the parties themselves. Upon a distribution they would not be improper parties, and would have a right to appear in respect to their personal interests. The general notice of the proceeding to be given to all persons would be notice to them, as well as to every other person who claimed any interest in the estate. In view of this direct interest as compared with the remote and indirect interest of the stockholders of a corporation, and because of the provisions of the section itself above referred to implying the contrary intention in the case of corporations, we do not think this case should be extended to include cases like the one at bar. Our conclusion, therefore, is that Judge Craig was not disqualified to act in the matter by reason of his wife's ownership of stock in the corporation defendant.

[7] We have shown that there is no allegation in the petition to the effect that Judge Craig was himself at any time a stockholder in said corporation. Inasmuch as it may be claimed that his ownership was a matter within his personal knowledge and that he should have taken cognizance thereof at the mere suggestion, it may be proper to present some further considerations on the subject. Upon the hearing in the District Court of Appeal an affidavit of Judge Craig was filed by the respondents, showing that he had not been the owner of any stock in the corporation since the date of June 13, 1917. There is no information obtainable from the record to show that ownership at that date would disqualify him. The cause was submitted, as we have said, upon a demurrer to the petition. The petition does not set forth the complaint in the action pending in the superior court, nor purport to state the substance thereof. No evidence was introduced at the hearing, either in the District Court of Appeal or in this court, as to the character of said action or as to the allegations of the complaint therein. The petitioners in their briefs set forth what purports to be a statement of some of the facts alleged in said complaint. As these facts were not alleged we cannot take notice of them when presented in this manner. It is true that the liability of a stockholder for the debts and liabilities of the corporation is direct and is created as soon as the corporate debt or liability is contracted or incurred (Const., art. 12, § 3), so that, if the liability involved in the action was contracted or incurred prior to the disposition by Judge Craig of his stock, as stated in his affidavit, he might still be interested in the action and be disqualified by subdivision 1 of section 170. But there can be no presumption in this case that such liability did exist at that time, for we have no facts upon which it could be predicated. Hence the contention that he is disqualified by reason of his own interest is not sustained by the allegations or proof.

It may properly be suggested that there is no good reason for further contention in the court below upon this subject. By calling in Judge Curtis, Judge Craig has already indicated his intention not to try the case. If it is improper for him to do so, or to choose the judge, under the actual circumstances of the case, as they may appear, the objection can easily be obviated by requesting the Governor to designate the judge to try the case.

The application for a peremptory writ of prohibition is denied, and the proceeding is dismissed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; OLNEY, J.; LAWLOR, J.; LENNON, J.; MELVIN, J.

181 Cal. 270

MAJORS v. SUPERIOR COURT OF CALIFORNIA IN AND FOR ALAMEDA COUNTY et al. (S. F. 9025.)

(Supreme Court of California. Sept. 24, 1919.)

1. Costs 🔑276 — Suit in forma pauperis not stayed on discharge of jury until payment of costs.

In view of earlier statutes and common-law rules, St. 1917, p. 788, declaring that if in a civil case the jury be discharged without a verdict the jury fees shall be paid by the parties who shall have required a jury, and until they are paid no further proceedings shall be allowed, did not require in and for plaintiff suing in forma pauperis to pay the fees of a jury which was discharged, where plaintiff after trial was begun obtained leave to amend the complaint, where there was no vexatious conduct on plaintiff's part.

2. Costs 🔑276 — Rights of plaintiff in suit in forma pauperis are in discretion of court.

Whether one once admitted to sue in forma pauperis should on vexatious conduct, delay, etc., be dispauperized, is for the court to determine in the exercise of its discretion, which discretion should be exercised as in the case of one originally seeking to be admitted to sue in forma pauperis, with a view to confine the privilege most strictly to those who having a substantial right to enforce or preserve are absolutely unable to otherwise proceed.

3. Costs 🔑130—Discretion of court as to suit in forma pauperis should be exercised with utmost care.

On application to sue in forma pauperis, the court should exercise its discretion in granting such relief with the utmost care, to the end that unworthy persons who are neither indigent nor possessed of substantial rights may not enjoy the privilege.

In Bank.

Petition by Ergo A. Majors for a writ of prohibition to be directed against the Superior Court of the State of California in and for the County of Alameda, and the Honorable T. W. Harris, Judge thereof. Writ denied.

D. C. Dutton, of Oakland, and H. F. Peart, of San Francisco (Green Majors, of Oakland, of counsel), for petitioner.

Ezra W. Decoto and T. P. Wittschen, both of Oakland, for respondents.

C. A. Linn, of Napa, and Milton T. U'Ren, of San Francisco, for Andrew Martin.

MELVIN, J. When this case was in the District Court of Appeal of the First Appellate District, Division No. 1, Mr. Justice Waste prepared the opinion of the court, which was as follows:

"Application for writ of prohibition prayed to be directed against the superior court of the state of California in and for the county of Alameda, Hon. T. W. Harris, judge thereof, staying proceedings in a civil action therein pending, until plaintiff therein shall have paid the fees of the jurors in the first trial; the jurors having been discharged without finding a verdict.

"Andrew Martin, as plaintiff, commenced an action against the defendant Majors (petitioner here), to recover damages for the death of plaintiff's minor daughter, alleged to have been occasioned by the wrongful acts of said defendant. When the case was at issue and ready for trial, Martin demanded a trial by jury and sought to be allowed to further prosecute the action in forma pauperis. The superior court denied him that right and refused to proceed to trial without prepayment of the fees for the jury, as required by the then existing statutes and the rules of the court.

"On application to the Supreme Court that tribunal issued its peremptory writ of mandate directing the lower court 'immediately upon receipt of the writ to issue an order, in due form of law, granting petitioner leave to prosecute his said suit * * * in forma pauperis * * * without being required to pay any costs.' Martin v. Superior Court, 176 Cal. 289, 168 Pac. 135, L. R. A. 1918B, 313.

"Thereafter, pursuant to the direction of said writ, respondents set the action for trial, a jury was impaneled and sworn, and the trial of the cause proceeded in forma pauperis. During the trial, the jury having been in attendance two days, the plaintiff Martin obtained leave to amend his complaint. Defendant, petitioner here, was given time to answer and the jury was discharged. The fees for the jury were not, and have not been, paid.

"On motion of the plaintiff in the action, and over the objection of the defendant (petitioner here), the lower court has reset the cause and is about to proceed with the trial on the day set. Respondents in their return admit, or allege, the foregoing facts 'and in this connection allege that there is no provision in the statutes of this state or in the law of this state, providing for the payment of jurors serving in civil cases, where the action is being prosecuted by the plaintiff in forma pauperis.'

"In this contention respondents are correct and the action of the trial court must be upheld.

"In opposition to the respondents, petitioner relies upon provisions of the California statutes establishing fees of trial jurors, and decisions of the highest courts in this and other jurisdictions, which he contends by analogy and parity of reasoning support his views. In the most recent legislative enactment on the subject it is provided:

" 'If in any trial in a civil case the jury be for any cause discharged without finding a verdict, the fees of the jury shall be paid by the party who shall have announced that a trial by jury is required, but may be recovered as costs if he afterwards obtain judgment; *and until they are paid no further proceedings shall be allowed in the action.*' Stats. 1917, pp. 788, 789. The italics are ours for illustration.

"Section 17 of the Act of March 28, 1868 (Stats. 1867–68, p. 436), provides: 'If in any trial, in a civil case, the jury be for any cause discharged without finding a verdict, the fees of the jury shall be paid by the plaintiff, * * * and until they are paid no further proceedings shall be allowed in the action.' This language is almost identical with the provision of the section of the statute of 1917, already quoted by us, and petitioner cites Lukes v. Logan, 66 Cal. 33, 4 Pac. 883, referred to and approved in Fairchild v. King, 102 Cal. 320, at page 323, 36 Pac. 649, and Carpenter v. Jones, 121 Cal. 362, 53 Pac. 842, construing the language of the early statutes quoted, and squarely upholding refusals by trial courts to proceed where fees of jurors have not been paid after nonsuit or disagreement. But counsel for petitioner fails to note the vital distinction between those cases and the case in interest here. In none of the earlier decisions was the question presented as to the rights of the parties in a cause in forma pauperis. Neither did the court in any of these cases consider the vital question of the right of a litigant in a civil case to have the benefit of a jury trial regardless of his financial inability to prepay the fees for such service.

"But the whole question of the rights of a litigant in forma pauperis so recently engaged the attention of the Supreme Court of this state in this very case (Martin v. Superior Court, supra), that we do not need to look elsewhere for authority on which to decide the question presented by the proceeding now before us. 'The fundamental question thus presented,' says the court in its opinion, 'is of the right of the petitioner [Martin] to proceed with the prosecution of his action in the superior court in forma pauperis, and therefore without the payment in advance of the legal fees.' The court points out that this privilege, so far as regards the exemption from court fees, was conceded to litigants at common law, and holds that the power to grant such exemption, in proper cases, now exists in our courts of general jurisdiction without the declaration of express statute.

"Continuing, the court says: 'With the power in our superior courts thus declared, to admit suitors to commence or having commenced to prosecute their actions in forma pauperis in all proper cases, the next consideration is whether or not the Legislature has by its enactments designed to curtail that power. Quite aside from the question as to the power of the Legislature to do this thing, it is obvious that only the plainest declaration of legislative intent would be construed as even an effort to do this thing. We find no such expressed intent. All of the statutes dealing with the payment and prepayment of fees, such as section 4295 of the Political Code, are general in their nature and have to do with the orderly collection and disposition of the fees, payment or prepayment of which is prescribed by law. Neither individually nor collectively are they even susceptible of the construction that the design of the Legislature was to deny to the courts the exercise of their most just and most necessary inherent power. They have applicability to all cases where the court has not, in the exercise of that power, remitted the payment of the fees on behalf of a poor suitor, and in every instance the court's order to this effect is sufficient warrant to every officer charged with the collection of fees to omit the performance of that duty in the specified case.'

"Petitioner seeks to render the decision of the Supreme Court inapplicable by his assertion that in the opinion the aforementioned section of the statute of 1917 (supra) was not referred to, and, so far as the language of the court discloses, was not considered. However, the earlier statutes, containing language so similar as to be almost identical, were before the court and were referred to in the opinion. Furthermore, the statute of 1917 had been passed and was in effect previous to the rendition of the decision, and the decision and the statute must be considered together.

"We fail to see a distinction between the status of a litigant in forma pauperis before a trial by a jury, and the same litigant after a partial trial, and discharge of the jury without finding a verdict. The act of 1917 refers to and regulates only the payment of fees where they can be and are paid by litigants. It nowhere refers to or relates to actions in forma pauperis. It is silent on the subject. We can see in it no declaration of legislative intent to curtail the inherent power of the superior court to admit suitors to commence, or having commenced, to prosecute their actions in forma pauperis in proper cases."

[1] Subsequently, the matter was transferred to this court in order that we might further examine the petitioner's contentions that in view of the peremptory provision whereby the clerk of the superior court was commanded to collect all jury fees each day in advance, the language requiring settlement of unpaid fees as a prerequisite to further proceedings could apply only to persons prosecuting actions in forma pauperis and that the language quoted by Mr. Justice Waste from the statute of 1868, although reproduced in substance in the act of 1917, could apply in the latter statute only to fees earned by jurors in criminal cases. Petitioner calls our attention to the facts that juries in criminal cases are paid by the counties in which the trials take place; that in ordinary civil actions fees must be paid each day in advance; and that the only causes in which jurors remain uncompensated when for any reason they are discharged are actions in which the trial is conducted under an order in forma pauperis. He argues, therefore, that there is no case in which the provision of the statute of 1917 that until the jury fees are paid "no further proceedings shall be allowed in the action" could possibly operate or be at all applicable excepting in civil actions proceeding in forma pauperis. He therefore insists that the statute of 1917 unequivocally applies to the trial of Martin v. Majors, and that, the jury having been discharged without finding a verdict, "no further proceedings shall be allowed in the action" until the jurors are paid.

To this argument respondents answer that for many years the law had been in virtual accord with the quoted section of the act of 1917, yet this court in Martin v. Superior Court announced no exception to the rule that in all stages of a trial a poor suitor shall have all of the benefits of uncompensated service from jurors and court officers.

There was no substantial change in the statutes amendatory of the act of 1868 with reference to the compensation of jurors until the statute of 1917 was adopted. Stats. 1869–70, pp. 148–176; Stats. 1871–72, p. 188. Section 631, subd. 5, Code of Civil Procedure, provides that a trial by jury may be waived in certain actions by the several parties to an issue of fact, "by failing, at the beginning of each day's session, to deposit with the clerk the jury fees and * * * mileage for such day"; but this subdivision (adopted in 1915) throws no light upon the problem presented to the court in the matter at bar. Petitioner declares that there is a wide and fundamental difference between the fee bill of 1868 and its early successors and that of 1917. In the act last framed, while there is a provision for payment of jurors by the county, all of their compensation in civil cases must come from the daily prepayment of the proper fees. By the earlier acts the fees were payable, in civil cases, by the prevailing party, before the entry of the verdict. There was also the provision that, if the sum received by each juror should be found at the end of the term to be less than the legal per diem and mileage, the difference should be paid by the county.

But it is argued by respondent that, inasmuch as actions prosecuted in forma pauperis were not specified in terms by the statute, and because the Legislature was dealing with the general practice in jury cases, the lawmakers only had in mind the situation which might arise in a suit or proceeding in which solvent litigants might be engaged. Respondents, in short, contend that the apparent restricted meaning of the requirement for payment of fees prior to further proceedings after discharge without verdict of a jury arises from unintentional inclusion in a statute adopting a new rule for prepayment of fees in ordinary cases of language which had been applicable to all litigants when used in earlier enactments. It is also asserted on behalf of respondents that in giving to the fee bill the interpretation suggested by petitioner this court would be going contrary to the spirit, if not the letter, of the decision in Martin v. Superior Court. With reference to the point last stated we agree with respondents that a very liberal view of the rights of poor litigants was adopted by this court in the Martin Case. There it was decided that only the plainest declarations of legislative intent would be construed as an effort to curtail the authority of courts given by the common law to admit litigants to sue in forma pauperis. In view of the language of the opinion in Martin v. Superior Court and of an examination of the various fee bills themselves, we are constrained to agree with respondents.

Since the submission of the cause it has been suggested by a member of the court that perhaps the legislators who enacted the statute of 1917 might have had in mind the fact that at common law a vexatious suitor in forma pauperis or one who unnecessarily delayed or otherwise damaged his adversary might be dispaupered and prevented from having further benefit of uncompensated service of jurors. This leads to an inquiry whether or not it is reasonable to suppose that the new matter in the act of 1917 was an attempt automatically and without the intervention of a court to dispauperize any one who had failed of a verdict from the jury first drawn. Such a result might follow the enforcement of the letter of the law of 1917.

Common-law courts, it is true, were jealous of extending the privilege of suing in this form. In Lilly's Practical Register (edition of 1735) p. 851, we are informed that Rolle, Chief Justice, said:

> "That he did not use to admit any one generally to sue in forma pauperis, that is, to sue in all causes, but only to sue so in one cause by virtue of that admittance, 1654. B. S. So that if he had other cause to shew, he must petition again to be admitted to sue in forma pauperis, & sic toties quoties."

The same author in the same article uses the following language:

> "If one that is admitted to sue in forma pauperis, will not proceed according to the rules of the court, but useth delays to vex his adversary, the court will dispauper him. (Mich. 22 Car. B. R.) For the law doth not favour the poor to do injury to others, but to help them to recover their right, where they want ability of themselves to do it."

There was a rule also that if a pauper gave notice of trial and did not proceed he should be dispaupered. A note of this rule is found in 91 Eng. Rep., Full Reprint, 433.

However, the rule seems to have been enforced, generally speaking, only upon some showing of vexatious conduct on the part of the pauper. In Blood v. Lee, reported in volume 95, Eng. Rep., Full Reprint, at page 912, we find the following interesting matter:

> "Wilmot, C. J., cited, from his own manuscript notes, the following cases relating to paupers and costs: Winter v. Slow, Mich. 4 Geo. 2, B. R., was trover by a pauper: at the trial, the plaintiff proved a demand and refusal at the time of serving the writ, which being after the commencement of the action, he became nonsuited; and having brought a second action for the same thing, it was moved that he might pay the costs of the nonsuit in the former action, before he proceeded in the second action; but the court refused to grant the motion, because they thought the plaintiff had not been vexatious. In Taylor v. Lowe, Trin. 7 & 8 Geo. 2, B. R., the plaintiff being a pauper, and having given five or six notices of trial and thereby vexed the defendant, it was moved that he might pay costs of former notices, or be restrained from proceeding to trial; but while the admission to sue in forma pauperis stood they would make no rule about costs, but made a rule to shew cause why he should not be dispaupered, which was made absolute upon an affidavit of service thereof."

In Hullock's Law of Costs (edition of 1796) 213, a case is cited where a single nonsuit made costs at once due, and it was ruled that the pauper might not thereafter proceed without paying costs, or showing, according to the act of Parliament, that he was whipped. The same learned author, at the same page, cites Winter v. Slow, supra, where it appeared that the nonsuit was not upon the merits, but occasioned by a mistake of plaintiff's attorney, and therefore in the court's opinion not vexatious. In Noaks v. Watts, 93 Eng. Rep., Full Reprint, 609, it was decided that a pauper shall not pay costs for not going on to trial, as other plaintiffs do; but if the costs are taxed the court would prevent his being vexatious by obliging him to pay them before going to trial.

It was declared in Doe dem. Leppingwell v. Weake, 2 Smith's (John Prince) Reports, 676, that withdrawing the record at the third day of the assizes, after giving notice of trial, was vexatious conduct meriting dispaupering of the plaintiff, but in that case it was decided that defendants had waived their right to complain.

In Brittain v. Greenville, 93 Eng. Rep. Full Reprint, 1072, the court denied a motion to tax costs after a lessor admitted in forma pauperis had a verdict against him. The purpose was to ground a further motion to stay his proceedings in a second ejectment. The decision seems to be grounded, in part at least, upon the failure of the moving party to proceed in the usual way to dispauper his adversary. It was held, however, that plaintiff's conduct was not vexatious.

In Doe dem. Leppingwell v. Trussell, 6 East 504 (probably a companion to Doe dem. Leppingwell v. Weake, supra), it was found that the plaintiff suing in forma pauperis had caused much delay by twice setting the case for trial and afterwards countermanding the notice, in one instance, before the term, and in the other withdrawing the record on the third day of the assizes. The defendant had incurred above £100 costs in procuring evidence, and his attorney swore that he believed the merits to be in favor of the defendant. The reporter describes the proceedings and their result as follows:

"To shew that the proper course was to move that the party should be dispaupered in case of vexatious delay, 2 Salk. 506; Taylor v. Lowe, 2 Stra. 903; Brittain v. Greenville, 2 Stra. 1122, and 2 Tidd's Practice, 893, were cited. It was contended that the lessor of the plaintiff ought at least to have countermanded his notice, and thereby saved a great part of the expense which the defendant had sustained.

"On this day Lawes shewed cause upon an affidavit, which stated, that the lessor of the plaintiff having about 30 copies of registers to procure, and several witnesses to collect, among whom was an old and infirm man, was unable to get to the assizes in time, and therefore was under the necessity of withdrawing the record.

"The court, however, made the rule absolute for dispaupering the lessor of the plaintiff, but discharged it as to the payment of costs."

Under the heading "Forma Pauperis" in 1 General Index to the English Common-Law Reports (Biddle and McMurtrie Edition of 1882), at page 373, we find the two following notes:

"Amendment without costs not demandable of right. Foster v. Bank, li. 878; 6 Q. B. 878. Withdrawing record to amend must pay costs of the day. Thompson v. Hornby, lviii. 977; 9 Q. B. 978."

In Weston v. Withers, 2 Durnf. & E. 511, it was held that after nonsuit in trespass the court will stay proceedings in a second action between the same parties for the same cause until payment of the costs of nonsuit, notwithstanding the fact that the plaintiff suing in forma pauperis was a prisoner at the time of bringing the second action.

It will be at once evident from the above citations that the common-law courts were not very ready to extend the privileges of a second trial to one suing in forma pauperis if there were circumstances indicating vexatious conduct. It will be also apparent that no very definite nor fixed rule was followed. But even the practice at the common law did not in general dispauperize one who merely failed to obtain a verdict, or who by the action of his counsel in securing a postponement of the cause for correction of pleadings permitted a jury to be discharged before submission of the issues of fact. We cannot justly decide, therefore, that a rule analogous to that for dispaupering litigants at common law was intended by the Legislature of 1917.

Besides, there could be no good reason for requiring a plaintiff excused from paying jury fees at the first trial to pay on a second trial the fees from which he was so excused. Some reason might exist for failing to extend the privilege to a second trial without fees, but that would be accomplished, not by forcing him to pay the charges from which he had been exempted, but by exacting the usual charges for a second trial.

[2] The question whether one once admitted to sue in forma pauperis should, on account of vexatious conduct, delay, etc., be prevented from having further benefit of uncompensated service, is one for the court having jurisdiction in the case or proceeding to determine in the exercise of a wise discretion. Its discretion here, as in the case of one originally seeking to be admitted to sue in forma pauperis, should be exercised with a view to confine the privilege most strictly to those who, having a substantial right to enforce or preserve, are absolutely unable otherwise to so do, and who, once having been admitted to proceed in forma pauperis, diligently pursue a course free from unreasonable delay or vexatious conduct of any kind.

[3] In conclusion, we wish most emphatically to declare our conviction that such discretion should be used with the utmost care, to the end that unworthy persons who are neither indigent nor possessed of substantial rights may not enjoy this privilege.

Petition denied. Alternative writ discharged.

We concur: ANGELLOTTI, C. J.; LENNON, J.; WILBUR, J.; OLNEY, J.; LAWLOR, J.

(42 Cal. App. 656)

In re OLSSEN'S ESTATE. (Civ. 2958.)

(District Court of Appeal, First District, Division 1, California. Aug. 13, 1919. Rehearing Denied by Supreme Court Oct. 9, 1919.)

1. WILLS 🔑130—HOLOGRAPHIC WILLS SUFFICIENTLY DATED BY USING FIGURES.

The figures "4/12/17th" are a sufficient dating for holographic will.

2. WILLS 🔑130—HOLOGRAPHIC WILL CONSISTING OF TWO CLAUSES SUFFICIENT THOUGH ONE IS UNDATED.

A writing containing two clauses, the first dated and the second undated, each clause being signed by testator, and written all at one time by him, *held* to constitute a single instrument, and not a will and an undated codicil.

3. WILLS 🔑130—INSTRUMENT SUFFICIENTLY INTELLIGIBLE AS HOLOGRAPHIC WILL.

An instrument written and signed by testator, reading, "mod clark I leev hore $2000 more cash mony. My my is cleere i leev hore alle," *held* sufficiently intelligible to constitute a holographic will.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Jack Olssen, deceased. Petition to probate will by Maude Clark, contested by Otto Stein and Gus Stein, also known as Otto Ottoson and Gus Ottoson. From an order and decree admitting holographic will to probate, contestants appeal. Affirmed.

Ambrose Gherini and Edwin H. Williams, both of San Francisco, D. Edwin Lyons, for appellants.

Samuel M. Shortridge, J. E. Harper, and Cullinan & Hickey, all of San Francisco, for respondent.

RICHARDS, J. This is an appeal from an order and decree admitting the olographic will of one Jack Olssen to probate upon the petition of the devisee named therein.

The following is a copy of the document in question:

> "4/12/17th
>
> "mod clark 351 jones st progfeeld Apa Aparmass 201 I leev hore $2000.00 more cash mony
> "Jack Olssen
>
> "My my is cleere i leev hore alle
> "Jack Olssen"

The trial court in its findings construed the above document, with the proper spelling ot the words therein, to read as follows:

> "4/12/17th.
>
> "Maude Clark, 351 Jones street, Brookfield Apartments, Apartment 201, I leave her $2000.00 more, cash money. Jack Olssen.
>
> "My mind is clear. I leave her all.
> "Jack Olssen."

[1] To this reading the appellants offer no particular objection, but insist that the original document, even with this reading, has not the qualities of an olographic will, and is otherwise too indefinite as to its intent to be given effect. The first arrow of the appellants is aimed at the date of the instrument, but we think this assault is sufficiently met by the decision of the Supreme Court in the matter of the Estate of Chevallier, 159 Cal. 161, 113 Pac. 130, in which the figures "4–14–07" was held to amount to a sufficient dating of an olographic will. The appellant insists that the addition of the letters "th," in connection with the figures at the head of the instrument in question here, renders their meaning uncertain; but we think that this is a hypercriticism, and that no real distinction can be found between the two cases.

The appellants' next contention is that, even if the instrument shall be held to be sufficiently dated and signed, as to the first portion thereof, the closing clause of the document must be regarded as an undated codicil. This question, however, must be determined by the circumstances under which the instrument was drawn, as revealed by the testimony in the case, from which it appears that the testator was, on the date which the document bears, a patient at the St. Francis Hospital in San Francisco, where he died five days later, and that, being then on his deathbed, he was observed by his nurse attempting to write something upon a piece of newspaper, and was asked by her if he would like to have some writing paper, and upon his nodding his head affirmatively she went out and got him a desk pad of writing paper; whereupon he asked her to telephone to the proponent, Maude Clark, which she did within the next 10 or 15 minutes, during which he was writing upon the piece of paper which the nurse identified. He had practically completed such writing when she returned to the room, and folding up the paper, he put it away. Within a half hour thereafter the proponent of this will came to the room of the testator, when he gave her the folded paper, telling her to take care of it, and not lose it, for it meant a whole lot to her. The folded paper, in the precise form in which the said proponent received it, was produced in court.

[2] From these facts we think the trial court was justified in arriving at the conclusion that the instrument in question was written all at one time, and was to be construed as a single instrument expressive of the will of the testator.

[3] As such we are satisfied that the reading thereof adopted by the trial court renders it a sufficiently intelligible and properly executed writing to constitute an olographic will, and hence that the trial court was not in error in admitting same to probate.

The order and decree are affirmed.

We concur: WASTE, P. J.; LANGDON, Judge pro tem.

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42 Cal. App. 585

SPOTTON v. DYER. (Civ. 2824.)

(District Court of Appeal, First District, Division 2, California. Aug. 8, 1919. Rehearing Denied by Supreme Court Oct. 6, 1919.)

1. APPEAL AND ERROR ⚷704(2)—APPELLANT BY FAILING TO PRESENT EVIDENCE ADMITS FINDINGS CORRECT.

On appeal from order denying motion to vacate judgment under Code Civ. Proc. § 663, and to change conclusions of law on the ground that they are not supported by the findings, appellant by failing to present evidence to appellate court concedes that the findings are correct and responsive to the issue.

2. APPEAL AND ERROR ⚷931(2)—FINDINGS ARE TO BE CONSTRUED MOST STRONGLY IN FAVOR OF RESPONDENT.

On appeal from order denying motion to vacate judgment on ground that the conclusions of law are not supported by findings under Code Civ. Proc. § 663, findings are to be construed most strongly in favor of respondent, and any uncertainty is to be resolved against appellant in support of the judgment.

3. BILLS AND NOTES ⚷134—WRITTEN CONTRACT AND NOTE THEREUNDER ARE TO BE CONSTRUED TOGETHER.

Under Civ. Code, § 1642, a written contract and a note, executed contemporaneously therewith as a part of the same transaction, are to be taken together, though neither refers to the other.

4. BILLS AND NOTES 🔑335—TRANSFEREE OF NOTE WITH KNOWLEDGE OF CONDITIONS STANDS IN PLACE OF PAYEE.

Where payment of note was made subject to performance of a condition by collateral written agreement, payee's transferee, who takes note with knowledge of such condition, is in no better position than original payee.

5. BILLS AND NOTES 🔑164 — NOTE WITH STATEMENT OF CONDITIONS THEREIN NONNEGOTIABLE.

Under Civ. Code, §§ 3088, 3092, a statement on face of note that note was not to be paid unless payee performed certain condition would have destroyed negotiability of note.

6. BILLS AND NOTES 🔑164—NOTE PAYABLE ON CONDITION NONNEGOTIABLE IN HANDS OF INDORSEE WITH KNOWLEDGE.

Where note was executed contemporaneously with written agreement and as part of same transaction, a condition limiting payment of note on performance of certain condition by payee, contained in the collateral agreement and not in the note itself, rendered note nonnegotiable in the hands of the payee and his indorsee with knowledge of the condition.

7. BILLS AND NOTES 🔑132—MAKER OF NOTE COULD AVOID PAYMENT ON PAYEE'S NONPERFORMANCE OF CONDITIONS.

Where collateral agreement made payment of note conditional upon performance of certain condition and further provided that maker, if dissatisfied with contract, could rescind before certain date, maker could avoid payment of note because of payee's nonperformance of condition, notwithstanding maker's failure to rescind before specified date.

8. BILLS AND NOTES 🔑113—PAYING ONE INSTALLMENT NOTE NOT WAIVER OF CONDITIONS UNPERFORMED.

The mere fact of paying one of a series of installments conditioned upon the performance of an act by the payee does not constitute a waiver, either of the right to have the act performed, or the correlative right to refuse to make further payments until it is performed.

9. BILLS AND NOTES 🔑132—TIME NOT ESSENCE OF PERFORMANCE OF CONDITION OF CONTRACT.

Where payment of note was made conditional, by collateral agreement, upon payee's construction, by certain date, of certain number of feet of billboard, payee might have performed after such date under Civ. Code, § 1492; time not being of the essence of the condition of the contract.

10. BILLS AND NOTES 🔑113—PAYMENT OF INSTALLMENT NOTE NOT WAIVER OF FUTURE PERFORMANCE OF CONDITION.

Where payment of certain amounts on July 1st and October 1st were made conditional upon payee's performance of certain conditions by June 1st, maker's payment of July 1st installment, notwithstanding payee's failure to perform condition, did not waive maker's right to refuse October payment because of continuing breach.

Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by E. K. Spotton against Edward F. Dyer. From an order denying a motion to vacate judgment against him and to change conclusions of law on the ground that they are not supported by the findings, plaintiff appeals. Affirmed.

Gavin McNab and R. P. Henshall, both of San Francisco, for appellant.

Powell & Dow, of San Francisco, for respondent.

BRITTAIN, J. [1] The plaintiff appeals from an order denying his motion made under the provisions of section 663 of the Code of Civil Procedure to vacate a judgment against him and to change the conclusions of law on the ground that they are not supported by the findings. None of the evidence is before the court. In such a case the appellant necessarily concedes that the findings are correct and responsive to the issues.

[2] On April 1, 1914, the two instruments involved in this suit were executed. One was a contract between Charles H. Green, of San Francisco, and Edward F. Dyer, of Cleveland, Ohio, and the other a promissory note, negotiable in form, for $10,000, made by Dyer to Green payable October 1, 1914. Under the terms of the contract, among other things, Green was to complete and transfer to the Green-Dyer Company on or before June 1, 1914, 10,000 lineal feet of billboards in and near the cities of San Jose, Santa Cruz, and Salinas. These billboards constitute "the plants" to which reference is made in the findings. The contract recited the payment of $10,000 by Dyer, coincident with its execution, and bound Dyer to make two other payments of $10,000 each on or before July 1, 1914, and on or before October 1, 1914, "provided, however, that no payment shall be made by said Dyer other than said ten thousand ($10,000) dollars until the said plants shall have been duly and legally transferred to the Green-Dyer Company, as hereinabove required, and until said plants shall have been completed as provided in paragraph nine hereof." The initial $10,000 only having been paid, the proviso applied to the future payments Dyer agreed to make. The proviso was in paragraph 3 of the contract. Paragraph 9 contained the requirement for Green to complete the plants. The lengthy contract was set forth in full in the findings, and in introducing it the court found that the consideration for the execution of the note by Dyer was the execution of the contract by Green. It was further found that the note and contract

were concurrent and dependent; executed at the same time, between the same parties, and with reference to the same subject-matter; and "that said note evidences and was intended * * * to evidence the final payment of $10,000 required by paragraph third of said contract to be paid on or before October 1, 1914. That said final payment was evidenced by said note for convenience of collection only, and there was no understanding between the defendant and said Green that the note was to be negotiated." In support of the judgment, any uncertainty in the findings must be resolved against the appellant, and they are to be most strongly construed in favor of the respondent. Gould v. Eaton, 111 Cal. 639, 44 Pac. 319, 52 Am. St. Rep. 201; Breeze v. Brooks, 97 Cal. 72, 31 Pac. 742, 22 L. R. A. 257; Cooley v. Brunswig, 30 Cal. App. 58, 157 Pac. 13.

[3] In neither instrument was there any reference to the other. This fact did not militate against the operation of the rule that several contracts relating to the same matter between the same parties, and made as parts of substantially one transaction, are to be taken together. Civ. Code, § 1642. Paraphrasing this rule and citing Goodwin v. Nickerson, 51 Cal. 166, a leading textwriter says:

> "Where there is a contemporaneous written contract affecting the terms of the note, it is to be construed with the note. * * * Any lawful condition annexed to the note by a collateral written agreement may be enforced." Daniel on Negotiable Instruments, § 156.

In the familiar application of this rule to notes secured by mortgages, frequently one or each of the instruments refers to the other. The rule is not changed where no such reference is made. In the hands of the original payee or of a transferee of the note with knowledge of the collateral agreement, whether or not the note is negotiable in form, it is nonnegotiable in fact. Metropolis, etc., Bank v. Monnier, 169 Cal. 592, 147 Pac. 265.

After the execution of the note and contract and before the maturity of the note, Green, for value, transferred the note to the International Banking Corporation. The court found that prior to and at the time of such transfer, and at all times mentioned in the complaint, the bank had notice and knowledge of the existence of the contract and of all the provisions thereof, and that it took the transfer with such notice and knowledge. After maturity of the note the bank transferred it to the plaintiff, not for value nor in the due course of business, but for the purpose of collection only. At no time after the execution of the contract was the capacity of the billboards in excess of 7,468 lineal feet, Green having failed to increase the plants to the contractual 10,000 lineal feet.

The complaint was in the ordinary form of a suit on the promissory note. The defendant set up the contract, the failure of Green to complete the plants, and the knowledge of the bank. The last finding was that the note had not been paid, "but that by reason of the provisions of the said contract, and the facts herein found in connection therewith, there is nothing due or owing from the defendant on said note." The conclusions of law, each of which is attacked by the appellant, are that the bank and its assignee, the plaintiff, are bound by the provisions of the contract governing the payment of moneys represented by the note; that as to the bank the note was nonnegotiable because of the accompanying contract of which the bank had notice; that under the provisions of the contract the defendant was not required to pay the moneys represented by the note because of the noncompletion of the plants; that there is nothing due, owing, or recoverable from the defendant; and that the defendant is entitled to judgment.

The appellant maintains the decision of the Supreme Court in the case of Flood v. Petry, 165 Cal. 309, 132 Pac. 256, 46 L. R. A. (N. S.) 861, is determinative of this case. It appears from the report of that case that Petry undertook to erect a building for Flood. The contract provided that the final payment, which was to have become due 35 days after completion, should be made partly in cash and the balance by a note payable 18 months thereafter. The note was executed when the contract was signed, and contained the clause:

> "This note is negotiable and payable without defalcation or discount and without any relief or benefit whatever from stay, valuation, appraisement, or homestead exemption laws."

Petry pledged the note to secure a loan from a bank. He failed to perform the building contract. Flood sued him and the bank for cancellation of the note, alleging the bank had notice of the contract. Judgment for Flood was affirmed in the District Court of Appeal, but on hearing in the Supreme Court the judgment was reversed upon the ground that the particular note was an advance payment upon the executory agreement of Petry to complete the building, and, notwithstanding the bank's knowledge of the building contract, Petry's subsequent breach of the executory agreement did not affect Flood's liability to the bank. In reaching this conclusion, as applied to the particular note, great stress was laid upon the statement of negotiability contained in the note. In the main opinion it was said:

> "If Dr. Flood had said to Petry, 'Take this note and, if you like, negotiate it,' the bank, knowing that fact, would have been justified in accepting it for a valuable consideration before maturity and before breach of the executory contract. But he did say substantially the same thing more emphatically than by word of mouth. He wrote it. It was to that extent a waiver of

the terms of the building contract and was a payment before performance, upon an executory agreement."

[4-6] In the present case, after the payment of the first $10,000, the contract expressly provided that Dyer was not to pay anything more until the billboards were completed. The court found the bank knew of this condition in the contract when it took the note, and that the note and contract were interdependent. As appears from both the main opinion and the concurring opinion of Mr. Justice Shaw in the Flood Case, the decision was based largely upon the ground that under the circumstances disclosed by the evidence, and by the assurance of negotiability written on the face of the note, Flood was estopped from denying that it was negotiable. In the present case, in the absence of evidence and in consideration of the knowledge of the bank of the express statement in the contract, no element of estoppel appears. Under section 1642 of the Civil Code, the contract of which the bank had notice was the entire contract evidenced by both the formal contract and the note. It was said by Mr. Justice Shaw, in his special concurring opinion in the Flood Case, the note would have been uncollectible had it remained in the hands of Petry. In this case, by reason of the knowledge of the bank of the condition in the contract, it was in no better position than the original payee. If, on the face of the note in the present case, the statement had been made, that it was not to be paid unless Green completed the billboards, it would have destroyed its negotiability. Civ. Code, §§ 3088 and 3092, in effect prior to the amendments of 1917 (St. 1917, p. 1534). A condition, limiting the payment of a note on the happening of a contingency, contained in the collateral agreement and not in the note itself, renders the note nonnegotiable in the hands of the original payee and his indorsee with knowledge of the condition. National Hardware Co. v. Sherwood, 165 Cal. 1, 130 Pac. 881; Smiley v. Watson, 23 Cal. App. 413, 138 Pac. 367. In the Flood Case the bank was protected because the note was negotiable. In this case by reason of the condition in the contract, of which the bank had notice, the note was nonnegotiable in its hands, and in the hands of its assignee for collection after the date of its maturity.

[7] The sixth paragraph of the contract provided that if for any reason Dyer became dissatisfied with his contract with Green, and before April 1, 1915, elected to withdraw, Green should repay to him all moneys theretofore advanced by Dyer under the contract. Upon the assumption that this clause constituted a special right to rescind, it is argued that to relieve Dyer of his obligation to make the October payment he was compelled to rescind the contract, returning to Green everything of value he had received. Under the contract, in addition to completing the plants and repaying Dyer if he elected to withdraw, Green was obligated to do a number of other things not involved in the present action. The contract provided that certain stock of the Green-Dyer Company should be placed in escrow until April 1, 1915, and, if Dyer elected to proceed further under the contract, it should then be equally divided between Green and Dyer. If, on the other hand, Dyer elected to withdraw from the venture, the stock was to remain in the hands of the depositary, and if Green failed to repay Dyer the money he had advanced, the stock was to be delivered to Dyer for his security. If Dyer had rescinded, or if rescission was intended by the sixth paragraph, the result would have been the nullification of this provision for security. To hold that Dyer was compelled to abandon his contractual rights as a prerequisite to his enforcement of them would be absurd. There is no finding that Dyer received anything of value from Green in exchange for the $20,000 he paid, other than the right to stand upon the terms of the contract, and the evidence, if any was adduced on this subject, is not before the court.

[8-10] It is argued that since the plants were to have been completed by June 1, 1914, and Dyer paid the second $10,000 July 1, 1914, he waived Green's breach and could not rely upon it to defeat the October payment. From the findings it does not appear what actuated Dyer to make the July payment. In support of the judgment it may be inferred that the circumstances were such that Dyer did not waive any of his rights. Even though the second payment was voluntary, that alone would not bind him to make the third payment. The mere fact of paying one of a series of installments conditioned upon the performance of an act by the payee does not constitute a waiver either of the right to have the act performed or the correlative right to refuse to make further payments until it is performed. The fact that Dyer was entitled to complete performance before the second payment was made did not relieve Green from the duty to finish the work. Time was not of the essence of this condition of the contract, and Green might have performed after June 1, 1914, Civ. Code, § 1492. Dyer was not obligated to make any payment except the first until the plants were completed. After June 1, 1914, every day's failure on the part of Green to do the work was a breach of the contract, and the fact that Dyer may have waived the breach up to July 1st did not preclude him from refusing to make the October payment because of the continuing breach. Woodard v. Glenwood, etc., Co., 171 Cal. 514, 153 Pac. 951.

It is further argued that, since the bank was not the assignee of the entire contract, Dyer could not offset against its claim

Green's failure to complete the billboards. It does not appear that Dyer is seeking to offset anything against the bank's claim. Under the terms of the contract the October payment never matured. It was not to be made unless Green completed the billboards, and the bank knew this when it took the note.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

(42 Cal. App. 596)

PEOPLE v. NEETENS. (Crim. 470.)

(District Court of Appeal, Third District, California. Aug. 11, 1919.)

1. FALSE PRETENSES 🔑31—INFORMATION INSUFFICIENT SHOWING NO CONNECTION BETWEEN REPRESENTATIONS AND OBTAINING OF THE MONEY.

An information charging that defendant obtained $100 by means of false pretenses as to a conversation with a third person relating to the payment of a mortgage, *held* defective, not showing or indicating any causal connection between the false representation and the obtaining of the money.

2. FALSE PRETENSES 🔑4—ELEMENTS OF OFFENSE STATED.

The elements of the crime of obtaining money by false pretenses consists of a fraudulent representation, defendant's knowledge of the falsity, the making of the representation with intent to deceive the innocent party, and the innocent party's reliance thereon.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, False Pretense.]

3. FALSE PRETENSES 🔑38 — INDICTMENT CHARGING CONVERSATION AS TO PROPOSED RELEASE OF MORTGAGE AND EVIDENCE OF STATEMENT OF RELEASE HAD, CONSTITUTED VARIANCE.

In a prosecution for obtaining money by false pretenses, which the information asserted were made with reference to a conversation with a third person as to the payment of a mortgage, and arrangement to release the premises, testimony that defendant stated the mortgagee had released the premises constituted a variance from the averments of the information.

4. FALSE PRETENSES 🔑49(1) — CORROBORATION OF PROSECUTING WITNESS INSUFFICIENT TO SUSTAIN CONVICTION.

In a prosecution for obtaining money by false pretenses, where the alleged false representations were wholly oral, testimony of the prosecutor's wife *held* insufficient corroboration of the prosecutor's testimony to sustain a conviction within Pen. Code, § 1110.

5. CRIMINAL LAW 🔑55—INSTRUCTION AS TO EFFECT OF DRUNKENNESS AS EXCUSING CRIME ERRONEOUS.

In a prosecution for obtaining money by false pretenses, an instruction that drunkenness affords no excuse for the commission of a crime, and that evidence of drunkenness can only be considered for the purpose of determining the degree of the crime, is erroneous, not being in accord with Pen. Code, § 22, declaring that whenever the actual existence of any purpose, motive, or intent is necessary to constitute any particular species of crime the jury may consider the fact that accused was intoxicated.

6. CRIMINAL LAW 🔑823(1)—ERRONEOUS INSTRUCTION NOT CURED BY GIVING CORRECT ONE.

An erroneous instruction is not cured by the giving of one correct in law.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Alexander Neetens was convicted of obtaining money under false pretenses, and he appeals from the judgment and order denying motion for new trial, and the order denying motion in arrest of judgment. Reversed.

Frank A. Henning, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Appellant was convicted of obtaining money under false pretenses, and he appeals from the judgment, the order denying a motion for a new trial, and the order denying a motion in arrest of judgment.

[1] The information upon which he was convicted charged the offense as follows:

"The said Alexander Neetens did on or about the 24th day of November, A. D. 1918, * * * devise and intend by unlawful ways and means, and by false and fraudulent representations and pretenses to obtain and get into his possession the personal property of one Jakob Hieb, in the manner following, to wit: That the said Alexander Neetens did, at and in the county aforesaid, and on or about the date aforesaid, willfully, unlawfully, knowingly, designedly, falsely, and fraudulently pretend and represent to said Jakob Hieb that he, the said Alexander Neetens, had met one Dan Seyer in the city of Stockton, * * * and had made arrangements with the said Dan Seyer to pay a mortgage which the said Dan Seyer held on the property of one Christina Wagenmann on De Forest avenue, in the city of Lodi, county of San Joaquin, * * * and that he desired to obtain from the said Jakob Hieb the sum of one hundred dollars until 10 o'clock a. m. on November 25, 1918, at which time the said $100 would be paid to the said Jakob Hieb."

Then follows an averment of the falsity of the statement as to said meeting and agreement with Seyer. The information proceeds:

"And the said Jakob Hieb believing said false and fraudulent pretenses and representations so made as aforesaid to be true, and being deceived thereby, was induced by reason of the said false and fraudulent pretenses and representations so made as aforesaid to deliver and pay over to the said Alexander Neetens the sum of $100, * * * and the said defendant then and there, by means of said false and fraudulent pretenses and representations so made as aforesaid, did then and there willfully, unlawfully, knowingly, designedly, and fraudulently receive and obtain from the said Jakob Hieb the said sum of $100, * * * with the intent to cheat and defraud the said Jakob Hieb of the same, and the said defendant did then and there willfully, unlawfully, and fraudulently take and carry away the same."

It is quite apparent that said information is defective, the most serious fault being the absence of any fact showing or indicating any causal connection between the false representation and the loan or transfer of the $100 from Hieb to defendant. From no allegation does it appear that Hieb was interested in said mortgage or its release, and why he should advance money for said payment is left entirely to conjecture. Under the decision of People v. Canfield, 28 Cal. App. 792, 154 Pac. 33, the information herein would be held fatally defective; but the Supreme Court in People v. Griesheimer, 176 Cal. 44, 167 Pac. 521, has taken a different view of this requirement of the rules of pleading, and it may be that the doctrine of that decision is sufficiently flexible and potential to save the information herein.

[2] The case, however, should be reversed, we think, by reason of the insufficiency of the evidence to support the conviction. The elements to be alleged and proven in a charge like this are well known. The fraudulent representations must clearly appear. It must be shown that they were known by the defendant to be false, or were made under circumstances not warranted by the knowledge of the defendant; that they were made with intent to deceive the innocent party; that the person injured relied upon the representation, and that otherwise he would not have parted with his money. People v. Jordan, 66 Cal. 10, 4 Pac. 773, 56 Am. St. Rep. 73.

[3, 4] As to these elements it is well to observe that the only representation as to an existing fact, upon which the charge can possibly be sustained, is that the defendant had met one Dan Seyer, and had made arrangements with him "to pay a mortgage which the said Dan Seyer held on the property of one Christina Wagenmann." It is also apparent that the only important feature of this alleged representation consists of the allegation as to said "arrangement." The circumstance of meeting Dan Seyer is surplusage, or, at least, mere matter of inducement. The vital consideration is that he had made arrangements or had agreed with Seyer to pay a certain mortgage. When we turn to the testimony of Hieb we find that he first related the conversation with defendant without mentioning this representation at all, and the only thing stated by him tending in any manner to support that allegation of the information is found in his answer to this suggestive question: "What, if anything, was said about any conversation with Dan Seyer?" His answer was: "Yes, he said that during the week he had been in talking to Seyer and he had released the house." That "he had released the house" is materially different from the allegation that he "had made arrangements to release" it. The variance seems substantial. Of course, the proof should correspond essentially with the allegation of the pleading. Moreover, if we concede that there is a sufficient correspondence in this respect between the testimony and the information, then there is a failure of proof, because there is no corroboration. Section 1110 of the Penal Code provides:

> "Upon a trial for having, with an intent to cheat or defraud another designedly, by any false pretense, obtained the signature of any person to a written instrument, or having obtained from any person any labor, money, or property, whether real or personal, or valuable thing, the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pretense, or some note or memorandum thereof is in writing, subscribed by or in the handwriting of the defendant, or unless the pretense is proven by the testimony of two witnesses, or that of one witness and corroborating circumstances."

It is admitted that the so-called false representation was entirely oral. It is true that another witness testified to said conversation between the defendant and Hieb, namely, the wife of the prosecuting witness. She related the conversation as follows:

> "When Mr. Neetens came over there he asked if he had a little money. Mr. Hieb says: 'Yes; I have got a little, but I need it for paying my taxes.' He said: 'I only want it until to-morrow to pay off the mortgage on Mrs. Wagenmann's house, pay the money to Mr. Seyer, and then I will pay the money back Monday morning at ten o'clock.'"

She was present during the entire interview, and in her testimony is not a word about any representation as to a conversation or arrangement between defendant and Seyer as to said mortgage. It is true that she was not asked the direct question as to whether any such representation was made by defendant, but it is a fair inference from her testimony that no such representation was made. At any rate she failed in this respect to furnish any corroborative evidence, and we find no circumstance in the case supplying the omission.

[5] Again, in his charge the learned trial judge instructed the jury as follows:

> "It is a well settled rule that drunkenness is no excuse for the commission of a crime. Drunkenness forms no defense whatever to the fact of guilt, for when a crime is committed

by a party while in a fit of intoxication the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of the crime."

Such an instruction is erroneous in this class of cases. The authority for the instruction cited by the lower court, namely, People v. Vincent, 95 Cal. 428, 30 Pac. 581, and People v. Methever, 132 Cal. 326, 64 Pac. 481, each involved a charge of murder, which offense is divided into degrees. The offense of obtaining money by false pretenses is capable of no such division, and the principle to be applied is enunciated in People v. Phelan, 93 Cal. 111, 28 Pac. 855. Therein it is said:

> "The intent with which a building is entered being a necessary element to constitute the crime of burglary, it is proper for the jury to take into consideration the fact that the accused was intoxicated at the time, in determining the intent with which he committed the act; and an instruction to the jury to the effect that they could not consider such evidence for any other purpose than that of determining the degree of the crime is prejudicially erroneous, there being no question as to the degree of the crime, the evidence showing without conflict that the building was entered in the nighttime."

In this case, as we have stated, there is no degree of the crime, and the instruction was therefore equivalent to saying that the jury could not consider the evidence of drunkenness for any purpose; whereas, the truth is that "the purpose, motive, and intent of the defendant" were and are involved in the charge, and the correct rule is prescribed in section 22 of the Penal Code as follows:

> "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act."

[6] This instruction was also given by the court, but it did not correct the error for the reason that "an instruction plainly erroneous is not cured by a correct instruction in some other part of the charge." People v. Westlake, 124 Cal. 457, 57 Pac. 467.

There is evidence in the record that the defendant at the time of the alleged offense was under the influence of liquor. Whether it contained more than the much discussed 2¾ per cent. of alcohol we are not advised, but a finding that he was intoxicated would not be unsupported. Therefore it was important that the jury should be correctly instructed as to this feature.

The case for the people is weak, and we think the interests of justice demand a reversal of the verdict. Accordingly the judgment and the order denying the motion for a new trial are reversed.

We concur: CHIPMAN, P. J.; HART, J.

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42 Cal. App. 573

COMMONWEALTH BONDING & CASUALTY INS. CO. v. PACIFIC ELECTRIC RY. CO. (Civ. 2921.)

(District Court of Appeal, Second District, Division 2, California. Aug. 7, 1919.)

1. STREET RAILROADS 🔑117(28)—CONTRIBUTORY NEGLIGENCE OF DRIVER OF TRUCK COLLIDING WITH CAR FOR THE JURY.

Whether the driver of a motor truck was guilty of contributory negligence in attempting to cross before defendant's street car, running 20 miles an hour, *held* for the jury.

2. NEGLIGENCE 🔑68 — ASSUMPTION THAT ANOTHER WILL USE CARE NOT CONTRIBUTORY NEGLIGENCE.

Though one may not willfully close his eyes to danger on the assumption that another will act with care, he cannot be deemed negligent when, if a reasonable use of his faculties does not warn him to the contrary, he rests on such assumption.

3. APPEAL AND ERROR 🔑930(2)—DEVIATION FROM INSTRUCTIONS APPEARS ONLY WHEN VERDICT NOT SUPPORTED BY EVIDENCE.

Only when the evidence does not support the verdict can the appellate court say the instructions, which did not direct a verdict for either party, were not followed.

4. TRIAL 🔑260(1) — INSTRUCTIONS REPETITION OF THOSE GIVEN PROPERLY REFUSED.

Requested instructions sufficiently covered by the instruction given are properly refused, though correct.

5. STREET RAILROADS 🔑118(15) — INSTRUCTION ON ISSUE OF LAST CLEAR CHANCE RAISED BY EVIDENCE, PROPER.

In an action against a street railway company for personal injuries by running its car into a motor truck crossing the track, question of last clear chance *held* raised by the evidence, and therefore properly instructed on.

6. STREET RAILROADS 🔑98(7)—ATTEMPT TO CROSS BEFORE CAR NOT NECESSARILY CONTRIBUTORY NEGLIGENCE.

A person is not guilty of contributory negligence merely because he attempts to cross a street railway track, where cars may legally run at 20 miles an hour, when a car is approaching.

7. STREET RAILROADS 🔑99(10) — DUTY OF TRUCK DRIVER TO USE ORDINARY CARE BEFORE CROSSING TRACK.

All that is required on any given occasion of a driver of a vehicle in attempting to use a street railway crossing, even where cars may legally run 20 miles an hour, is to exercise ordinary care to observe coming cars through his senses of sight and hearing.

8. STREET RAILROADS ⚷99(7)—CROSSING BEFORE CAR UNDER REASONABLE BELIEF OF SAFETY NOT CONTRIBUTORY NEGLIGENCE.

It is not negligence for an automobile driver to attempt to cross a street railway track, at a point where cars legally may operate at 20 miles an hour, in front of an approaching car such a distance away that an ordinarily prudent person would believe he could cross safely.

Appeal from Superior Court, Los Angeles County; G. W. Nichol, Judge.

Action by the Commonwealth Bonding & Casualty Insurance Company against the Pacific Electric Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

Frank Karr, R. C. Gortner, E. E. Morris, and A. W. Ashburn, all of Los Angeles, for appellant.

Haas & Dunnigan and E. B. Drake, all of Los Angeles, for respondent.

SLOANE, J. The plaintiff corporation was the insurer of the Los Angeles Daily Express Company upon its liability to its employés under the workmen's compensation law and brought this action to recover from the defendant Pacific Electric Railway Company for damages caused by the collision of one of the latter's electric street cars with a motor truck of the express company, on which one George L. Makley was riding, and which was driven by a fellow workman, Fenn Hart. Both of these men were employés of the express company. Makley was thrown from the motor car by the collision, and had both legs cut off by the electric car. The plaintiff company, having paid the compensation allowed Makley under the workmen's compensation law, is maintaining this action under its subrogated claim against the electric railway company.

The collision took place in Hollywood, in the city of Los Angeles, at the intersection of Hollywood boulevard, which runs approximately east and west, and Wilton place, a street running north and south. The motor car was proceeding toward the south on Wilton place, and the electric car was going toward the east on the south track of the electric company's double track railway on Hollywood boulevard. The verdict of the jury was in favor of the plaintiff, and awarded damages in the sum of $8,000. Defendant's motion for a new trial was denied, and the appeal is from the judgment upon the judgment roll and a bill of exceptions. The grounds relied on are insufficiency of the evidence and alleged errors of the court in giving and refusing instructions.

The main contention made by appellant is that the evidence establishes contributory negligence. It does not seem to be disputed that the evidence was sufficient to justify the jury in finding that the defendant's motorman was guilty of negligence in driving his car at an excessive and unlawful rate of speed. The speed limit at the place of the accident, under the traffic ordinance of the city of Los Angeles, was 20 miles per hour. It was testified by a number of witnesses that the defendant's car approached the scene of the accident at a rate variously estimated at from 30 to 40 miles per hour. The issue as to liability for damages, therefore, hangs on the question of contributory negligence.

There may be eliminated from this consideration the manner of the approach of the motor truck to the street intersection. The evidence sufficiently discloses that after entering the street intersection both the driver and Makley saw the approaching electric car, and that the motor truck was slowed down and under sufficient control so that it could have been stopped before reaching the track on which the electric car was approaching. The driver of the motor truck and Makley claim that at this point, where they could have stopped in safety, they saw the electric car approaching, at a distance of about 200 feet, at what appeared to them to be a reasonable rate of speed. They were then going at about 8 miles per hour, and were about 20 feet from the car track on which the electric car was approaching. The driver speeded up his motor and attempted to cross in front of the electric car. Then the collision occurred. Makley, testifying as to conditions just as they attempted to cross the car tracks, says:

> "I then looked to the west. When I looked to the west I saw a car about 200 feet down the track toward Taft street. I supposed this car was running at a reasonable rate of speed. I saw the car, of course, and it appeared to be coming at a reasonable rate of speed. It looked that way to me. I continued on across the boulevard. * * * When we got to the westbound track I saw that it was coming at a high rate of speed, and I raised to jump from the truck, and before I could do so the front of the car struck on the front part of the truck and knocked it from under my feet."

The testimony of Fenn Hart, the driver of the truck, as to the situation at this juncture, was as follows:

> "My auto truck at the time I first observed the car that collided with us—the front end of the truck was possibly eight or ten feet from the north rail of the north track; that would put me somewhere around fifteen feet where I was sitting in the car back from the north rail of the north track. * * * When I saw the car it was close to Taft street. I couldn't say how far Taft is, but it is the first street west—it is a block. I couldn't tell how fast the car was mov-

ing, but it seemed to be traveling at a reasonable rate of speed. I was going about eight or ten miles an hour at the time; the front end of the automobile truck was eight or ten feet from the first track. I was watching this car practically all the time. When I was north of the north track, possibly eight or ten feet—something like that—I opened up the throttle. When the front end of my truck was between the two tracks, more to the south than the north, I saw that I didn't have time to get across in front of it, and I tried to stop. One of my front wheels passed over the north rail of the south track, and then was when the collision happened. Just before it collided with me I saw it was traveling at least thirty-five miles per hour."

It was shown in evidence that the width between the rails of each of the car tracks was 5 feet, and the distance between the south rail of the north track and the north rail of the south track was 7 feet. Starting with the front of the car 10 feet north of the first track, the motor truck had probably 30 feet to go, besides its own length, before it would clear the approaching electric car. Fifty feet would cover the entire distance, as testified to by these witnesses. As they there saw the situation, the electric car was 200 feet or more distant, approaching at what they supposed was a "reasonable rate of speed." Under the city ordinance that rate might not lawfully exceed 20 miles per hour. If the auto motor's accelerated speed reached even 10 miles per hour, the driver of the motor car could clear the tracks while the electric car at 20 miles per hour covered 100 feet of the intervening space. Of course, there can be no such mathematical accuracy of calculation in such a case, but this estimate would still leave another hundred feet as a margin of safety. They took the chances. Was it negligence, as a matter of law? Or was the jury entitled to determine the question of negligence as one of fact, in view of the conditions shown by the testimony?

[1] The fact that one voluntarily assumes a certain degree of risk is not conclusive of negligence. In these days of rapid transit and congested traffic, every man who crosses a busy street, or drives an automobile, takes chances, and serious ones. The question is, are they greater than is reasonably necessary to meet the ordinary requirements of business, or even pleasure? Where the precise facts under consideration are such as to give rise to an honest difference of opinion between intelligent men, the question is one for the jury. We think this is such a case.

[2] If the jury accepted the testimony of the witnesses for plaintiff, as they fairly could, it is evident that the element of miscalculation on the part of the men on the autotruck was in underestimating the speed of the approaching electric car when they determined to pass in front of it. To what extent were they entitled to rely upon the presumption that the railway company's servants were observing the speed limits, in justification for their mistake? Clearly not to the extent of shutting their eyes and crossing blindly in front of a moving car. But these men did not do that. They used their eyes and exercised their judgment, and thought that the rate of speed was reasonable, and, in view of the distance to be traveled by the electric car, would permit them to cross in safety. This would have been the result if the defendant's car had been traveling within the limits prescribed by law. Under these circumstances we think the jury would be justified in concluding that the men on the truck supplemented their own judgment of the speed of the electric car with the presumption that the law was being obeyed. This they had a right to do Although, as already stated, one may not willfully close his eyes to danger on the assumption that another will act with care and prudence and in observance of the law, yet he cannot be deemed negligent when, if a reasonable use of his faculties does not warn him to the contrary, he rests on such assumption. Harris v. Johnson, 174 Cal. 55, 161 Pac. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560; Mann v. Scott, 182 Pac. 281; Medlin v. Spazier, 23 Cal. App. 242, 137 Pac. 1078.

[3] Appellant's second assignment of error is that the jury disregarded the instructions of the court. We fail to understand how it is made to appear in this case that the jury disregarded any of the instructions of the court in arriving at its verdict. The instructions did not direct a verdict for the defendant, but left the way open for a verdict for either the one or the other of the parties, according as the jury found upon certain ultimate facts. It is only in the event that the evidence does not support the verdict that we can say that the instructions were not followed.

[4, 5] No useful purpose would be served by discussing all of appellant's exceptions to the rulings of the court in granting and refusing instructions. We are satisfied that the instructions fairly covered all the matters necessary to a correct understanding by the jury of the law of the case. Some of the instructions refused correctly stated the law, but upon points sufficiently covered by the instructions given. It was, for instance, sufficiently pointed out that Makley owed a duty to look out for himself in crossing the car tracks, and might not blindly rely on the driver; and that neither of them could shut their eyes to the dangers from approaching cars, and rest secure in the assumption that the electric cars would approach the crossings in a careful and prudent manner. There was no necessity for the instructions offered and refused relating to the effect of negligence of the Commonwealth Bonding Company and the Los-

Angeles Daily Express on the right of plaintiff to recover, from the fact that their only connection with the events of the accident was through the agency of the men in charge of the motor truck; and it was sufficiently pointed out that contributory negligence on their part would defeat a recovery by plaintiff.

We think, also, that the instruction as to the "last clear chance" was not out of place. It might have appeared to the jury, under the evidence, that the occupants of the truck were at fault in attempting to cross the tracks in front of the approaching car; but that after they had placed themselves in a position of danger, which was discovered by them too late to extricate themselves, the defendant, having knowledge of their dangerous situation, might, by the exercise of diligence, still have avoided the accident. It may well be that a motorman, with a better knowledge of the rate of speed at which his car is traveling, may discover the imminent danger of persons attempting to cross the track before they themselves become aware of it; and in such a case, notwithstanding their careless disregard of danger, if he had time to stop or slow up his car his would be the last clear chance.

[6-8] We think instructions 11 and 12 correctly stated the law in declaring that "it cannot be said that a person is guilty of contributory negligence merely because he attempts to cross a street railway when a car is approaching"; that "all that is required on a given occasion of a driver of a vehicle in attempting to use a street railway crossing is to exercise ordinary care of his sense of sight and hearing to observe coming cars"; and that it is not negligence to attempt to cross in front of an approaching street car "if it is at such a distance away that an ordinarily prudent person would believe he could make such crossing in safety, although it may afterwards appear by evidence that a different course of conduct would have been safer on his part." Counsel for appellant, while admitting the correctness of these instructions as applied to street crossings where the speed limit is from 4 to 8 miles an hour, claims that the rule should not apply in localities where the allowed speed is 20 miles an hour. We do not see the force of the distinction. There are, ordinarily, on many lines of street railway, where a speed of 20 miles per hour is permitted, cars passing at such frequent intervals that it is rarely that a car is not approaching a given crossing. It is, of course, in such localities incumbent on one attempting to cross the tracks to take into account this greater rate of speed in determining how far in advance of an approaching car he can prudently attempt to pass. But to say he is guilty of negligence in attempting to cross at all in front of an approaching car would place an intolerable burden and hardship on the traveler by team or automobile. We think the doctrine of Clark v. Bennett, 123 Cal. 275, 55 Pac. 908, Scott v. San Bernardino Traction Co., 152 Cal. 610, 93 Pac. 677, and Campbell v. Los Angeles Traction Co., 137 Cal. 565, 70 Pac. 624, applies to crossings located as was the one under consideration here, as well as to crossings where a slower rate of speed is prescribed, subject to the qualification as to a prudent determination as to the distance of the car to correspond with the different rates of speed.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

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42 Cal. App. 482

BROWN v. RIVES et al. (Civ. 2929; L. A. 4874.)

(District Court of Appeal, Second District, Division 2, California. July 29, 1919. Opinion of Supreme Court Denying Rehearing Sept. 25, 1919.)

1. ACKNOWLEDGMENT ⚷48 — NOTARY TAKING ACKNOWLEDGMENT OF PERSON USING FICTITIOUS NAME NOT LIABLE.

Where one forged deed to fictitious grantee, assumed the fictitious name, and sold the land, a notary, who certified that the forger was "known to be the person whose name is subscribed to the within instrument," was not liable, under Civ. Code, §§ 1185, 1200, and Pol. Code, § 801; the certificate being true as far as the notary was concerned.

On Rehearing in Supreme Court.

2. ACKNOWLEDGMENT ⚷48 — NEGLIGENCE OF NOTARY TAKING ACKNOWLEDGMENT NOT PROXIMATE CAUSE OF DAMAGE TO PURCHASER OF LAND.

Where one forged deed to fictitious person, assumed the fictitious name, and sold the land, negligence of notary in taking the forger's acknowledgment without proper examination, etc., as required by Civ. Code, §§ 1185, 1200, and Pol. Code, § 801, was not the proximate cause of loss to the purchaser.

In Bank.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action by George W. Brown against E. E. Rives and the American Surety Company of New York. From judgment for defendants, plaintiff appeals. Affirmed in the District Court of Appeal, and rehearing denied in the Supreme Court.

W. N. Goodwin and Goodwin & Morgrage, all of Los Angeles, for appellant.

Dale H. Parke and Bicksler, Smith & Parke, all of Los Angeles, Walter F. Dunn, of Monrovia, and John P. Dunn, of Los Angeles, for respondents.

THOMAS, J. This is an action against a notary public and his sureties for damages alleged to have resulted from the negligence of the notary. The facts in regard to this case, as we get them from the record here, are as follows:

On May 26, 1916, Martin L. Kelsey and Anna B. Kelsey, his wife, were, and for many years prior thereto had been, and now are, the owners of lots 15, 16, and 17, in block 9, of Van Ness Square, in Los Angeles city, and such ownership was then shown in the proper records of Los Angeles county. Prior to said May 26, 1914, one Leonard C. Canfield conceived a felonious scheme to obtain money by forging the names of Kelsey and his wife and the notarial certificate of their acknowledgments to a deed purporting to convey said property to a fictitious person as grantee, and placing such forged deed of record, and then, assuming the name of such fictitious grantee, to sell said property to such person as he might be able to victimize. In furtherance of this scheme said Canfield forged the names of Kelsey and his wife to a deed purporting to grant said property to a fictitious grantee, designated as Helmer E. Rabild, and attached thereto a forged certificate of acknowledgment of the execution of said deed before W. B. Julian, a notary public of Los Angeles county. This forged deed was recorded in the recorder's office of Los Angeles county on May 27, 1914.

On or about June 10, 1914, said Canfield called plaintiff on the telephone and stated to plaintiff that the person speaking was Helmer E. Rabild, and offered to sell and convey said three lots to plaintiff for $4,750, subject to taxes for the current year. In the same conversation he stated that he would furnish certificates of title issued by the Title Insurance & Trust Company, showing title to said property vested in plaintiff, free from all incumbrances, except taxes and certain building restrictions. Plaintiff accepted this proposition over the telephone, and in the same conversation stated that he would instruct the Title Insurance & Trust Company to pay $4,750 when it could issue its certificates that title to said property appeared from the records of Los Angeles county vested in plaintiff. In furtherance of said scheme Canfield prepared a deed of said property, in which the name of Helmer E. Rabild appeared as grantor, and Geo. W. Brown as grantee, and prevailed upon the assistant cashier of a Monrovia bank to introduce him to defendant E. E. Rives as Helmer E. Rabild, and thereupon defendant Rives, without further evidence or knowledge that the person so introduced was in fact Helmer E. Rabild, attached to said deed a certificate signed by him as notary public of Los Angeles county, and impressed with his notarial seal, reciting that "on this 12th day of June, 1912, before me, E. E. Rives, a notary public in and for said county, personally appeared Helmer E. Rabild, *known to me to be the person whose name is subscribed to the within instrument*, and acknowledged that he executed the same," and returned said deed, with the above certificate attached, to said Canfield. Canfield then delivered the deed to the Title Insurance & Trust Company, with instructions to record the same, and when it issued its certificates showing title to all of said property to be of record in plaintiff, subject to certain taxes, restrictions, and easements, to send its check, drawn in favor of Helmer E. Rabild, to post office box No. 615, Monrovia, Cal. The Title Insurance & Trust Company filed said deed for record with the county recorder of Los Angeles county, and it was recorded June 24, 1914. Upon the same day said title company issued its certificates of title that the official records of Los Angeles county showed title to each of said lots vested in George W. Brown on June 24, 1914, subject to said taxes, restrictions, and easements, and thereafter, but on the same day, issued its check in favor of Helmer E. Rabild for $4,750, and sent the same by mail, addressed to Helmer E. Rabild, box No. 615, Monrovia, Cal. Said check was thereafter paid by the bank upon which it was drawn, and returned to said title company, indorsed "Helmer E. Rabild." Before said check was drawn by said title company, plaintiff had deposited with it $4,750, with instructions to pay said sum to Helmer E. Rabild when the records of the county of Los Angeles showed the title of each of said lots to be vested in George W. Brown, and it issued its certificates of title to that effect, and the check drawn by said title company and mailed to Helmer E. Rabild, as above stated, represented the $4,750 delivered to it by plaintiff. Neither plaintiff nor the title company ever saw Canfield during the negotiations consummated by the pretended sale, and all communications with him were by telephone or by mail. The lots in question were of the reasonable value of $2,500 each.

When satisfied that the deed recorded May 27, 1914, was a forgery, plaintiff commenced this action to recover from the notary, Rives, and his bondsman, $4,750, resting his claim for damages upon the contention that the certificate of the notary attached to the deed of June 12, 1914, was false in fact, and its falsity the proximate cause of plaintiff's loss. The court found the facts to be substantially as above stated, but concluded therefrom that the certificate complained of was not the proximate cause of the loss, and entered judgment dismissing the action, with costs to defendants. Plaintiff appeals from the judgment on the judgment roll alone.

[1] The findings in this case are very clear and specific. Among other things, the court found as follows:

"The court further finds * * * that at all of the times herein mentioned there existed no such person as Helmer E. Rabild. That the name Helmer E. Rabild was used and designed by the said Leonard C. Canfield to identify some fictitious person, who did not exist, but under whose assumed personality he, the said Leonard C. Canfield, would conduct his negotiations with reference to the sale and transfer of this property to the plaintiff, and that such secret intention on the part of the said Canfield was not known to the defendant Rives. That Helmer E. Rabild was at all times herein mentioned the name assumed by and used by the said Leonard C. Canfield, and by him alone, and that at the time of the execution of the deed to the plaintiff herein, and the acknowledgment thereof before the defendant notary, E. E. Rives, Helmer E. Rabild, in so far as there was any Helmer E. Rabild, did, in the person of said Leonard C. Canfield, appear before the said notary and acknowledge the execution of the instrument as in the notarial certificate stated, and that the certificate of the said notary did truthfully so set forth the fact that Helmer E. Rabild had executed the said instrument."

It therefore conclusively appears that the very individual who signed and acknowledged the deed, and who was referred to therein, regardless of the name under which he had transacted business with others, did actually appear before the notary. This being true, the notarial certificate of acknowledgment spoke the truth, and was not false.

Section 1185 of our Civil Code provides:

> "The acknowledgment of an instrument must not be taken, unless the officer taking it knows or has satisfactory evidence, on the oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the instrument; or, if executed by a corporation, that the person making such acknowledgment is the president or secretary of such corporation, or other person who executed it on its behalf."

Section 1200 of the same Code reads as follows:

> "An officer taking proof of the execution of any instrument must, in his certificate indorsed thereon or attached thereto, set forth all the matters required by law to be done or known by him, or proved before him on the proceeding, together with the names of all the witnesses examined before him, their places of residences, respectively, and the substance of their testimony."

Appellant contends that said certificate of acknowledgment is false, in the light of the facts in this case, based upon his understanding of the limitations imposed by our laws upon a notary public in taking and certifying to an acknowledgment of a deed to real property in this state. It will be noticed that the first section above quoted imposes upon the notary the duty of certifying that "the person making such acknowledgment is the individual *who is described in and who executed* the instrument" (italics ours); not that the person who executed the instrument *is the person whom he claims to be, or that the name given is his true name*, as manifestly contended for by appellant. This makes all the difference in the world.

In this case Rives, the notary, had never seen Canfield before. Rives, however, was well acquainted with the assistant cashier of the bank at Monrovia, who introduced Canfield to him as Rabild. The assistant cashier knew him by that name, and none other. That was the name he gave when he opened his account at that bank. This is the man, regardless of the fact that his true name was Canfield, who executed the deed, and whose execution thereof passed all the title that stood in the name of Rabild, and acknowledged to the notary, that he executed the same. Under the holding of this court in Anderson v. Aronsohn, 28 Cal. App. Dec. 216,[1] this was sufficient basis for the statement contained in the certificate that the notary *knew* "that the person making such acknowledgment is the person who is described in and who executed the instrument." The certificate stated the absolute truth, although, according to this record, Canfield was a liar and a forger. Had "Rabild" come to this notary alone, with the deed already signed, accompanied by no one whom the notary knew, and had asked him to acknowledge the same, another question would be before us. In that case we think the "satisfactory evidence," referred to in the section, would have to be received. This latter evidence, however, was not necessary under the facts as disclosed here. We are confronted in this case with a condition, not a theory. Such being true, this court will never knowingly mulct any person for telling the truth and acting honestly.

Our attention is called to the case of Joost v. Craig, 131 Cal. 504, 63 Pac. 840, 82 Am. St. Rep. 374, as supporting appellant's position here. We do not think that case in point. In that case the certificate was, in fact, false. In this case it is true. In that case it was said:

> "If the deed is not genuine, but is forged, the notary and his sureties ought to be held for all damages unless they have taken the precautions expressly required by the statute."

That, we think, is tantamount to saying that if the deed is genuine the notary, or his sureties ought not to be held for any damages, even though they have not taken such precautions. In the case at bar, the deed was genuine. True, it was executed by Canfield under said assumed name—Rabild. Under this assumed name, however, as before stated, he opened his bank account at Monrovia. Under this assumed name he was known to the banker. To him he was Mr. Rabild of Monrovia—the very man mentioned in the body of the deed, and, as appellant urges in his brief, who "signed the name Helmer E. Rabild in the presence of defendant Rives and requested the notary to certify his acknowledgment thereof." This deed was genuine, and the certificate of acknowledgment attached thereto was true. In such case there can be no liability on the part of the notary, under section 801 of the Political Code, or any other statute. As was said in the case of Anderson v. Aronsohn, supra:

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[1] Reversed by Supreme Court on rehearing. See 184 Pac. 12.

> "The language of Joost v. Craig, 131 Cal. 504 [63 Pac. 840, 82 Am. St. Rep. 374], clearly recognizes a situation in which a notary may comply with the law and yet be honestly mistaken, and injury result to innocent parties by reason of his mistake, and yet the notary not be liable."

The same is true here. It is further said in the Joost Case:

> "The certificate here gave assurance that the notary knew of his own knowledge, and not upon mere hearsay, that the grantor was Charles A. Anderson of Redwood City. If this certificate was not true, the notary should be held."

The foregoing is tantamount to saying, and we think it does say, by a perfectly rational inference to be deduced therefrom, that if the certificate was true the notary should not be held liable, regardless of whether the information upon which he based such certificate was hearsay or otherwise.

There is no doubt but that the first deed—the alleged deed from Kelsey and wife to "Helmer E. Rabild"—was a forgery. Nor is there room for argument that the second deed—the deed from "Rabild" to Brown, plaintiff here—was genuine. The only trouble with this deed was that it conveyed nothing, the grantor having nothing to convey, for reasons that are obvious. To hold that the notary and his sureties were liable, as contended for by appellant, whenever for some reason there appeared some flaw in the title to the property sought to be conveyed by such deed, or because the grantor in such instrument had no title to convey, and under such circumstances as disclosed by the record here, would be so revolutionary an act on the part of this court that it would cause business to quake to its very foundation. Such certainly cannot be the law. The notary public and his bondsmen are in no sense insurers of the title. It is true that, without the certificate of acknowledgment to the purported deed from Rabild to plaintiff, the deed could not legally have been recorded; and, if not recorded, it follows that the certificate of title thereafter issued could not have shown the title of record in plaintiff. But the fact that the certificate of title did not so show was not because the notary's certificate of acknowledgment was false, as we have already seen. Under these circumstances, if the said certificate of acknowledgment was true, there was no liability. And it was true.

It was urged on the argument, while conceding the legal right to transact business in that way, that no one has the right to adopt a fictitious or assumed name for the purpose of the commission of a crime. This is true. It is also true that if one does commit a crime under such fictitious or assumed name, and causes a second party to suffer damages (as was done by Canfield to plaintiff here), still that fact alone is not the basis, legal or otherwise, for the predication of an action for the recovery of such damages against a third party, who knew absolutely nothing of such fact, and who has acted honestly, and certified correctly, in so far as whatever he did had to do with the case is concerned.

In view of these conclusions, we think no other point urged needs consideration.

The judgment appealed from is affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

Opinion of Supreme Court Denying Rehearing.

PER CURIAM. [2] The application for a hearing in this court, after decision by the District Court of Appeal of the Second Appellate District, Division 2, is denied. We base our denial solely upon the fact that it clearly appears that any negligence on the part of the notary, Rives, was not a proximate cause of the injury to plaintiff.

We deem it proper to further point out that in the case of Anderson v. Aronsohn, 28 Cal. App. Dec. 216, which is referred to in the opinion, the decision of the District Court of Appeal was vacated by this court and the cause ordered to a hearing herein, where it is now pending.

All concur.

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42 Cal. App. 602

DILLWOOD v. RIECKS et al. (Civ. 2010.)

(District Court of Appeal, Third District, California. Aug. 11, 1919.)

1. EVIDENCE 🔑83(4)—ACTION OF BOARD OF COUNTY SUPERVISORS IN PURCHASING LAND—PRESUMPTION.

It must be presumed that in purchasing land the board of supervisors of a county exercised its power to accomplish one or more of the objects contemplated by the authority given by Pol. Code, § 4041, subd. 6, empowering boards to purchase land for public pleasure grounds, parks, and other like purposes.

2. COUNTIES 🔑1—POLITICAL SUBDIVISIONS OF STATE—DIFFERENCE FROM MUNICIPAL CORPORATIONS.

Counties are political subdivisions of the state for governmental purposes, and not, like municipal corporations, incorporations of the inhabitants of specified regions for purposes of local government.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, County.]

3. Counties 🔑142—Management of agricultural park — Liability for destruction of stallion.

Where a county, pursuant to Pol. Code, § 4041, subd. 6, through its board of supervisors purchased land for an agricultural park, and erected stables wherein stalls were rented, such county was not liable for destruction by fire of a stallion kept in a stall, on the ground the acts of the county officers in the management of the park which caused the fire were in a proprietary capacity, not in the exercise of governmental functions.

4. Counties 🔑88—Maintenance of park—Personal liability of officers—Burning of horse.

Where county officers under the direction of the board of supervisors undertook to burn grass in the county's agricultural park, which resulted in the burning of a valuable stallion in the park stables, the officers were liable if they burned the grass, an undertaking discretionary with them, in a negligent manner.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by Jennie E. Dillwood against W. H. Riecks and others. From judgment for defendants, plaintiff appeals. Judgment reversed, and new trial ordered.

Gordon A. Stewart and Lawrence Edwards, both of Stockton, for appellant.

Charles Light and H. C. Stanley, both of Stockton, for respondents.

CHIPMAN, P. J. This is an action to recover damages for the loss of plaintiff's horse, alleged to have perished by fire on June 14, 1916, through the negligence of defendants. The defendants, other than defendant Quail, are sued as members of the board of supervisors of San Joaquin county and as individuals. Defendant Quail is sued as county surveyor and in his individual capacity. It is alleged in the amended complaint that plaintiff is the owner of a stallion named "Ishmael," of the value of $5,000; that on the day above mentioned and some time prior thereto plaintiff "had kept said stallion in a stall at the county fair grounds; that upon said fair grounds there is a race track and stables for the care of horses using said race track."

Paragraph 4 is as follows:

> "That during all the times herein mentioned the said fair grounds was and now is the property of the county of San Joaquin, and was and is managed and controlled by said defendants, and is owned and held by the county for the holding of county fairs, and to be rented from time to time for the holding of exhibitions in motor and horse racing, fairs, and public exhibitions of various kinds, for which a charge is made and collected by the county of San Joaquin from said parties; that the horse stalls on said fair grounds are likewise rented to divers persons to be used by them in the care of horses trained by them on such race track of said fair grounds, and for the use of which horse stalls a charge of one and $^{50}/_{100}$ ($1.50) dollars a month is made for each stall rented as aforesaid; that the said horse 'Ishmael' was on the said 14th day of June, 1916, in a stall on said fair grounds, for the use of which stall said charge of one and $^{50}/_{100}$ ($1.50) dollars was made and collected by the county of San Joaquin; that the said defendants, by their agents and employés, on the 14th day of June, 1916, set fire to and burned the grass, then standing around and near the stall in which plaintiff's horse was then standing, and carelessly and negligently permitted said fire to be communicated with said stall, setting the same on fire, thereby destroying said horse, to the damage of the plaintiff in the sum of five thousand ($5,000) dollars."

It is alleged that the plaintiff duly filed with the board of supervisors a claim for damages for the loss of said horse, which was by the board refused payment. The complaint is verified. A general demurrer to the complaint was overruled, and defendants answered denying most of the averments of the complaint. Defendants—

> "Admit that horse stalls on said fair grounds are rented to divers persons to be used by them in the care of horses trained by them on such race track of said fair grounds, and for the use of which a small charge of $1.50 per month is made for each stall rented as aforesaid, but allege that said sum of $1.50 is used exclusively in keeping up the track used by the occupants of said stalls free of charge, and without profit to the county of San Joaquin."

The cause was tried by the court without a jury. The court made findings as follows:

> "(2) That on the 14th day of June, 1916, plaintiff was the owner of a five year old standard bred pacing stallion named 'Ishmael,' of the alleged value of $5,000; (3) that on said last-named date, and for some time prior thereto, the said plaintiff had kept said stallion in a stall at Agricultural Park, commonly known as the county fair grounds, or race track grounds; that upon said Agricultural Park there is a race track and stalls for the care of horses using said race track; (4) that during all the times herein mentioned the said Agricultural Park was and now is the property of the state of California, and that the board of supervisors of the county of San Joaquin during all of the times herein mentioned did exercise a control over same as the agents of the state of California in a public and governmental capacity, and that the county of San Joaquin rented a stall upon said Agricultural Park to said plaintiff for the rental of $1.50 per month, and that the said stallion 'Ishmael' was in said stall on the 14th day of June, 1916, and that the rent for said stall was paid to the county of San Joaquin by said plaintiff; that the grass standing around and near said stall was on the 14th day of June, 1916, set fire to and burned by certain

persons confined in the county jail of San Joaquin county as prisoners acting under the direction of certain employés and officers of the highway maintenance department of the county of San Joaquin, and said county prisoners and employés of the said county of San Joaquin carelessly and negligently permitted said fire to become communicated with said stall, setting the same on fire, and thereby destroying said horse."

As conclusions of law the court found:

"(1) That said board of supervisors had no power or authority to manage and control said Agricultural Park except as agents of the state of California, and had no power or authority whatever to rent said stall to said plaintiff, or to permit said stallion Ishmael to be kept in said stall or in said Agricultural Park; (2) that said plaintiff is not entitled to take anything by said action."

Judgment accordingly passed for defendants, from which plaintiff appealed, and brings the record here on a bill of exceptions.

Appellant specifies the following grounds in support of her contention that the judgment is against law: (1) That, while the evidence shows that plaintiff's horse was destroyed through the carelessness of the employés of the county of San Joaquin, the court held the county not liable; (2) that, while plaintiff's horse was destroyed through the negligence of persons acting under the instructions of certain officers of the county, the court held that such officers were neither liable as officers nor as individuals; (3) that the court failed to find the value of the horse Ishmael.

There is no controversy as to the facts. It was alleged that the county became the owner "by a grant deed conveyed to the county of San Joaquin, during the year 1911, 85.65 acres of land, and being the property commonly known as 'Agricultural Park,' and also as the 'County Fair Grounds,' and being the same property upon which the plaintiff's horse was destroyed by fire." It is alleged in the complaint that these grounds were "managed and controlled by said defendants, and is owned and held by the county for the holding of county fairs, and to be rented from time to time to private parties for the holding of exhibitions in motor and horse racing, fairs and public exhibitions of various kinds."

[1] It appeared that by resolution of the board of supervisors all moneys received for rent should be placed in a fund to be called "Agricultural Park Fund," and was to be used in the care and maintenance of the grounds. The particular purpose for which the board of supervisors made the purchase does not appear. By subdivision 6 of section 4041 of the Political Code the board is given power "to purchase" land for "public pleasure ground, public parks, and other public purposes, * * * and to * * * take care of, manage and control the same." It must be presumed that in purchasing this land the board exercised its power to accomplish one or more of the objects contemplated by the statutory authority given to it. Furthermore, the pleadings and the evidence show that the land has been devoted to public purposes—the holding of "county fairs, exhibitions in motor and horse racing, fairs, and public exhibitions of various kinds." It is not contended that the small charge for the use of the stalls or for the use of the grounds for fairs and exhibitions was for profit or for purposes other than as contributions towards the care and maintenance of the park. It appeared that on the day of the accident defendant French, a member of the board of supervisors, who seems to have had charge of these grounds for the board, gave directions to have the prisoners held in the jail go to the park and burn the dry grass, concededly a proper thing to have done. Section 4041 of the Political Code authorized the board to make such use of "convicted prisoners in the county jail." The burning of the grass was done under the immediate supervision of defendant Quail, who had general charge of the prisoners for all work done by them.

[2] Appellant's principal contention is that the liability of the county is the same as that of a municipal corporation, a city, or town; and, viewed in that light, the county or its officers were liable for the reason that the acts done in the management and care of the park in question were done by the officers in a proprietary capacity, and not in the exercise of governmental functions; citing Chafor v. City of Long Beach, 174 Cal. 478, 163 Pac. 670, L. R. A. 1917E, 685, Ann. Cas. 1918D, 106.

Appellant's major premise, that the legal status of a county is the same as that of a municipal corporation, is not sustained by reason or authority. Law writers and the courts have very clearly pointed out the distinction between the two organizations. The Supreme Court thus dealt with the question in People v. McFadden, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66:

"It is clear, therefore, that the Constitution does not hold counties to be municipal corporations, or 'corporations for municipal purposes'; but so far as they are to be regarded as corporations at all they are 'political corporations.' And this is in harmony with the common acceptation of the terms 'municipality' or 'municipal corporation,' as used in the common and written law of both England and America time out of mind. This view is also in harmony with those provisions of the statutes and codes which define counties to be 'bodies politic and corporate,' and also with the decision of this court, made before the adoption of the Constitution, when it declared that a county is not a municipal corporation within the meaning of that term as used in the Political Code."

The following terse statement is found in County of San Mateo v. Coburn, 130 Cal. 636, 63 Pac. 80:

> "A county is a governmental agency or political subdivision of the state, organized for purposes of exercising some functions of the state government, whereas a municipal corporation is an incorporation of the inhabitants of a specified region for purposes of local government."

In Reclamation Dist. No. 1500 v. Superior Court, 171 Cal. 672, 679, 154 Pac. 845, 848, the court said:

> "The counties are governmental agencies of the state, * * * and the property intrusted to their governmental management is public property. The proprietary interest in all such property belongs to the public, and, if there be a legal title in the county, it is a title held in trust for the whole public. [Citing cases.] In the absence of constitutional restrictions, the Legislature has full control of the property held by the counties as agencies of the state, and may dispose of that property without the consent of the county or without compensating it."

In Hersey v. Neilson et al., 47 Mont. 132, 31 Pac. 30, Ann. Cas. 1914C, 963, the authorities will be found collected to the proposition that counties are political subdivisions of the state for governmental purposes. The doctrine is fully stated in Sacramento v. Chambers, 33 Cal. App. 142, 164 Pac. 613. It is also clearly set forth in 7 R. C. L. p. 925.

The Supreme Court of Kansas, in Silver v. Board of Commissioners of Clay County, 76 Kan. 228, 91 Pac. 55, thus states the principle:

> "It is well-established law that a county is an involuntary corporation for governmental purposes, and is in no sense a business corporation; that the powers and obligations of the county are such only as the law prescribes or as arise by necessary implication therefrom. * * * Cities, however, in this state, are municipal corporations, and neither their powers nor obligations are so restricted, and decisions as to their liability for negligence have no application."

Finally, "the several counties, as they now exist, are hereby recognized as legal subdivisions of this state." Const. art. 11, § 1.

[3] It results from the foregoing that the decision in Chafor v. City of Long Beach, 174 Cal. 478, 163 Pac. 670, L. R. A. 1917E, 685, Ann. Cas. 1918D, 106, relied upon by plaintiff, is not controlling where a county is involved. Necessarily, counties being but agencies of the state their functions are exclusively governmental, and are such only as are imparted to them by the state. In conferring power upon the board of supervisors to purchase land for "public pleasure grounds, public parks, and other public purposes and to take care of and manage the same," the purchase is for the benefit of the people of the state, and not exclusively for the people of the county; and, as was said in Reclamation District No. 1500 v. Superior Court, supra, "property so acquired is held by the counties as agencies of the state."

[4] Whether or not the officers connected with the burning of this grass are individually liable presents a more difficult question. In Doeg v. Cook, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171, it was said that "the very decided trend of modern decision is to hold such officers liable for acts of nonfeasance, or for the negligent performance of a duty when the duty is plain, when the means and ability to perform it are shown, and when the performance or nonperformance, or the manner of its performance, involves no question of discretion. In short, where the duty is plain and certain, if it be negligently performed, or not performed at all, the officer is liable at the suit of a private individual especially injured thereby." In Taylor v. Manson, 9 Cal. App. 382, 387, 99 Pac. 410, the rule as stated in Doeg v. Cook was applied. In the case of Edwards v. Brockway, 16 Cal. App. 626, 117 Pac. 787, the defendant Brockway was held not liable for the reason that there were no facts showing that Brockway "was guilty of official negligence as superintendent of streets or that he failed and neglected to perform any official duty imposed upon him either by law, ordinance, or order, or regulation of his superiors." In Doeg v. Cook the court quotes approvingly from Shearman and Redfield on Negligence (3d Ed., § 156), where the rule is thus given:

> "The liability of a public officer to an individual for his negligent acts or omissions in the discharge of official duty depends altogether upon the nature of the duty of which the neglect is alleged. Where the duty is absolute, certain, and imperative, involving merely the execution of the set task—in other words, is merely ministerial—he is liable in damages to any one specially injured, either by his omitting to perform the task, or by performing it negligently or unskillfully. On the other hand, where his powers are discretionary, to be exercised or withheld according to his judgment as to what is necessary or proper, he is not liable to any private person for a neglect to exercise those powers, nor for the consequences of a lawful exercise of them, where no corruption or malice can be imputed, and he keeps within the scope of his authority."

The early case of Huffman v. San Joaquin County, 21 Cal. 426, was an action for damages resulting from want of proper repairs to a bridge. The statute at that time devolved upon boards of supervisors the management and control of bridges in their respective counties and upon the road overseers of the county the duty of keeping bridges on public highways in repair. In sustaining a demurrer to the complaint the court said:

> "If any remedy exists for injuries resulting from neglecting to keep such bridges in repair,

it must be sought either against the road overseers or supervisors personally."

In Hover v. Barkhoof, 44 N. Y. 113, it was held that one who assumes the duties, and is invested with the powers of a public office, is liable to an individual who sustains special damage by a neglect properly to perform such duties.

Relying upon the distinction made between the discharge of duties plainly and certainly devolved upon the officer and duties which he may or may not perform at his discretion, it is contended that in the present case the duty to burn the grass as a preventive of damage which might otherwise accrue was discretionary and not compulsory, and hence, under the decision in Doeg v. Cook, supra, and the rule as stated by Shearman and Redfield, supra, the defendants are not individually liable.

The cases involving the question are generally cases arising from the neglect to do some act—cases of nonfeasance rather than misfeasance. It seems to us quite clear that where the power to do the act exists, though its performance is left to the discretion of the officer, if he acts in execution of such discretion his liability would be the same as in the discharge of a mandatory duty, and if he performs the act or discharges the duty in a negligent manner he would be liable in an action for damages by a person injured thereby. Whether the duty performed be discretionary or compulsory there is no reason why like consequences should not follow the negligent performance of the duty.

The rule, as stated by Shearman and Redfield and in Doeg v. Cook, has reference more particularly to acts of nonfeasance, where it was entirely discretionary with the officer to do or not to do the act. It is perhaps a debatable question whether or not the duty "to care for, manage, and control" this agricultural park did not impose upon the supervisors a plain and certain duty to burn this dry grass in order to prevent damage to the property itself or to individuals using it, still, having determined that it should be burned and having undertaken to do it, it was their duty to see that the work was not done in a careless and negligent manner, failing in which a liability arose for damages resulting from their negligence.

There was evidence tending to show that the management and care of the park grounds were being exercised by defendant Supervisor French, under direction of the board of supervisors; that the "chain gang," composed of prisoners in the county jail, was placed in the charge and control of defendant Surveyor Quail, when put to work on the highways or elsewhere; that Fred E. Smith was the acting assistant highway maintenance engineer, and was given instruction by defendant Quail to go to the fair grounds and burn the grass; that Engineer Smith communicated these instructions to James McAfee, the guard of the "chain gang," and directed him to take the "chain gang" to the grounds and burn the grass, and that the work was finally done under the immediate direction of McAfee. The court found that the grass was "burned by certain persons confined in the county jail of San Joaquin county as prisoners, acting under the direction of certain employés and officers of the highway maintenance department" of the county, and that through their negligence plaintiff's horse was burned to death. The view taken by the court "that said plaintiff is not entitled to take anything by said action" will account for its failure to make findings of fact as to the defendants' connection with the accident, either as officers of the county or as individuals. The court, doubtless, held, as is now urged as the law by respondents, that no liability of defendants, either as officers or as individuals, was shown. This, we think, was error. There should have been findings of fact showing the acts done by the defendants and each of them, and the circumstances attending the acts. It would then be possible to draw the correct conclusion of law from such acts as to the liability or nonliability of defendants.

The judgment is reserved and a new trial ordered.

We concur: HART, J.; BURNETT, J.

42 Cal. App. 699

BATES et al. v. RANSOME-CRUMMEY CO. et al. (Civ. 2879.)

(District Court of Appeal, First District, Division 2, California. August 15, 1919. Rehearing Denied by Supreme Court Oct. 13, 1919.)

1. APPEAL AND ERROR 🔑347(1)—DOCKET OF JUDGMENT ENTRY IMPORTS NOTICE TO ALL PERSONS INTERESTED.

Under Code Civ. Proc. §§ 650, 659, 939, as amended by St. 1915, pp. 201, 205, 207, the time of serving notice of motion for new trial and proposed bill of exceptions depends on service of notice of entry of judgment, while time to appeal begins to run from entry of judgment when docketed, and the docket is a public record importing notice to all parties interested (Code Civ. Proc. §§ 668, 671, 672, 673).

2. APPEAL AND ERROR 🔑345(1)—MOTION FOR NEW TRIAL AFTER TIME TO APPEAL DOES NOT EXTEND TIME.

Where no appeal was taken within 60 days after entry and docketing of judgment, and at the expiration of such 60 days no new trial proceedings were pending, the right to appeal was lost, although a motion for a new trial was subsequently filed and overruled, in view of Code Civ. Proc. §§ 650, 659, 939, as amended by St. 1915, pp. 207, 201, 205.

3. CONSTITUTIONAL LAW 🔑316—STATE APPELLATE PROCEDURE IS WITHIN LEGISLATIVE CONTROL.

The construction of Code Civ. Proc. § 939, as amended by St. 1915, p. 205, as not permitting a motion for new trial filed after time for an appeal from the judgment had expired, to extend the time in which to appeal, is not in violation of Const. U. S. art. 14, § 1, relating to due process.

4. APPEAL AND ERROR 🔑345(1)—JUDGMENT FINAL ON FAILURE TO APPEAL OR MOVE FOR NEW TRIAL WITHIN SIXTY DAYS.

The contention that, so long as defendant's right exists to move for new trial or to vacate the judgment, it does not become final, cannot be sustained since under Code Civ. Proc. §§ 659, 939, as amended by St. 1915, pp. 201, 205, upon failure within 60 days after the entry of judgment either to appeal or to commence proceedings for new trial, the judgment becomes final.

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

Action by Amy Bates and others against the Ransome-Crummey Company and another. Judgment for plaintiffs, and defendants appeal. Appeal dismissed.

R. M. F. Soto, of San Francisco, for appellants.

Beggs & McComish, of San Jose, for respondents.

BRITTAIN, J. Amy Bates and 10 other property owners sued the Ransome-Crummey Company, a corporation, and Louis Lightston, treasurer of the city of San Jose, to quiet title to their respective properties and for an injunction restraining the defendants from interfering with the plaintiffs' properties or asserting any interest therein or lien thereon. Louis Lightston, as treasurer, filed a disclaimer. The Ransome-Crummey Company answered, and by way of cross-complaint sought to establish the lien of a street assessment and the validity of bonds issued to represent the assessments on the respective parcels of land of the plaintiffs. After answer to the cross-complaint, the case was tried, findings responsive to the issues of fact were signed, and as a conclusion of law therefrom the court determined the plaintiffs were entitled to a judgment and decree quieting their titles. The appeal by the defendants is from the judgment entered pursuant to the decision.

At the outset the court is met with the claim on the part of the respondents that the appeal was not taken in time. If this claim is well founded in law, this court has no jurisdiction of the appeal, and cannot consider any error claimed to have been made by the trial court. The jurisdiction of the trial court to render its judgment is not questioned. It has always been held that an appeal from a judgment taken after the time limited by the statute to appeal cannot be considered and must be dismissed. Gray v. Palmer, 28 Cal. 416; Contra Costa v. Soto, 138 Cal. 57, 70 Pac. 1019. A motion for a new trial is a proceeding distinct from that of an appeal. Under a former statute, even after the filing of a stay bond on appeal, the trial court had power pending the appeal to grant a new trial. Knowles v. Thompson, 133 Cal. 245, 65 Pac. 468; Union Collection Co. v. Oliver, 162 Cal. 755, 124 Pac. 435. The result of an order granting a new trial was to set the entire case at large and to give the trial court authority to try the case anew. Miller & Lux v. Enterprise, etc., Co., 169 Cal. 419, 147 Pac. 567.

[1] In 1915 the Legislature amended sections 650, 659, and 939 of the Code of Civil Procedure. St. 1915, pp. 201, 205, 207. Under section 650, when a party desired to have exceptions taken at the trial settled in a bill of exceptions, he might at any time within 10 days after notice of the entry of the judgment, or such further time as might be allowed, serve his proposed bill of exceptions. If he intended to move for a new trial, he was required within 10 days after receiving notice of the entry of the judgment to file with the clerk and serve upon the adverse party a notice of his intention so to move. Code Civ. Proc. § 659. He might appeal from the judgment within 60 days after its entry; but, if proceedings on motion for a new trial were pending, the time to appeal from the judgment was extended for 30 days after the determination of the new trial proceedings. Code Civ. Proc. § 939. Section 963 of the Code of Civil Procedure was also amended (St. 1915, p. 209), and the privilege of appealing from a new trial order, except in specific cases of which this is not one, was withdrawn. In summarizing these provisions of the Code, reference has been made only to those relating to cases tried by the court without a jury.

[2] Under these amended sections the time of serving notice of motion for a new trial and to propose a bill of exceptions is made dependent upon the service of notice of the entry of the judgment, while the time to appeal begins to run from the time of entry of judgment. The Code provides that upon the entry of the judgment it shall be docketed, and when so docketed the judgment becomes a lien upon the real property of the judgment debtor. The docket is a public record, and as such imparts notice to all persons interested. Code Civ. Proc. §§ 668, 671, 672, and 673. The party aggrieved by a judgment under these amended provisions of the statutes was given the election of appeal-

ing directly within 60 days from the entry of the judgment, or, if he desired to move either for a new trial or to vacate the judgment in the trial court, he might do so. If he did so within the 60 days allowed for an appeal, the time within which he might appeal was extended automatically until 30 days after the determination of the new trial proceedings. No such provision for extension of time was made in the statute because of the pendency of proceedings to vacate the judgment on the ground that the conclusions of law were not supported by the findings. The losing party was not required to move for a new trial, until he received notice of the entry of the judgment, unless the record showed he had waived such notice. He was not required to wait, however, until he received the notice of entry, but might have given notice of his intention to move for a new trial at any time after judgment. Of his own motion, therefore, he might have extended the time within which to appeal by serving notice of motion for new trial at any time within the 60-day limitation for appeal, even though he had not received notice of the entry of the judgment. If at the expiration of the 60-day period within which an appeal might be taken, no notice of intention to move for a new trial was given; in other words, if there was no proceeding for a new trial pending, the time to appeal from the judgment elapsed, and the privilege of appealing from the judgment, or of having a new trial order reviewed on appeal, terminated. There is no statutory requirement by which the prevailing party in a suit is required to give notice of the entry of the judgment. Because there is no such provision, the judgment debtor might in effect indefinitely extend the time of appeal by waiting until he was served with notice of the entry of judgment, and might appeal from the judgment at the expiration of 6 months or a year, or, for that matter, 10 years, from its entry, if it should be held that the right of appeal does not terminate at the expiration of 60 days after the entry of judgment, if no proceedings for a new trial are then pending.

In the particular case the findings of fact and conclusions of law were filed October 19, 1915. Judgment was entered November 24, 1915. The 60 days within which an appeal might have been taken expired January 23, 1916. Notice of intention to move for a new trial was dated and presumably served February 21, 1916, or 29 days after the time to appeal from the judgment had expired, without new trial proceedings having been commenced. Motion for new trial was denied April 14, 1916, and notice of appeal was served and filed April 24, 1916, or more than 3 months after the time to appeal had elapsed.

On behalf of the appellants it is argued that under the rule of liberal construction doubtful clauses affecting the right of appeal should be construed in favor of the right. It does not appear that the language of section 939 is doubtful. It provides that the appeal shall be taken within 60 days, but the time is extended if, or as the appellants contend, when, new trial proceedings are pending. In the present case no such proceedings were pending when the time of appeal elapsed.

[3] It is argued that under the construction given to section 939 of the Code of Civil Procedure it is unconstitutional, as in violation of section 1 of article 14 of the Constitution of the United States, because the appellants are deprived of their property without due process of law and are denied equal protection of the laws. Similar contentions have failed to meet the approval of courts. The matters of motions for new trial and appeal are entirely within the control of the Legislature. It might altogether abolish the right to move for a new trial, as it has abolished the privilege of appealing from an order made upon a motion for a new trial. Lancel v. Postlethwaite, 172 Cal. 329, 156 Pac. 486; Woodruff v. Colyear, 172 Cal. 440, 156 Pac. 475.

[4] It is argued, because it is the duty of the plaintiff diligently to prosecute an action to a finality, that so long as the right of the defendant to move for a new trial or to move to vacate the judgment exists, it does not become final; but citation of authority is not necessary to support the statement that for the purposes of appeal the judgment is final under the express terms of the statute as soon as it is entered. When the defendant fails within 60 days after the entry of judgment either to appeal or to commence proceedings for a new trial, the judgment becomes final for all purposes at the expiration of the 60-day period. The matters determined are res judicata, and under the rule of United States v. Throckmorton, 99 U. S. 61, 25 L. Ed. 93. An appeal from such a judgment is not within the provisions of the statute, and vests no jurisdiction in the appellate court.

The appeal is dismissed.

We concur: LANGDON, P. J.; HAVEN, J.

42 Cal. App. 776

ANDERSON v. ADLER et al. (Civ. 3005.)

(District Court of Appeal, First District, Division 1, California. Aug. 20, 1919. Rehearing Denied by Supreme Court Oct. 16, 1919.)

1. APPEAL AND ERROR 🔑110—ORDER DENYING MOTION FOR NEW TRIAL NOT REVIEWABLE.

St. 1915, p. 209, amending Code of Civ. Proc. § 963, does not allow an appeal from an order denying a motion for new trial, and such an appeal must be dismissed.

2. LANDLORD AND TENANT 🔑33—FINDING OF MODIFICATION OF LEASE BY EXECUTED ORAL CONTRACT SUSTAINED BY EVIDENCE.

In an action to foreclose a chattel mortgage given by a tenant to secure payment of rent, a finding that defendants were excused from full performance of lease terms by reason of an executed oral agreement modifying the terms of the original contract *held* supported by the evidence.

3. CONTRACTS 🔑238(2) — EXECUTED ORAL AGREEMENT IS ONE WHOSE TERMS HAVE BEEN PERFORMED.

Civ. Code, § 1698, provides that "a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise," and an "executed agreement" is one the terms of which have been fully performed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Executed Contract.]

4. CONTRACTS 🔑237(1)—ORAL MODIFICATION OF LEASE BASED ON SUFFICIENT CONSIDERATION.

An agreement adding to the terms of an existing agreement between the same parties, and by which new and onerous terms are imposed upon one of the parties, without any compensating advantage, requires consideration to support it.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by J. M. Anderson against J. R. Adler and others. From judgment for plaintiff for less relief than demanded and from an order denying plaintiff's motion for new trial, plaintiff appeals. Appeal from order denying motion for new trial dismissed, and judgment affirmed.

Wright, Winnek & McKee, of San Diego, for appellant.

A. J. Morganstern, of San Diego, for respondents.

WASTE, P. J. Plaintiff brought this action to foreclose a chattel mortgage, given to secure the payment of the term rent, and installments, to become due under a lease of of a hotel building in San Diego, alleging the sum of $13,500 to be due and unpaid on account of such rents. The trial court found that the terms of the original lease, as to the amount of the rent therein reserved, had been modified by an executed oral agreement, and entered its decree and judgment in favor of plaintiff foreclosing the mortgage for the sum of $3,333.35, with interest, attorney's fees, and costs.

Upon the entry of this judgment, plaintiff filed a notice of intention to move for a new trial. This proceeding was decided by the court below on June 19, 1916, the court denying said motion. Plaintiff filed notice of appeal, both from the judgment and from the order denying his motion for a new trial.

[1] The amendment of 1915 to section 963 of the Code of Civil Procedure (Stats. 1915, p. 209) does not allow an appeal from an order denying a motion for new trial. So far as that appeal is concerned, it is unauthorized and must be and is dismissed. Gray v. Cotton, 174 Cal. 256, 162 Pac. 1019.

[2] Appellant's contention on appeal is that the court erred, in law and fact, in finding, as it did, that defendants were excused from full performance of the terms of the lease in question by reason of an executed oral agreement materially changing the terms of the original contract.

The lease was for a period of ten years, at a term rental of $150,000, payable in monthly installments of $1,250. The building was to contain approximately 100 rooms, with suitable and sufficient halls, light courts, and light rooms, and a lobby, or entrance, to said building. As part of the consideration for the making of the lease, the lessees were to furnish and equip the building for hotel purposes, and were to give a chattel mortgage, upon the furnishings and equipment, to the amount of $10,000, as security for the term rent, installments of rent, and performance of the other conditions of the lease.

The alleged oral modification may be summarized as follows: Instead of a building containing approximately 100 rooms, the lessor provided one containing only 88 rooms. When the lessees discovered this discrepancy, they refused to go on with the lease, furnish the building, or pay the rent reserved. The lessor then agreed to waive that portion of the lease providing rentals, and agreed with the lessees that if they were unable to pay the rent reserved the lessor would meet the conditions and would waive the clause, or provision, of the lease relating to the payment of rent, and would accept as rental, under such conditions, such a sum of money from time to time as defendants could pay out of the proceeds of the business, and that he would demand only such rental as would enable defendants to make a profit out of the business.

Pursuant to this agreement, so the trial court found, the deal was consummated and the lessees entered into the occupancy and possession of the building, equipped and operated a first-class hotel. They kept the operating expenses as low as possible, and for a number of months paid plaintiff whatever balance remained on hand for receipts, after paying said expenses of operation, and cost of keeping up the equipment. The plaintiff received and accepted said balances as and in full satisfaction of all rentals due from defendants from February, 1914, to, and including, the 24th day of September, 1914.

Upon these findings the court based its conclusion and judgment that the defendants had paid the rent of the premises for the months of February to September 24, 1914, and gave judgment for the plaintiff for the amount due by way of rent from the last-named date to December 15, 1914, at which time plaintiff re-entered the premises. It is conceded that the rent was not paid according to the terms of the lease, and that but for the alleged modification of the lease and chattel mortgage the rent for the months just specified was not paid.

The findings of the trial court, which we have just briefly summarized, indicate that there was an executed oral modification of the written agreement of lease, and, so far as this contention is concerned, it only remains to determine whether or not the evidence supports the findings. Without stating the testimony, we are of the opinion that it does. While the testimony of the plaintiff tends to strongly negative the evidence on the part of the defendants bearing on the alleged oral modification of the lease, in another sense it gives color and support to defendants' claim. He admits the giving of rebates on the rent for a period of months, and for the period from February to September, in the year 1914, accepted and credited as rent many small sums, in explanation of which fact he testified he had agreed that when defendants collected the money they would turn it in in weekly payments, instead of paying in advance at the first of the month. But, whatever conflict may have arisen in the evidence, and the credibility to be given to the respective parties and their witnesses, was for the trial court to determine.

[3] "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." Civ. Code, § 1698. An "executed agreement" is one the terms of which have been fully performed. Henehan v. Hart, 127 Cal. 656, 657, 60 Pac. 426.

When therefore the trial court, on sufficient evidence, found the existence of an executed oral contract modifying the terms of the original lease as to the rent, and further found that it had been fully performed, it finally settled the issues of this case. The cases cited by appellant on this subject deal with executory and not executed contracts.

[4] There can be no doubt of the principle, contended for by the appellant, that an agreement adding to the terms of an existing agreement between the same parties, and by which new and onerous terms are imposed, upon one of the parties, without any compensating advantage, requires consideration to support it. But this, of course, may consist either in a new consideration, or in some favorable modification of the original contract. Main Street, etc., Co. v. L. A. Traction Co., 129 Cal. 301, 305, 61 Pac. 937. The evidence in this case, on which the court based its findings, shows that the oral agreement which became executed was, by both parties to the lease, regarded as a most favorable modification of the original contract, by the lessor much more preferable than having an empty hotel on his hands, and by the lessees as affording them an opportunity to make a profit out of the venture.

There is nothing in the contention of appellant that the executed oral agreement, proved in this case, for the purpose of altering the previously written lease, does not require to be done, or suffer, something not required to be done, or suffered, by the terms of the writing.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

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42 Cal. App. 683

In re MARSHALL'S ESTATE. (Civ. 2960.)

(District Court of Appeal, First District, Division 1, California. Aug. 14, 1919.)

1. DESCENT AND DISTRIBUTION 🔑1 — TAXATION 🔑858—STATUTE OF SUCCESSION DETERMINES HEIRSHIP AND LIABILITY FOR TAX.

Under California law the right of heirship in an intestate's estate is founded on the statute of succession, and such statute must be looked to, to measure the rights and obligations of a person as heir of a decedent's estate for the purposes of fixing the inheritance tax due the state.

2. DESCENT AND DISTRIBUTION 🔑14—HUSBAND AND WIFE 🔑274(1)—INHERITANCE OF STEPDAUGHTER ON DEATH OF STEPFATHER INTESTATE.

Under Civ. Code, § 1386, subd. 8, a stepdaughter succeeded to the title to any estate vested in her stepfather at the time of his death, he having died intestate, so far as such estate consisted of community property of his predeceased spouse, the daughter's mother, and himself, or of separate property which he had inherited from such predeceased spouse.

3. DESCENT AND DISTRIBUTION 🔑14—SOURCE OF TITLE MATERIAL IN DETERMINING HEIRS OF INTESTATE WIDOWER.

The source of the title of a widower who has died intestate, whether or not from his predeceased wife, is immaterial, so far as the extent of his estate in his property is concerned; but the source of his title is material in establishing the identity of his heirs, as a stepdaughter, under Civ. Code, § 1386, subd. 8.

4. Taxation ⚿875(1), 886½ — Stepdaughter taking as heir of stepfather liable for inheritance tax.

The stepdaughter of a widower, who dies intestate, leaving property which had been either community property or separate property of his deceased spouse, and which he had inherited, under Civ. Code, § 1401, as it existed prior to the amendment of 1919, which property, under section 1386, subd. 8, goes to the stepdaughter, takes as an heir of her stepfather, and as a stranger to him, and must pay a 5 per cent. inheritance tax on the balance left after her exemption of $500, as provided in Inheritance Tax Act, § 4, subd. 4, and section 6, subd. 5.

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

In the matter of the estate of Thomas E. Marshall, deceased. From an order determining the amount of the inheritance tax due the state from Marjorie O'Neill, sole heir, there is an appeal. Order reversed, and trial court directed to everrule objections to the report of the inheritance tax appraiser, and to make its order confirming report and fixing tax.

Robert A. Waring, J. Paul Miller, Jas. Atteridge, and Adrian C. Stanton, all of Sacramento, for appellant.

Haven & Athearn, of San Francisco, for respondent.

BARDIN, Judge pro tem. This is an appeal from an order determining the amount of inheritance tax due the state of California from Marjorie O'Neill, the respondent herein, and sole heir of the estate.

There is no controversy about the facts of the case, and, so far as they are pertinent to this appeal, may be briefly stated as follows: Thomas E. Marshall died intestate, leaving as his entire estate property which had either been the community property of himself and his predeceased spouse, Delia Marshall, or property which had formerly been the separate property of such predeceased spouse, and which he had inherited upon her demise. Marshall and his spouse left no issue of their bodies, but Delia Marshall left an only child, named Marjorie O'Neill. This child was never adopted by Thomas E. Marshall, nor did he ever stand in the mutually acknowledged relation of a parent to such child, and she is not a grandchild of Thomas E. Marshall, and is a stranger in blood to him.

The sole question involved in this appeal is this: Is Marjorie O'Neill entitled to the exemption of $10,000 provided for by subdivision 2 of section 6 of the Inheritance Tax Act, chapter 589 of the Statutes of 1917, and to the 1 per cent. rate on the balance of her inheritance as provided by subdivision 1 of section 4 of said act, or is she entitled to an exemption of $500 only, as provided in subdivision 5 of section 6 of the same act, and required to pay a tax of 5 per cent. on the balance of her inheritance, as provided in subdivision 4 of section 4 thereof? In other words, is the amount of the inheritance tax to be paid by Marjorie O'Neill to be determined upon the theory that she takes from Delia Marshall, or from Thomas E. Marshall, and as a stranger to his blood?

[1-3] It is fundamental that under our law the right of heirship in an intestate's estate is founded upon the statute of succession, and it is to that statute that we must look in order to measure the rights and obligations of Marjorie O'Neill as an heir of the estate of Thomas E. Marshall. It is clear from the facts that, under the provisions of subdivision 8 of section 1386 of the Civil Code, considered in connection with the introductory portion of the section, Marjorie O'Neill succeeded to, and there must be distributed to her, the title to any estate vested in Thomas E. Marshall at the time of his death; he having died intestate, so far as such estate consisted of community property of his predeceased spouse and himself, or of separate property which he had inherited from such predeceased spouse. Respondent's title to such property would, of necessity, be derived from the estate of Thomas E. Marshall, for under section 1401 of the Civil Code, as it existed prior to the amendment of 1919, it was provided that "upon the death of the wife, the entire community property, without administration, belongs to the surviving husband." Mr. Marshall became the absolute owner of the community property from the moment of the death of his wife. It was never any part of his deceased wife's estate. Estate of Klumpke, 167 Cal. 415, 139 Pac. 1062. And the title to the common property having passed absolutely to the present intestate, as well also such of the separate estate of his predeceased spouse, as was set out in the report of the inheritance tax appraiser, then whatever title would, by virtue of subdivision 8 of section 1386 of the Civil Code pass to Marjorie O'Neill must go directly to her from the estate of Thomas E. Marshall. The source of his title is immaterial so far as the extent of his estate in such property is concerned; but the source of his title would be material in establishing the identity of his heirs under subdivision 8 of the section last referred to. The respondent's relationship to her deceased mother would be the determining factor in establishing her status as an heir of Thomas E. Marshall; but the title to the property she is entitled to receive by reason of that status would not relate back for its origin, to her mother. It would come directly to her from her stepfather. She would take as the heir of Marshall. Estate of Watts, 175 Pac. 415.

It was the view of this court in the case of Wright v. Rohr, 182 Pac. 469, in which a petition for hearing in the Supreme Court was denied, that subdivision 8 of section 1386 of the Civil Code establishes a rule of succession applicable in the specified contingencies, and did not create a limitation upon the power of the surviving holder of community property to convey such property, and the subdivision of the section referred to fully recognized the right of the owner to dispose of such property either by gift inter vivos, or by last will and testament. And this court previously expressed the same views in the case of Veirs v. Roberts, 179 Pac. 689, in which it was unsuccessfully contended by the appellants that proceeds of the community property held by a widow should be regarded as held in trust for the issue of her predeceased spouse and herself, and that under the provisions of section 1386 of the Civil Code she had no legal right to make a transfer of the property.

[4] Since Marjorie O'Neill takes as an heir of Marshall, and her inheritance consists of property to which he had the full and unconditional title, there seems no escape from the conclusion that she takes as a stranger to him and that she should, therefore, be compelled to pay the greater tax. Not only do we believe our conclusion in this case to be in entire harmony with the previous decisions of this court, to which reference has already been made, but also to be in full accord with the opinion of the Supreme Court, as to the effect of subdivisoin 8 of section 1386 of the Civil Code, as expressed in Estate of Brady, 171 Cal. 1, 151 Pac. 275.

It follows, then, that the order of the trial court, modifying the report of the inheritance tax appraiser, should be reversed, and the trial court be directed to overrule the objections to said report, and make its order confirming said report and fixing the tax as therein provided. It is so ordered.

We concur: WASTE, P. J.; RICHARDS, J.

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42 Cal. App. 705

BURKE v. NORTON et al. (Civ. 2965.)

(District Court of Appeal, Second District, Division 2, California. Aug. 15, 1919.)

1. LANDLORD AND TENANT 🔑198—RE-ENTRY BY LESSOR RELEASING LESSEE FROM FUTURE ACCRUING RENTS.

The retaking of the premises by the lessor releases the lessee from subsequently accruing rents, unless the lease expressly provides otherwise, as in a provision that for failure to observe covenants or conditions the lessor shall have the right to enter and at his option terminate the lease.

2. LANDLORD AND TENANT 🔑103(2)—DECLARATION OF FORFEITURE OF LEASE PROVIDING FOR RE-ENTRY IN ACTION FOR RENT ERRONEOUS.

Where a landlord, by lease providing that for breach of condition he might re-enter and at his option terminate the lease for the lessee's failure to pay, brought action for the rent, the trial court improperly declared forfeiture of the lease, which also provided that all the remedies given the lessor were cumulative.

3. LANDLORD AND TENANT 🔑184(2)—SECURITY DEPOSITS APPLICABLE TO JUDGMENT FOR ARREARS OF RENT.

In view of the terms of the lease, *held*, that a $5,000 security deposit made by the lessees was intended to be applied to any arrears of rent, so that the trial court in an action therefor properly ordered the deposit applied to satisfaction of the judgment.

4. APPEAL AND ERROR 🔑1153—MODIFICATION OF ERRONEOUS JUDGMENT BY APPELLATE COURT.

Where the trial court fully ascertained the rights of the parties and erred merely by entering an erroneous judgment, the duty of the appellate court is to modify the judgment so as to finally settle the controversy.

Appeal from Superior Court, Los Angeles County; H. D. Gregory, Judge.

Action by Carleton F. Burke against I. H. Norton and others. From the judgment, plaintiff appeals. Modified and affirmed.

Newlin & Ashburn, of Los Angeles (Eugene D. Williams, of Los Angeles, of counsel), for appellant.

Haas & Dunnigan, of Los Angeles, for respondents.

THOMAS, J. This is an action brought to recover rent, attorney's fees, damages, and restoration of the premises held by the defendants, I. H. Norton, H. Joe Isaacs, and M. M. Norton, under a certain lease entered into by them with the plaintiff on July 12, 1912, for a period of seven years and three months, commencing October 1, 1912, and ending December 31, 1919, at a total rental of $179,925 payable in certain installments. The defendants entered into possession of the premises, and either themselves, or by subtenant, remained in possession thereof until the filing of the suit.

Rent for the months of June, July, and August, 1915, amounting in all to $5,520, was not paid when due, or at all. On July 27, 1915, the plaintiff caused to be served on defendants a notice requiring that within 20 days they pay said rent or surrender the possession of the premises; and also caused to be served upon defendants another notice, in similar terms, except that it was required that within 3 days they pay said rent or surrender possession of the premises. The defendants did neither. Thereafter, and on August 20, 1915, this action was filed. Default of all the defendants, except the three above named, with whom the lease was made, having been regularly entered, and said defendants having answered, trial was had, and judgment rendered for plaintiff in the sum of $5,770, including $250 attorney's fees. The judgment also provided:

> "That the said judgment is subject to a credit of $5,000, and subject to another credit of $175."

It also contained the further provision:

> "That the agreement of lease entered into between the plaintiff and the defendants, I. H. Norton, H. Joe Isaacs, and M. M. Norton on the 5th day of July, 1912, be forfeited by the defendants and terminated as of date of August 31, 1915."

With the two last-quoted provisions plaintiff is dissatisfied, and because thereof appeals from the said judgment, and the whole thereof.

Appellant urges two points for reversal of the judgment here:

> (1) That "the court erred in declaring a forfeiture of the lease"; and (2) that "the court erred in ordering that the sum of $5,000 (held by plaintiff as security for the performance of the conditions of the lease, and to be applied in payment of rent reserved for the last two months of the lease) should be applied in satisfaction of the judgment."

The appeal is by the alternative method. The record consists only of the transcriptions of the clerk and reporter, and appellant's opening brief. The points submitted to us, therefore, are purely questions of law. Did the trial court err?

Appellant concedes that in certain cases such forfeiture of the term is properly declared as part of the judgment, but insists that, under the terms of the lease here involved, no forfeiture was worked by the bringing of the unlawful detainer suit; and that in the absence of an election by plaintiff to declare a forfeiture, and a prayer for a decree to that effect, none occurred or could properly be adjudged. In this action the complaint did not demand a forfeiture of the lease, nor was the question of forfeiture at all within the issues as made by the pleadings.

By the lease it was provided that—

> "It is further expressly understood and agreed that each and all of the provisions of the lease are conditions precedent, to be faithfully and fully performed by said lessees to entitle them, or any of them to continue in possession of said premises; and if the said lessees shall fail to pay the rental aforesaid when the same becomes due and payable, or if they fail to keep, observe or perform any other covenant, condition or obligation of this lease on their part to be kept or performed, the lessor shall have the right *to enter* into possession of the demised premises and to remove all persons and property therefrom, *and, at his option, to terminate this lease.* It is further understood that each and all of the remedies given to the lessor hereunder are cumulative; and that *the exercise of one right or remedy by the lessors shall not impair his right to any other remedy;* and the lessees hereby waive all claim for damages that may be caused by the lessor in re-entering and taking possession of said premises as herein provided, and all claims for damages that may result from the destruction or injury of or to said premises or buildings thereby, and all claims for damages to, or loss of such property belonging to the lessees or any of them, or any other person, firm or corporation as may be in or upon the premises at the time of such reentering."

Did the trial court treat the phrases we have italicized in the provisions of the lease quoted above as having no force or effect? If so, what was the reason? Confronted with these provisions in the lease, can it be successfully maintained that the entry into possession and the removal of all persons and property from the leased premises—assuming such to have been done—would terminate the lease, without some other act on the part of the lessor indicating his election to avail himself of "his option to terminate the lease"? Do the provisions of section 791 of the Civil Code, under which this action was brought, manifest any intention to affect, limit, or control in any respect the terms or provisions of such a lease as the one involved in the case at bar? Is it not a question of construction to be arrived at from the language of the lease, as to whether it was the intention of the parties that a re-entry, by virtue of legal proceedings or otherwise, should of itself constitute an election to declare a forfeiture of the term? The answers to the foregoing questions are, we think, obvious.

To affirm the judgment of the trial court would, it seems to us, be tantamount to saying that the bringing of such an action as this constitutes a conclusive election to declare a forfeiture, and hence that the provisions of the lease involved here, which are quoted above, are rendered nugatory for the reason that the landlord is deprived of any expeditious or efficacious remedy for carrying out the terms of the lease as written. This we do not understand to be the law. Are the provisions referred to obnoxious to equity or to public policy? We think not. We are of the opinion that the construction placed upon the lease by the trial court converts the lease into something other and different than the parties themselves intended. The entry by plaintiff here was an entry "by virtue of the expressed provisions of said lease," and is perfectly good, unless such entry is prohibited by some law to which our attention has not been called.

[1, 2] As we understand it, the rule is that—

> "The retaking of the premises by the lessor releases the lessee from subsequently accruing rents, unless the lease expressly provides oth-

erwise." Watson v. Merrill, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719; Grommes v. St. Paul Trust Co., 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248; 1 Taylor on Landlord and Tenant (8th Ed.) §§ 377, 378; 2 Wood on Landlord and Tenant (2d Ed.) § 477.

A very complete and, we think, a fair discussion of the subject is contained in the second case just cited. The court in that case, among other things, said:

> "There is nothing illegal or improper in an agreement that the obligation of the tenant to pay all the rent to the end of the term shall remain, notwithstanding there has been a re-entry for default; and, if the parties choose to make such an agreement, we see no reason why it should not be held valid as against both the tenant and his sureties."

We think this language is applicable to the case at bar. To hold otherwise, it seems to us, would be to place a lessee in a position to retain the premises without the payment of rent, and to compel the lessor to rely wholly upon the financial responsibility of the lessee and seek his rent from month to month by action, or to wholly terminate the lease, either of which would be less advantageous to the landlord than the right to re-enter and, if necessary, to relet the premises, looking to the lessee for only that portion of the rental reserved which represents the difference between what the landlord could obtain from any person upon such reletting and the total monthly rental. We do not hesitate to say that a construction which would thus permit a lessee to determine his own liability is, as we understand them, repugnant to the decisions of this state. Belloc v. Davis, 38 Cal. 242; Wilcoxson v. Stitt, 65 Cal. 596, 4 Pac. 629, 52 Am. Rep. 310; Smith v. Mohn, 87 Cal. 489, 25 Pac. 696; Banbury v. Arnold, 91 Cal. 606, 27 Pac. 934; Freeman v. Griswold, 4 Cal. Unrep. 256, 34 Pac. 327; North Stockton, etc., v. Fischer, 138 Cal. 100, 70 Pac. 1082, 71 Pac. 438; Central Oil Co. v. Southern Refining Co., 154 Cal. 165, 97 Pac. 177; Reed v. Hickey, 13 Cal. App. 136, 109 Pac. 38; Harron v. Cutting, 19 Cal. App. 780, 127 Pac. 827.

From what we have said, it follows that the court erred in declaring a forfeiture of the lease.

It is urged by appellant that, there having been no forfeiture of the lease presented by the issues as framed by the pleadings, and none demanded by the plaintiff, and further that the bringing of this action did not constitute a termination of the term or of the lease, and that hence there was no forfeiture of the lease, it follows that the court erred in ordering the application of the sum of $5,000, held by appellant under the terms of the lease, to the settlement of the judgment, because by such action the plaintiff was deprived of a valuable security, to which he was entitled under the specific terms of the lease. With this contention we are unable to agree. By clause 19 of the lease referred to, it is provided that—

> "It is hereby mutually covenanted and agreed that said lessees have paid to said lessor the sum of five thousand ($5,000.00) dollars as security for the faithful performance by said lessees of each and all of the terms and covenants and conditions herein contained on the part of said lessees to be kept and performed, and that said sum of five thousand ($5,000.00) dollars shall be held by said lessor as security for said faithful performance by said lessees, and that in the event that said lessees shall fail to keep and perform each and all of the terms and covenants and conditions herein contained, on their part to be kept and performed, said five thousand ($5,000.00) dollars, or such proportion thereof as may be necessary shall be retained by said lessor *and applied* [italics ours] by him on account of the damages sustained by reason of the failure of said lessees to faithfully perform any of the conditions herein contained on their part to be performed. But notwithstanding the retention of said sum of five thousand ($5,000.00) dollars by said lessor, said lessor shall have all and every action, right, remedy, claim and demand against said lessees for all damages sustained by him in excess of the sum of five thousand ($5,000.00) dollars, up to the sum of twenty-five thousand ($25,000.00) dollars by reason and on account of the failure of said lessees to perform the covenants herein contained on their part to be performed, but that in no event shall said lessor be entitled to ask for, demand, claim or receive from said lessees any sum or amount in excess of the sum of twenty-five thousand ($25,000.00) dollars by reason or on account of any damage sustained by said lessor by or through the failure of said lessees to live up to, abide by or perform any of the terms, covenants or agreements herein contained on their part to be performed."

[3] For this, we think, it conclusively appears that the money so held by plaintiff was to be applied in just such a contingency as has arisen here. This being true, the learned trial court was correct in ordering the same applied to the satisfaction of the judgment.

[4] The practice in this state, from the very earliest time, has been to modify a judgment in the appellate tribunal so as to finally settle the controversy, when the rights of the parties appear from the record to be fully ascertained. Persse v. Cole, 1 Cal. 369; Fox v. Hale, etc., Co., 122 Cal. 219, 54 Pac. 731. In the case at bar, we think it conclusively appears that the rights of the parties have been fully ascertained, and that the trial court simply erred by the entering of an erroneous judgment. Hence it seems clear that our present duty is to modify the judgment so as to finally settle this controversy, and render another trial unnecessary.

It is therefore ordered that the clause denominated "3" of the judgment entered herein, which reads as follows, "That the agreement of lease entered into between the plaintiff and defendants I. H. Norton, H. Joe Isaacs and M. M. Norton, on the 5th day of

July, 1912, be forfeited by the defendants and terminated as of date August 31, 1915," be, and the same is hereby, stricken out, and, as so modified, that the judgment be, and the same is hereby, affirmed; and that appellant shall recover his costs of appeal herein.

We concur: FINLAYSON, P. J.; SLOANE, J.

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42 Cal. App. 752

HIGHLAND PARK INV. CO. v. LIST et al. (Civ. 3035.)

(District Court of Appeal, First District, Division 1, California. Aug. 19, 1919. Rehearing Denied Sept. 18, 1919; Denied by Supreme Court Oct. 16, 1919.)

1. APPEAL AND ERROR 🔑1097(1)—DECISION ON FORMER APPEAL AS LAW OF CASE.

A decision of the appellate court on former appeal in full accord with the authorities establishes the law of the case.

2. CORPORATIONS 🔑317(2)—UNDER NO DUTY TO EXAMINE RECORD TO DISCOVER DIRECTOR'S FRAUD IN SALE TO IT.

There was no duty resting on a corporation intending to purchase lots, or upon any of its members, to examine the public records of a county to determine whether a director had purchased the lots from the owner to resell to the company at a profit, or to suspect the director was intending thus to perpetrate a fraud.

3. LIMITATION OF ACTIONS 🔑55(1)—FRAUD ON CORPORATION WAS CONSUMMATED WHEN CONVEYANCE TO IT WAS MADE BY DIRECTOR.

As respects the statute of limitations, fraud of corporation's director, consisting in obtaining a secret profit by purchasing lots and selling them to corporation at an advance, was consummated when the conveyance of the lots was made by the director and his wife to the corporation.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by the Highland Park Investment Company against R. D. List and others. From judgment for plaintiff, defendants appeal. Affirmed.

Goodrich & Martinson and Tobias R. Archer, all of Los Angeles, for appellants.

Meserve & Meserve and Paul H. McPherrin, all of Los Angeles, for respondent.

WASTE, P. J. This is an appeal from a judgment in favor of the plaintiff, after the second trial, the case having once before been before the appellate court. Highland Park Inv. Co. v. List, 27 Cal. App. 761, 151 Pac. 162.

The action was brought to recover a sum of money alleged to have been secured by appellant R. D. List as a secret profit upon a sale of certain lots of land to plaintiff corporation. The facts are fully and succinctly stated in the opinion of the court on the former appeal, and do not need to be repeated.

"The directors of a corporation hold a fiduciary relation to the stockholders, and have been intrusted by them with the management of the corporate property for the common benefit and advantage of each and every stockholder, and by their acceptance of this office they preclude themselves from doing any act or engaging in any transaction in which their private interest will conflict with the duty they owe to the stockholders, and from making any use of their power or of the corporate property for their own advantage. * * * For the reason that it is against public policy to permit persons occupying fiduciary relations to be placed in such a position that the influence of selfish motives may be a temptation so great as to overpower their duty and lead to a betrayal of their trust, the rule is unyielding that a trustee shall not, under any circumstances, be allowed to have any dealings in the trust property with himself, or acquire any interest therein. Courts will not permit any investigation into the fairness or unfairness of the transaction, or allow the trustee to show that the dealing was for the best interest of the beneficiary, but will set the transaction aside, at the mere option of the cestui que trust." Wickersham v. Crittenden, 93 Cal. 17, 29, 28 Pac. 788, 790; Sims v. Petaluma Gaslight Co., 131 Cal. 659, 63 Pac. 1011; Pacific Vinegar Works v. Smith, 145 Cal. 352, 366-367, 78 Pac. 550, 104 Am. St. Rep. 42.

"It is well settled that any secret profit obtained by the president or a director of a corporation by reason of any violation or disregard by him of any obligations incident to the fiduciary or quasi trust relations that he occupies toward the corporation and its stockholders cannot be retained by him but must be accounted for to the corporation. * * * It is universally held as a consequence of this doctrine that he may not on behalf of the corporation contract with himself as an individual, which of course includes contracting with others with whom he has an interest, without the full knowledge and approval of the corporation." Western States Life Ins. Co. v. Lockwood, 166 Cal. 185, 190, 196, 135 Pac. 496, 498.

[1] The decision of the appellate court on the former appeal is in full accord with these authorities, and establishes the law of this case, with which, on the facts before us, we are in full accord.

When the decision of the lower court in the first trial of the case was reversed on appeal (Highland Park Inv. Co. v. List, supra), it was on the ground, solely, as we read the decision, that one of the essential findings of fact was not sustained by the evidence. That finding of fact was, in substance, that, prior to August 25, 1908, the date of the meeting of the directors of the plaintiff corporation, authorizing the purchasing of the Withington lots, appellant R. D. List learned that the directors of the corporation would vote for the purchase of said lots for the price of $8,000, and that thereupon, without disclosing the fact to his fellow directors, List purchased the lots, taking the title in his wife's name at a less price, and, without disclosing to the corporation that he had so purchased them, completed the transaction for transfer at the price of $8,000, to the corporation, thereby reaping a profit of $3,326.

The judgment sought and recovered in the case, and based on the findings made at the first trial, was not one of rescission. The corporation elected to retain what it had received from List, and to secure from him the profits which he had made on the sale of the land.

Considering the findings, and the judgment entered in the case, the appellate court said:

> "There is no doubt but that such a judgment would have been proper were it shown that while the board of directors, of which List was one, was negotiating for the purchase of this property, List secretly obtained title thereto and thereupon resold the property to the company, making a profit thereon. The evidence as it is set out in the transcript does not show that the directors had taken up the matter of the purchase of these particular lots prior to the meeting of August 27, 1908. It appeared without dispute that List had purchased the lots five days prior to this time. None of the witnesses, directors, and stockholders of plaintiff corporation, testified to having talked with List regarding the desire of the corporation to purchase the lots prior to the day upon which the directors' meeting was held at which the resolution authorizing the purchase was adopted. Upon this state of the evidence, the legal situation presented is no different than had it appeared that List had become the owner of the lots 30 or 90 days, or more, prior to the 27th day of August. * * * The facts and circumstances shown in evidence do not support the findings as to the essential matters indicated herein." Highland Park Inv. Co. v. List, supra.

The judgment recovered in the lower court on the first trial and again on the second trial, from which judgment this appeal is taken, was the proper form for a judgment in such a case. "The plaintiff corporation was simply seeking to recover such secret profits as were made by one of its officers in a transaction wherein he was forbidden to make any such secret profits, and which profits, in view of the rules we have discussed, belonged to the corporation." Western States Life Ins. Co. v. Lockwood, supra; Ex-Mission Land & Water Co. v. Flash, 97 Cal. 636, 32 Pac. 600.

On the retrial, the judgment in which is the basis of this appeal, the plaintiff introduced evidence curing the defect in the first trial, pointed out by the court of appeal, and the record now amply shows that List, prior to August 27, 1908, the date on which he purchased the lots, had knowledge that the corporation desired and intended to purchase the property. The finding of the trial court to that effect is fully supported by the evidence.

[2] The trial court found that the fraud practiced by defendant R. D. List on the plaintiff corporation was not discovered by any of its officers or directors until the month of April, 1909. There is ample evidence to sustain this finding, and the finding itself does not appear to be attacked except upon the theory that the recording of the deed from Withington to List on August 27, 1908, gave notice to the corporation of the fraud. There was no duty resting upon the corporation, or any of its members, on August 27th, to examine the public record of Los Angeles county, nor to anticipate nor to suspect that List would, or even that he was intending to, perpetrate fraud upon the corporation.

> "Where no duty is imposed by law upon a person to make inquiry, and where under the circumstances 'a prudent man' would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not bebar him from relief when thereafter he shall make actual discovery. The circumstances must be such that the inquiry becomes a duty and the failure to make it a negligent omission. Bank of Mendocino v. Baker, 82 Cal. 114 [22 Pac. 1037, 6 L. R. A. 883]; Prouty v. Devin, 118 Cal. 258 [50 Pac. 380]. In this case, though means of information were open to the plaintiff, it does not appear that there was any duty devolving upon him to make use of them. Nothing had occurred to excite his suspicion, or to put him upon inquiry, and for these reasons, under the facts of this case, we think the finding of the court sufficient and sufficiently supported by the evidence." Tarke v. Bingham, 123 Cal. 166, 55 Pac. 760.

[3] The fraud was consummated by the execution and delivery of the deed by List and wife to the corporation on the 31st day of August, 1908, assuming that it was delivered on the date of its execution and acknowledgment. The present action was commenced on August 31, 1911. It was therefore brought within the statutory time of three years, even though the corporation had knowledge from the date of the consummation of the fraud. There is no merit in the appeal. We do not feel it necessary to further discuss the matters raised in the supplemental briefs filed by the appellants.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

42 Cal. App. 747

McNULTY v. LAWLEY et al. (Civ. 2794.)

(District Court of Appeal, First District, Division 2, California. Aug. 19, 1919.)

1. TURNPIKES AND TOLL ROADS 🔑19—RIGHT OF TOLL ROAD OWNERS TO TAKE MATERIAL FROM SERVIENT LAND.

The owners of a toll road over another's land had the right to grade their road, as reasonably necessary or appropriate, and perhaps the right to use material for filling or surfacing other portions of the road, but no right to take material from the land, even within right of way, without regard to grading operations on the land, but to be hauled miles away, as well as to points on other roads.

2. TURNPIKES AND TOLL ROADS 🔑15—RIGHT OF WAY GIVES RIGHT OF PASSAGE, NOT OWNERSHIP OF SOIL.

An easement of toll road owners for highway purposes over the land of another is for passage only, with necessary incidental powers and privileges to grade the way and repair and maintain it; such incidental powers and privileges giving the owners, holders of the easement, no right of ownership in the soil.

3. APPEAL AND ERROR 🔑932(1)—PRESUMPTION FAVORING JUDGMENT BELOW BY ACCOUNTING FOR SMALLNESS.

In a landowner's action to recover from the owners of a toll road over the land for rock taken from a quarry and for damages, it must be presumed in favor of the judgment for much less than the landowner claimed that the jury made proper allowance for rock used in grading operations by defendant road owners.

4. TURNPIKES AND TOLL ROADS 🔑26½—IMMATERIALITY OF PROCEEDINGS ESTABLISHING AND ABANDONING ROAD IN SUIT AGAINST TOLL ROAD OWNERS.

In an action by a land and quarry owner against the proprietors of a toll road to recover for rock improperly taken, in view of the toll road owners' mistaken theory of the law, rejection of proffered evidence of proceedings of the supervisors in establishing and abandoning an old road was not erroneous; proceedings affecting the old road at a different place having no tendency to prove the width of the right of way past the quarry, while the width of the road was immaterial anyway.

5. APPEAL AND ERROR 🔑1058(1)—EXCLUSION OF EVIDENCE AS HARMLESS.

The exclusion of evidence tending to prove for defendants a point of fact as to which their witnesses testified was harmless.

6. EVIDENCE 🔑113(19)—ASSESSMENT ROLLS AS EVIDENCE OF VALUE OF LAND.

In an action by a landowner against proprietors of a toll road to recover for rock taken from the land and for damages from the taking, the assessment rolls of several successive years were not admissible for defendants as original evidence to prove the value of plaintiff's property.

Appeal from Superior Court, Napa County; R. H. Latimer, Judge.

Action by Delia McNulty against Harry B. Lawley and Charles A. Lawley. From judgment for plaintiff, defendants appeal. Affirmed.

John T. York, of Napa, for appellants.

Aitken, Glensor & Clewe, of San Francisco, for respondent.

BRITTAIN, J. The defendants appeal from a judgment for $779, entered upon the verdict of a jury, in a suit for the value of rock taken from the plaintiff's quarry, and for damages for injury to the land by reason of the taking. The appellants contend that the trial court committed error in rejecting certain evidence and in giving certain instructions concerning their rights as the proprietors of a toll road running over the plaintiff's land and by or through the quarry in question.

Through the plaintiff's land runs a stream, from the left bank of which rose a steep hill in which the quarry was opened. The toll road hugs the bank of the stream, and was graded and used at that point to a width of some 20 feet. The quarry has an opening of about 370 feet along the road. Its floor is substantially level with the road, and, roughly speaking, forms the segment of a circle having a depth at the center of about 70 feet from the nearest edge of the traveled portion of the road to the base of the quarry face. From the base to the top of the quarry, at its deepest central part, the height is about 100 feet, and at the ends of the quarry the height is perhaps 30 feet.

[1] The defendants claimed to be entitled to a right of way for the toll road 66 feet wide, up to a line some 46 to 48 feet further from the creek than the inside line of the traveled and graded way. They also claimed, and here claim as a matter of law, the right to take rock from any part of the right of way. If the appellants' second contention is not correct, their first contention is immaterial. Even though the proper boundaries of the defendants' right of way included the entire quarry, they had no right to take rock which, but for the easement, belonged to the plaintiff. They had the unquestionable right to grade their road in such manner as was reasonably necessary or appropriate for its use, and perhaps the further right to use the material so separated from the land for filling or surfacing other portions of their road. They had no right to take material from plaintiff's soil, even within the boundaries of the right of way, without regard to grading operations on the plaintiff's land, but to be hauled, as some of it was, to points on the toll road miles away from the plaintiff's land, as well as to points on other roads, public and private. As well might they have claimed the right to operate

for their own benefit a gold mine on any portion of the right of way.

[2] The easement for highway purposes is for passage only over the land, with necessary incidental powers and privileges to grade the way and to repair and maintain it upon or adjacent to the lands of the respective abutting owners. These incidental powers and privileges give the holders of the easement no right of ownership in the soil. Lord Mansfield said the rule was express "that the king has nothing but the passage for himself and his people; but the freehold and all profits belong to the owner of the soil." Goodtitle v. Alker, 1 Burr. 143. Material may be taken from the highway for the purpose of building or repairing the same in front of the adjoining land, or for bringing it down to grade, but the taking of such material, not for the improvement of the highway at the point from which they are taken, but merely for use in improving other portions thereof, is unjustifiable. 13 R. C. L. Highways, § 112. The text in Ruling Case Law is amply supported by authority. In two cases cited by respondent the facts were substantially the same as in this case, and the rule was applied. Dist. of Columbia v. Robinson, 180 U. S. 92, 21 Sup. Ct. 283, 45 L. Ed. 440; Smith v. City of Rome, 19 Ga. 89, 63 Am. Dec. 298. In this state the broad general principles underlying the rule have been discussed in a number of cases. Wright v. Austin, 143 Cal. 236, 76 Pac. 1023, 65 L. R. A. 949, 101 Am. St. Rep. 97; North Fork, etc., Co. v. Edwards, 121 Cal. 662, 54 Pac. 69; Burris v. People's Ditch Co., 104 Cal. 248, 37 Pac. 922. The authorities relied upon by the appellants on this branch of the case, when carefully examined, tend rather to support the argument of the respondent, and do not overcome the rule applied by the Supreme Court of the United States and recognized in this state.

[3, 4] There was some evidence on the part of the defendants that a part of the rock taken was from the ends of the quarry for the purpose of widening and straightening the road. On the other hand, the plaintiff's evidence was that a great portion of the rock was taken from the main quarry face, which was outside of the right of way claimed by the appellants. The jury visited the quarry. The verdict was for much less than the plaintiff claimed. It must be presumed in favor of the judgment that the jury made proper allowance for any grading operations. Even though the main quarry face had been within the claimed right of way, it was not nor could it be claimed the quarrying at that point was in furtherance of grading operations. The rock taken was not used by the defendants on that part of their road located on the plaintiff's land. Under these circumstances, and following the rules laid down in the foregoing authorities, the actual location of the inner boundary of the right of way was immaterial. There was no error, in view of the defendants' mistaken theory of the law, in rejecting the proffered evidence of proceedings of the supervisors in establishing and abandoning an old road.

[5] The rejection of this evidence was correct for other reasons. A county road, 66 feet wide, had been laid out and constructed, at least in part. It was abandoned in order that the defendants' predecessor might utilize such parts of it in the construction of his toll road as he desired. He was not compelled to nor did he utilize it either for its full length or its full width. The county road never ran across the plaintiff's land, and did not pass the quarry. The toll road is largely in the mountains, and was constructed, as at the plaintiff's place, of such a width as the proprietary owners of the easement deemed necessary to accommodate the mountain traffic. It was maintained at this point at a width of 18 or 20 feet for over 40 years. Proceedings affecting the old county road at a different place had no tendency to prove the width of the right of way past the plaintiff's quarry. Moreover, witnesses of the defendants testified in regard to their claims to a right of way 66 feet wide. If it could be held that there was technical error in excluding the evidence, the defendants were not injured. In such a case the judgment would not be disturbed. Estate of Wineteer, 176 Cal. 28, 167 Pac. 516; Code Civ. Proc. § 475.

The instructions of which complaint is made by the appellants were in accord with what has been said of the law regarding the use of material in the highway. In view of the law, they were perhaps more favorable to the appellants than they were entitled to have.

[6] The plaintiff testified concerning the value of the rock taken. On cross-examination she testified that she did not know for what her property was assessed. On behalf of the defendants it was sought to introduce the assessment rolls of several successive years. The offer was properly rejected. The assessment rolls would not have contradicted the plaintiff's evidence, and they were not admissible as original evidence of value. The only case cited by the appellants on this subject supports the action of the trial court. Central Pac., etc., Co. v. Feldman, 152 Cal. 303, 92 Pac. 849.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

42 Cal. App. 780

McCLENDON v. HEISINGER et al.

(Civ. 2899.)

(District Court of Appeal, First District, Division 2, California. Aug. 21, 1919.)

1. Evidence 🔑441(12)—Parol evidence varying written guaranty of note inadmissible.

In action on guaranty of a note indorsed on its back, any conversation regarding plaintiff payee's agreement that, if the five defendants would sign the guaranty, plaintiff would stand his pro rata share of any loss that might be occasioned to them, *held* inadmissible as varying the writing.

2. Guaranty 🔑87 — Failure to plead fraud as defense to action on guaranty waiver thereof.

In an action on guaranty of a note indorsed on its back, where defendants have not pleaded fraud by plaintiff in procuring their guaranty by an oral agreement to bear his pro rata share of any loss that might be occasioned to them by it, they cannot rely on the defense.

3. Frauds, statute of 🔑20—Oral contract of guaranty of debt of another invalid.

If plaintiff payee of a note had made to defendant an oral agreement to bear his pro rata share of any resulting loss to them as guarantors, such agreement would have amounted to nothing more than a contract of guaranty of the debt of another, which would not have been enforceable unless in writing.

4. Set-Off and counterclaim 🔑24—Agreement to share in loss of guarantors not enforceable until payment by them.

Where plaintiff, payee of a note, agreed that if defendants would guaranty it he would stand his pro rata share of any loss occasioned to them, in the absence of allegation and proof that defendants have suffered any loss they cannot rely on plaintiff's agreement as a counterclaim against his cause of action on the guaranty, having no existing cause of action, as required by Code Civ. Proc. § 438, as it would not accrue until their liability had matured by actual payment.

5. Guaranty 🔑49 — Release of guarantors by impairment or suspension of creditor's rights against principal.

The consent of plaintiff, payee of a corporate note, as director of the corporation, to the transfer of its assets to a trustee for creditors, did not constitute an act impairing or suspending plaintiff's rights or remedies against the company to release other directors from liability on their guaranty of the note, under Civ. Code, § 2819.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by W. J. McClendon against S. L. Heisinger and others. From judgment for plaintiff, defendant Heisinger and another appeal; Alice M. McClendon, as administratrix of plaintiff, being substituted as respondent on his death. Judgment affirmed.

Everts & Ewing and M. G. Gallaher, all of Fresno, Lafayette J. Smallpage, of Stockton, and Walter E. Hettman, of San Francisco, for appellants.

Byron F. Stone, Jr., and Richard C. Harrison, both of San Francisco, for respondent.

HAVEN, J. Action on a contract of guaranty. Plaintiff and defendants were the directors of the California Rochdale Company, a corporation. Defendants guaranteed the payment to plaintiff of a promissory note of said company in the sum of $5,000, which amount was subsequently reduced by payments made thereon to $4,132.20, the amount sued for herein. The contract of guaranty was written on the back of the note, and was signed by the five defendants contemporaneously with the execution of the note. After the maturity of the note the California Rochdale Company transferred all of its assets to a trustee for the benefit of its creditors. Subsequently a settlement was effected with some of the creditors, leaving the corporation indebted to the plaintiff and to certain other creditors. Thereafter, with the consent of the corporation and of such remaining creditors, and with the consent of the defendant Heisinger, said trustee transferred the assets then remaining in his hands to a committee of three, consisting of the plaintiff, the defendant Heisinger, and the defendant Bennett, which transfer was found to have been made in trust for the benefit of such remaining creditors. The trial court rendered judgment in favor of plaintiff and against defendants, all of the defendants having defaulted except Heisinger and Bice, from which judgment the nondefaulting defendants prosecute this appeal.

The defenses of each of the defendants were: First, that he had signed the contract of guaranty in reliance upon a prior agreement of plaintiff to the effect that, if the five defendants would sign the same, plaintiff would stand his pro rata share of any loss that might be occasioned to them by reason thereof; second, that, without the consent of the guarantors, plaintiff had released the maker of the note from all liability thereon; and, third, that after the execution of the contract of guaranty, the California Rochdale Company, with the consent of the plaintiff, but without the consent of the guarantors, transferred all of its assets to one Smith as trustee for the benefit of its creditors, and that thereafter the plaintiff without the consent or knowledge of the guarantors, executed a waiver in writing of all his rights as holder of the note to participate in the assets of said corporation. At the close of the trial the court granted plaintiff's motion to strike out the testimony of certain witnesses by which defendants attempted to prove an oral agreement between plaintiff and defendants that plaintiff would stand his pro rata share of any loss that might be suffered by them by reason of said guaranty, hereinabove referred to in the first defense, and in accordance with the remaining evidence found that no such agreement had been made.

[1, 2] We cannot agree with appellants' contention that this ruling was erroneous. If there was any conversation regarding such an agreement, it was inadmissible, as the contract sued upon was in writing, was complete in itself, and superseded all negotiations or conversations which preceded or accompanied its execution. Appellants do not attempt to dispute the well-established rule that parol evidence is inadmissible to vary the terms of a written instrument. They argue, however, that plaintiff is estopped from enforcing his contract of guaranty because of the oral agreement which they claim he entered into; that, if he made such oral agreement without intention of fulfilling it, it constituted fraud in the procurement of the contract of guaranty, which would preclude its enforcement. There is no merit in this contention. Fraud as a defense must be pleaded and proved. This defendants have not done.

[3, 4] Appellants further claim that the introduction of parol testimony to establish this oral agreement was not an attempt to vary the terms of a written contract, but that it evidenced another collateral agreement, which constituted a part of the consideration for the execution of the contract of guaranty. If such an agreement were made, it would have amounted to nothing more than a contract of guaranty of the debt of another, which would not have been enforceable unless in writing. The cases cited by appellants do not bear out their contention in this regard. Nor would such an agreement constitute a counterclaim against plaintiff's cause of action, as claimed by appellants, for the reason that the agreement pleaded and attempted to be proved was to "stand his pro rata share of any loss that might be occasioned said defendant by reason of his becoming the guarantor of said note." The record contains no allegation nor proof that appellants have as yet suffered any loss by reason of their guaranty. They had therefore, no "existing" cause of action against plaintiff under such alleged agreement, as is required by section 438 of the Code of Civil Procedure. A cause of action upon contract is not "existing," within the meaning of the above section, until a liability upon such contract has matured. Provident Mutual Building Loan Association v. Davis, 143 Cal. 253, 76 Pac. 1034. No loss would be occasioned to defendants within the meaning of the alleged agreement until actual payment was made by them. Even recovery of judgment against them would not have given rise to a matured right of action in their favor against the plaintiff. Oaks v. Scheifferly, 74 Cal. 478, 16 Pac. 252.

[5] The trial court found that "the plaintiff did not at any time * * * release the California Rochdale Company from liability on the note referred to in said complaint or from any part of its liability on said note." Appellants' contention that plaintiff released the corporation "or its representative, Smith," from its obligation upon the note, is unwarranted. Smith was the trustee for the creditors. The California Rochdale Company passed a resolution authorizing and directing defendant Heisinger, president of the corporation, upon acceptance of a certain compromise settlement by a majority in number and amount of its merchandise creditors, to deliver to said Smith a copy of said resolution, "which is hereby constituted an authority and instruction to H. L. Smith to retransfer to F. A. Bennett, S. L. Heisinger, and W. J. McClendon, or their nominees, all of the assets heretofore transferred to him by the California Rochdale Company." Plaintiff and Heisinger, as creditors of said corporation, each executed a release to Smith for all claims and demands which he "has or may have against said H. L. Smith on account of the aforesaid transfer of assets, and does hereby consent that said H. L. Smith may transfer said assets and property" to said parties. This release does not purport to be a release of the corporation, or any one else, from any obligation under the note in suit, nor a waiver by plaintiff of any rights thereunder. This is the only release in evidence. Reliance is placed upon section 2819 of the Civil Code, which provides that—

> "A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended."

It is not contended that the original obligation was altered in any respect. The consent of plaintiff, as a director of the corporation, to the transfer of the assets of said corporation for the benefit of creditors, did not constitute an act impairing or suspending the remedies or rights of plaintiff against the corporation. In this connection appellants rely on the well-established rule that "a payee, who voluntarily releases the lien on property which he holds as security for the payment of his note, exonerates the guarantor thereon." The note in suit, however, was unsecured. By his consent to the transfer of the corporate assets to a trustee, plaintiff neither released any security for his note nor extended the time of payment.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

42 Cal. App. 742

PACIFIC MFG. CO. v. RASMUSSEN et al. (Civ. 2887.)

(District Court of Appeal, First District, Division 2, California. Aug. 19, 1919. Rehearing Denied Sept. 18, 1919; Denied by Supreme Court Oct. 16, 1919.)

1. Mechanics' liens 🔑309—Variance between notice of completion of building and actual date immaterial.

Appellants in a mechanic's lien foreclosure action may not complain that a notice specified the date of completion of a building as December 19th, whereas the court found the date was really December 24th, since Code Civ. Proc. § 1187, then permitted notice within 10 days after completion, and appellants did not file their lien claim within such time after December 24th, and they were not injured.

2. Appeal and error 🔑1011(1)—Findings on conflicting evidence not reviewed.

Where the evidence to support findings of trial court is scant, but conflicting, the findings will not be disturbed.

3. Mechanics' liens 🔑281(2)—Evidence sufficient to show acceptance of work on specific date.

In consolidated actions for foreclosure of mechanics' liens, evidence *held* sufficient to support the findings of the trial court in relation to the acceptance of the work of both painter and plasterer as of a specific date.

4. Mechanics' liens 🔑132(4)—Claim invalid for failure to file notice within time limited.

Where claimants did not file their notices of mechanics' liens, either within the time limited after the notice of completion or within the time limited after the completion of their original contracts, their liens are not valid, because of failure to comply with Code Civ. Proc. § 1187.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Consolidated mechanics' lien actions, in which the Pacific Manufacturing Company, a corporation, and others, were plaintiffs, and C. H. Rasmussen and others were defendants. From the judgment rendered, Eric Petersen and H. W. Lassen appeal. Affirmed.

Carl F. Wood, and L. D. Manning, of Oakland, for appellants.

W. B. Rinehart, of Oakland, for respondents.

LANGDON, P. J. This is an appeal by Eric Petersen and H. W. Lassen, two of the plaintiffs in a consolidated action to foreclose mechanics' liens, first, from that portion of the decision of the trial court holding that the sum of $4,150, found to be the unpaid balance owing from Court Livermore, No. 77, Foresters of America, the owner of the building upon which the work was performed, to the defendant Rasmussen, the contractor, was payable to defendant Farmers' & Merchants' National Bank of Livermore under an assignment, and that such sum was not subject to payment of the amounts found to be due appellants for labor and materials used in the construction of the building; and, second, from that portion of the decision and judgment denying appellants a lien against the land on which the building was constructed. The amounts of the appellants' claims were determined by the findings and judgment ordered in their favor for such amounts against the contractor, Rasmussen.

On May 6, 1914, Court Livermore, through its building committee, entered into an agreement in writing with Rasmussen, as contractor, for the erection of a building on a lot in Livermore, Alameda county. The contract price was to be something over $14,000, payable in monthly installments during the progress of the work, in sums equal to 75 per cent. of the value of the work done up to the date of payment, the remaining 25 per cent. to be paid 35 days after final completion of the work. The court found that upon the completion of the work there was due the contractor the sum of $4,150, which had previously been assigned by him to the defendant Farmers' & Merchants' National Bank to secure a note of the contractor, which note was given for money advanced by the bank and used in the erection of the building. The causes of action stated in the complaint of appellant Petersen include a number of claims assigned to said appellant by other lien claimants, which will be considered later.

Appellants contend that a valid notice of completion was never filed by the owner, and that therefore it is precluded from maintaining any defense based upon the ground that the liens were not filed in time, under the provisions of section 1187, Code of Civil Procedure. The facts involved in this determination are that on December 19, 1914, Court Livermore occupied the building, which was substantially completed at that time, but there remained unfinished at that time the exterior painting and a small amount of plastering and concrete work, of the value of about $4.30. The court found that such occupation and use of the building by Court Livermore, on and after the 19th day of December, 1914, was open and notorious and well known to all of the parties plaintiff and defendant in this action, including all of the lien claimants in the consolidated actions. The court found that the contractor, Rasmussen, completed the construction of said building on the 24th day of December, 1914, and that said building was accepted by said owner on said 24th day of December, and a notice of completion and acceptance thereof was duly filed and recorded in the office of the county recorder of Alameda county on said 24th day of December, 1914, and that all of the parties to this action and all of the lien claimants mentioned therein, except Robert Howden, had knowledge of the completion of said building on and after the actual date of completion thereof as found by the court, to wit, the 24th day of December, 1914.

[1] The notice of completion filed and recorded on December 24th specified the date of completion as of December 19th, and the appellants' objection is that, as the court found said date of completion was really December 24th, the notice should have so stated, and that, as it stated that the completion date was December 19th, instead of December 24th, said notice is fatally defective, as not being in conformity with the statute. Section 1187, Code of Civil Procedure, as it stood at the time of this notice, provided that the owner may within 10 days after completion of any contract file for record in the office of the county recorder a notice setting forth the date when the same was completed, together with his name, etc. While it may be true that if the lien claimants had relied upon this notice of completion as filed, and had filed their claims within the 30 days allowed after the time stated in the notice as the date of completion, the owner would have been estopped to deny that such date, so stated, was not the actual date of completion—in the present case, the claimants and their assignors neither filed their claims within 30 days of the date stated in the notice, nor within 30 days from December 24th, the date found by the court to have been the actual date of completion and the date upon which the notice was filed and recorded. They are, therefore, not injured and in no position to complain.

The court also found that on the 24th day of December, 1914, it was agreed and understood by and between plaintiff Petersen and defendant Rasmussen and said Court Livermore that the work and contract of said plaintiff Petersen should be and the same was accepted on said date, omitting therefrom the aforesaid concrete work, amounting to $4.30, which it was agreed between the parties aforesaid, on said day, might be performed at such time thereafter as would be proper and convenient for said Petersen, and that as to said last-mentioned work no time of performance was agreed upon and no time of payment fixed; that the performance of same was, by said agreement between the said parties, eliminated from the contract of said plaintiff Petersen, and a new contract made with relation thereto as aforesaid, wherein and whereby it was agreed that Petersen might perform the same and should receive therefor when performed the sum of $4.30, the same to be paid by defendant Rasmussen, and that the said Court Livermore did not agree to pay the same.

[2] With reference to the other work remaining unfinished on December 24th—i. e., the exterior painting, contracted to be done by Morrill & Walters, assignors of Petersen—the court found that said contract was accepted as fully performed by said Rasmussen and the said Court Livermore on the 24th day of December, 1914, for all the purposes of the completion of said building; that on the said 24th day of December, 1914, it was agreed and understood between Morrill & Walters, Rasmussen, and said Court Livermore that the work and contract of said Morrill & Walters should be and the same was on said day accepted, omitting therefrom the aforesaid unfinished portion of said work, amounting in value to the sum of $153, which it was agreed between the parties might be performed at such time thereafter as would be proper and convenient; and that the performance of the same was by agreement between the parties eliminated from the contract of Morrill & Walters and a new contract made with relation thereto.

[3] Appellants contend that there is no evidence to warrant the above findings that new contracts were entered into between the parties for the completion of the cement work and painting work, and that the original contracts for such work were accepted as completed by the owner as of December 24th. It is true the evidence to warrant these findings is scant; but there is a conflict in the evidence, and, if there is any evidence from which these findings could be made, they are not subject to review here. We find in the record the agreement signed by Morrill & Walters, the painters, and also signed by Rasmussen, the contractor, on or about December 24th, which reads:

> "We hereby agree that the value of the unfinished painting work on the Foresters' Hall on Saturday, December 19, 1914, as compared with the entire contract price for this painting, amounts to $153; in other words, our total contract for painting amounts to $654, and painting work completed December 19, 1914, amounts to $500, and as above noted the unfinished work amounts to $153."

A similar agreement was signed by Petersen in relation to the unfinished portion of the plastering and concrete work, amounting to $4.30. In relation to these two agreements we have the testimony of Rasmussen, the contractor, that, when these agreements were signed, Rasmussen showed to Mr. Walters and to Mr. Petersen, respectively, a letter from the architect, explaining that he wanted to have the building accepted to meet all legal requirements, and requesting an estimate of and agreement concerning the unfinished portion of the work, which letter is a part of the record here; that Walters was with Rasmussen when the agreement was presented to Petersen; that the letter from the architect was shown to Petersen, and that it was explained to him, as it had been to Mr. Walters, that the owner wanted to have the building accepted, and that the painting might be completed when the weather permitted. We think this evidence is sufficient to support the findings of the trial court in relation to the acceptance of the work of both the painter and plasterer as of December 24th.

[4] Under the findings it therefore appears that neither the plaintiff Petersen nor his assignor, Morrill & Walters, have valid liens under the provisions of section 1187, Code of Civil Procedure. They did not file their notice of lien, either within the time limited after the notice of completion, or in the time limited after the completion of their original contracts. Under the findings of the trial court, this is also true of the lien of the appellant Lassen, and of the various lien claimants whose claims were assigned to Petersen.

The judgment is affirmed.

We concur: **BRITTAIN, J.**; **HAVEN, J.**

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42 Cal. App. 736

MICHALEK v. NEW ALMADEN CO.

(Civ. 2893.)

(District Court of Appeal, First District, Division 2, California. Aug. 18, 1919. Rehearing Denied by Supreme Court Oct. 16, 1919.)

MINES AND MINERALS ⚷97—EMPLOYÉS NOT HAVING INTEREST IN MINE, PAID FOR ORE PRODUCED, NOT PARTNERS.

Where mine owner made oral agreement with certain number of its employés giving them the right to open up abandoned tunnel, agreeing to pay them at specified rate for ore delivered to it, and furnishing them with tools wherewith to do work, the employés were not "mining partners" under Civ. Code, §§ 2511, 2512, 2516, not having any interest in or right to possession of the mine, and the contract being merely one of employment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mining Partnership.]

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by A. Michalek against the New Almaden Company. Judgment for plaintiff, and defendant appeals. Reversed.

David M. Burnett, of San Jose, and John J. O'Toole, of San Francisco, for appellant.

Arnold C. Lackenbach, R. Porter Ashe, and Roland Becsey, all of San Francisco, for respondent.

HAVEN, J. Plaintiff sued as the assignee of five individuals, who are alleged to have been the members of a mining partnership, for the recovery of the reasonable value of work and labor performed by said assignors under a license for the working of the mining property of defendant. The license was granted by oral agreement between defendant and seven persons, of whom one had died and three others had withdrawn from the partnership prior to the assignment to plaintiff, thus leaving but three of the original licensees who joined in the assignment. The other two assignors are alleged to have become members of the partnership after the acquirement by it of the license. The defendant pleaded a defect of parties plaintiff, both by demurrer and answer; and also pleaded in abatement of plaintiff's cause of action that, if any partnership existed among the plaintiff's assignors, it was a general and not a mining partnership, which transacted its business under a designation not showing the names of the persons interested as partners, and that no certificate had ever been filed or published by such partnership, as required by sections 2466 to 2469 of the Civil Code. Defendant further contended that if the partnership was a general one the entire partnership claim was not assigned to plaintiff. These defenses were valid unless a mining partnership existed. Plaintiff alleged such a partnership. Both parties assumed that it was essential to plaintiff's recovery to allege and prove the existence of a mining partnership, and the jury was so instructed. The vital question involved in the appeal is whether or not a mining partnership existed among plaintiff's assignors by reason of the relations among themselves, or between them and the defendant. There is no conflict in the testimony as to the facts, which may be summarized as follows:

The defendant is the owner of a quicksilver mining property in Santa Clara county. The persons who are alleged to have formed the mining partnership had been working as miners upon this property. In December, 1915, one of such miners, who acted as the spokesman for his associates, approached the foreman of the mine and stated that he and some others of the miners had gone into an abandoned tunnel from another part of the mine and discovered a lot of quicksilver metal there, which they wanted to get out; that the only way to do so would be to open up that tunnel; and that he and six others desired to go into partnership and try to open it up. The foreman referred the miner to his superior officer, the general manager of the mine. At a subsequent interview between the manager, the foreman, and the spokesman for the alleged partners, the foreman advised the manager of the desire of the miners to obtain the privilege referred to, and an oral arrangement was then entered into between the general manager and the miners whereby it was agreed that the miners should have the privilege of opening up the tunnel referred to, and "to take out the ore and deliver it to the company for one and a half years after the completion of the tunnel," for which the company was to pay them at the rate of $6 per ton for each one per cent. of quicksilver in the ore delivered by them to defendant at the mouth of the tunnel; that the defendant would furnish them with all the necessary mining tools and supplies for the purpose of opening the tunnel, but that they were to furnish their own board. The miners were to receive nothing in the way of wages, but were to do the work upon their own account. The property to be worked was the property of the defendant. There was no agreement that the miners were to acquire any interest in the mine, nor in the ore when it was taken out; but they were to deliver it to the defendant and to receive compensation for their work at the rate above specified. They were not bound to work any specified length of time, but could stop whenever they found that they would not get enough compensation out of the ore to satisfy them. There was no writing evidencing the contract. The record contains evidence to the effect that the licensees were referred to among themselves and by the employés of defendant as partners, and were generally recognized as such. This is no proof, however, of the existence of the peculiar character of partnership necessary for the successful maintenance of plaintiff's cause of action.

The court instructed the jury that their verdict must be for the defendant, unless they found the existence of a mining partnership, and that the work performed by plaintiff's assignors was so performed by them as a mining copartnership and not as individuals. In definition of a "mining partnership" and its attributes the court read to the jury sections 2511, 2512, and 2516 of the Civil Code. The jury found a verdict in favor of plaintiff, from which the defendant appeals, urging that the verdict is not supported by the evidence. Defendant's motion for a new trial was based, among other things, upon the same ground, and was denied by the trial court.

The facts above recited do not prove the existence of a mining partnership. Under the sections of the Civil Code above referred to and the authorities in which the nature of such a partnership has been considered, the ownership of an interest in a mine, or the right to the possession thereof, or an option to purchase the same, is a prerequisite for the existence of such a partnership. Under section 2511 of the Civil Code:

> "A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom actually engage in working the same."

Under this definition, the ownership or acquirement of a mining claim, or of at least an interest therein, and the actual engagement in working such a claim, are both essential before a mining partnership can be said to exist. A mining partnership exists by reason of the joint interest of the partners in a mining claim. In the case at bar the alleged partners had no such interest when the alleged partnership was formed, nor did they subsequently acquire any. Their contract amounted to nothing more than the privilege of working upon a mine in which they neither had nor were to acquire any interest. It was a contract of employment.

Respondent relies upon certain authorities which hold that the ownership of a mining claim in fee is not necessary for the existence of a mining partnership, and that such partnership "can be formed either to prospect for and locate mines, or to work mines belonging to other persons or to any or all of the individual members." 27 Cyc. 756. An examination of the cases cited by the text-writers discloses that the mining partnerships there involved were decreed by reason of the existence in the partners of some interest in the property, or of a right of possession in their own right, as distinguished from that of the owner. The recent case of Harper v. Sloan, 177 Cal. 174, 169 Pac. 1043, 181 Pac. 775, is cited by respondent, and is an example of similar cases. In that case the plaintiff acquired, under his contract, the privilege of purchasing the property, and conveyed to his associates a portion of that right. Such a contract vests in the holder thereof an equitable or contingent interest in the property itself. In Crowley v. Genesee Mining Co., 55 Cal. 273, the court construed a contract by which the plaintiff was employed to work in a mine belonging to defendant for the purpose of taking out what is known as "tribute rock," and delivering it at the defendant's quartz mine, to be crushed at its mill free of cost or expense to the plaintiff, and as compensation for his services one-half of the gross proceeds of each crushing was to be paid to the plaintiff. That contract was held to be a "contract of employment under section 1965, Civil Code." In Hudepohl v. Liberty Hill Consolidated Mining & Water Co., 80 Cal. 553, 558, 22 Pac. 339, 340, a written contract was executed by the superintendent of a mining company to plaintiff and an associate, which contract stated that the mining company leased to the plaintiff and his associate "the right and privilege to work and mine" certain mining property; that the company was to make improvements necessary for commencing and carrying on the work; and that the other parties were to work and mine the ground and receive one-half of all the gross products as compensation. In construing that contract the court said:

> "Such a contract does not create the relation of landlord and tenant, but fixes a rule of compensation for services rendered. It is, in all its essential features, a contract for labor to be performed, and to be paid for by a share of the profits realized from such labor."

It was admitted upon the trial by the attorney for respondent that the contract here involved evidenced a license and not a lease. In Wheeler v. West, 71 Cal. 126, 128, 11 Pac. 871, 873, an oral contract was involved, under which defendants were to enter and work a certain portion of the mine as they saw fit and to exercise their own discretion whether they worked it or not. That contract was held to convey to defendants a mere license and not a lease. In distinguishing the legal rights of a licensee from those of a tenant under a lease, the court used the following language:

> "There is a broad distinction between a lease of a mine, under which the lessee enters into possession and takes an estate in the property, and a license to work the same mine. In the latter case the licensee has no permanent interest, property, or estate in the land itself, but only in the proceeds, and in such proceeds not as realty, but as personal property, and his possession, like that of an individual under a contract with the owner of land to cut timber or harvest a crop of potatoes thereon for a share of the proceeds, is the possession of the owner"—quoted to the same effect in Shaw v. Caldwell, 16 Cal. App. 7, 115 Pac. 941.

De Haro v. United States, 5 Wall. 599, 627, 18 L. Ed. 681, announces the same doctrine.

The verdict was not supported by the evidence in that no mining partnership was proved. Under the facts disclosed by the record, the doctrine of estoppel relied upon by respondent can have no application.

The judgment is reversed.

We concur: LANGDON, P. J.; BRITTAIN, J.

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42 Cal. App. 637

ROSENTHAL v. SILVEIRA. (Civ. 2666.)

(District Court of Appeal, First District, Division 1, California. August 12, 1919. Rehearing Denied by Supreme Court Oct. 9, 1919.)

1. VENDOR AND PURCHASER 🔑85—EVIDENCE INSUFFICIENT TO SHOW ACCEPTANCE OF QUITCLAIM DEED BY VENDOR AND RESCISSION.

Where purchaser served quitclaim deed, releasing his interest in the land, upon vendor who was unable to read or understand the English language, and vendor within two days handed deed to his lawyer, who returned it to purchaser as soon as he could ascertain proper address, there was no acceptance of deed or acquiescence by vendor in rescission of contract.

2. VENDOR AND PURCHASER 🔑123—EVIDENCE SHOWING ASSIGNMENT OF INTEREST BY PURCHASER BEFORE ATTEMPT TO RESCIND.

In purchaser's action to rescind, involving issue of whether third parties, to whom purchaser had transferred interests in the contract prior to purchaser's attempt to rescind, had abandoned their rights, thereby enabling purchaser to revest vendor with title free from any cloud created by the contract, finding that, at time of purchaser's attempt to rescind, such other persons had no interest in the contract, *held* against weight of evidence.

3. APPEAL AND ERROR 🔑883 — APPELLANT ESTOPPED ON APPEAL TO OBJECT TO CONSIDERATION OF DEED.

Where substance of deed and date book and page of its recordation were read into the record during the trial, and the existence of the deed appeared to have been considered before lower court by all parties, plaintiff was estopped on appeal from objecting to consideration of deed, though deed itself had not been admitted in evidence.

4. DEEDS 🔑121 — VENDOR AND PURCHASER 🔑116—TENDER OF QUITCLAIM DEED INSUFFICIENT AS A RECONVEYANCE TO VENDOR.

Where purchaser made quitclaim of the property to third party, a subsequent quitclaim deed served upon vendor by purchaser was insufficient as a tender of reconveyance, since it failed to revest vendor with title freed from the cloud created by contract of sale, for a quitclaim deed conveys no more than present interest of grantor.

5. VENDOR AND PURCHASER 🔑55—SALE OF TRACT AND CONVEYANCES OF PARTS THEREOF A SEPARABLE CONTRACT.

Contract for sale of large tract of land, requiring vendor to convey one or more acres upon payment of certain price per acre, was a divisible and separable contract, such that full performance of one part might be made by both parties without affecting the subsequent performance or right of performance as to remainder.

6. VENDOR AND PURCHASER 🔑145—RIGHT TO CONVEYANCE OF PROPORTIONAL NUMBER OF ACRES UPON MAKING INITIAL PAYMENT.

Where contract for sale of certain tract of land, at certain price, to be paid within certain time, provided for conveyance of one or more acres upon payment of certain price per acre, purchaser was not entitled to conveyance of proportional number of acres for initial payment made upon execution of contract; such payment being a general payment on price of tract as an entirety.

7. VENDOR AND PURCHASER 🔑334(6) — DEFAULT BY VENDOR IN CONVEYANCE OF PORTIONS OF TRACT SOLD NOT AFFECTING ENTIRE CONTRACT.

Where contract provided for sale of tract of land at certain price to be paid at, or, at purchaser's option, before specified date, and required vendor to convey one or more acres upon purchaser's payment of a specified price per acre, vendor's refusal to convey certain number of acres upon tender of required amount, before purchaser had exercised option by paying or tendering total purchase price, was not a default by vendor of the entire contract, but was mere refusal to carry out a portion thereof not entitling purchaser to recover initial payment made upon execution of the contract.

8. VENDOR AND PURCHASER 🔑118—VENDEE IN DEFAULT IN FAILING TO PAY OR TENDER VENDOR TAXES ADVANCED.

Where contract required purchaser to pay taxes, but it was subsequently agreed that vendor should pay taxes and that amount due therefor should thereafter be adjusted between the parties, purchaser did not fully perform under the contract without paying or offering to pay taxes advanced by vendor, though vendor never requested payment.

9. VENDOR AND PURCHASER 🔑79—NEITHER PARTY COULD SUE ON CONTRACT WITHOUT PERFORMANCE OF CONDITIONS.

Where land contract provided for payment of purchase price within certain period and interest and taxes by purchaser and for conveyance by vendor of one or more acres upon payment of certain price per acre, neither party could maintain action thereon without first performing all the conditions previously to be performed by him.

10. VENDOR AND PURCHASER 🔑107 — EVIDENCE SHOWING NO EQUITABLE GROUND FOR RESCISSION BY VENDEE.

Where vendor, who was unable to read English language, refused to sign deed conveying certain number of acres upon payment of certain price, under contract requiring him to so do, without first consulting his attorney, and where purchaser, taking advantage of such refusal, immediately served notice to rescind and quitclaim deed upon vendor, and filed suit to rescind before vendor's attorney could return quitclaim deed, and where interest payment was soon due, and purchaser was at such time indebted to vendor for taxes, there was no equitable grounds for rescission on part of purchaser.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Cerf Rosenthal against Joseph C. Silveira. Judgment for plaintiff, and defendant appeals. Reversed.

F. I. Lemos, of Hayward, and Rose & Silverstein and Fitzgerald, Abbott & Beardsley, all of Oakland, for appellant.

A. C. Aiken, of San Francisco, for respondent.

WASTE, P. J. Appeal from a judgment, rendered in favor of plaintiff and respondent, for the sum of $8,257.75, together with costs and disbursements, ordering that plaintiff have a lien upon the real property involved in the action to the amount of the judgment, and canceling and annulling a contract, wherein plaintiff agreed to purchase from defendant, and defendant agreed to sell, the real property described in the pleadings. The judgment of the court below is for the return of the payments made by plaintiff on the purchase price of the land, and interest, on the theory that there was a rescission of the contract.

Plaintiff in the case is an experienced real estate operator and engineer by profession. He bought the property for subdivision purposes. He understands perfectly the English language. Defendant is a Portuguese farmer, unable at all to read or write the English language, and understanding it at best but imperfectly.

The property in question was part of the farm owned and cultivated by the defendant. The contract provided for the sale of the property for the sum of $30,000, $5,000 of which amount was paid on execution of the contract. The balance of $25,000 was payable at any time within four years from date. The contract also provided that all taxes on the property, which became due after June 30, 1913, were to be paid by plaintiff, who was also obligated to pay interest on the deferred payments at 6 per cent., net, per annum, payable semiannually; the contract not stating whether such interest payments were to be paid in advance or otherwise. Under the terms of the agreement, plaintiff was given the right to a conveyance of one or more acres of the land, upon the payment of $300, or $500, per acre, according to the location of the property; but no definite time was stated when or under what conditions such conveyances should be made. Time was made the essence of the contract.

Plaintiff took possession of the property, built roads therein, destroying some of the fruit trees in so doing, and plotted out the property for subdivision purposes.

The tract, being part of defendant's entire acreage, was assessed in one amount for 1913–14. Rather than allow the tax to go delinquent, and after his attention had been called to the matter by the tax collector, he paid taxes on the whole tract for the year 1913 when they became due. After settlement as to the amount due, plaintiff repaid to defendant his pro rata share, as required by the agreement. Plaintiff also paid all installments of interest to and including July 2, 1914. Taxes for the year 1914–15 became due October, 1914, and were again paid by the defendant. No adjustment or pro rata payment by the plaintiff had been had when the purported rescissison took place, on December 29, 1914, nor had the interest on the contract been paid, subsequent to July 2 of that year.

After entering into possession of the tract, plaintiff, on February 6, 1914, made a quitclaim deed of the property to the Clarabelle

Realty Company, and this deed was recorded. Plaintiff also entered into a contract, without the knowledge of defendant, to sell 2½ acres of the tract to a German, whose name was unknown to defendant. No money was paid on this contract, and the purchaser appears to have never entered into possession. The plaintiff, through the realty company, entered into a written agreement, in escrow, with S. G. and Clara F. Brown, for the purchase of five acres of the real property. Brown entered into possession. No money was paid to defendant under either the contract with the unknown purchaser, or with Brown, and neither contract was recorded.

On December 29, 1914, in the evening, after defendant was in bed, plaintiff, accompanied by a Mr. Atthol, called upon the defendant at his residence, near Hayward, and requested defendant to sign a deed conveying 16⅔ acres of the premises, explaining to defendant that it was in consideration of the $5,000 theretofore paid and credited on the purchase price at the time of the execution of the contract. Defendant refused to execute the deed. Thereupon plaintiff tendered to defendant the further sum of $300 and demanded that he sign a conveyance of a certain one acre of the land to the party Atthol, as provided in the contract. Defendant also refused to accept the $300 or to execute the conveyance demanded.

The evidence is conflicting as to just what occurred at this meeting. The plaintiff testified that the defendant positively refused to execute any further deeds until the remainder of the purchase price, amounting to $25,000, had been paid. The defendant testified that he merely explained to the plaintiff that he did not understand the matter, and requested that the execution of the deeds be postponed until the next day, when he could consult his attorney; that his only refusal to comply with plaintiff's demand occurred when he was pressed by plaintiff to sign the deeds, and finally said, "No, I sign nothing to-night, until I see my lawyer." While the trial court, with the witnesses before it, was satisfied with, and accepted, plaintiff's version of the occurrence, and what subsequently transpired, and found that defendant's conduct amounted to a rescisssion of the contract, we cannot but feel that there is much in the whole line of action of the plaintiff on the occasion of that visit, and immediately thereafter, which lends vivid color to the contention of the appellant that—

> "The purpose of this visit by Rosenthal and Atthol was to inveigle Mr. Silveira into some sort of a technical default, so as to enable plaintiff and his successors in interest to evade carrying out of the contract of purchase."

On the very next day following the visit to defendant, at Hayward, plaintiff signed, and sent by a messenger to defendant, who personally received it, a notice of rescission and cancellation of the contract of sale, based on the alleged refusal of defendant to execute deeds for certain portions of the tract, and for false statements and alleged misrepresentations to various prospective purchasers. We pause here to note that nowhere in the record does it appear that any false statements, or misrepresentations, were ever made by defendant, or by any one in his behalf, in the premises. The notice was accompanied by a quitclaim, executed by the plaintiff and his wife to defendant and his wife, which deed released and quitclaimed the entire tract. It contained a recital that it was "made for the purpose of releasing all interests of the" makers "by reason of" the contract of sale between the parties. The plaintiff did not in this notice, or at any other time, offer to pay, or tender, to defendant the taxes accrued on the property, and paid by defendant, for the year 1914, or the interest on the contract which accrued after July 2d of that year.

Defendant could not read the documents thus served on him, but within a day and a half, or two days, he handed them to his attorney. The latter, acting for defendant, as quickly as he could ascertain the proper address, returned the quitclaim deed to plaintiff. This was on January 4, 1915, and but five days after its receipt by defendant. In a letter accompanying the returned deed, defendant, through his attorney, denied refusing to execute any deeds, and the making of any false statements concerning the matters at issue, and stated his willingness to comply with the terms, covenants, and conditions mentioned in the contract of sale, and demanded payment of the unpaid interest, amounting to $750, and settlement for the taxes as therein provided. He offered further to make a deed to plaintiff of all the property covered by the contract upon being paid the full amount of the purchase price. Plaintiff had, however, immediately after executing the quitclaim deed, brought this action for rescission, and return of the amounts paid, alleging the delivery of the deed to defendant, of which fact his attorney notified the attorney for defendant, inclosing the deed, and refusing to entertain its return to plaintiff. Defendant's attorney offered in reply to hold the quitclaim deed for Rosenthal, but that offer was refused, plaintiff's counsel stating that the return was absolute and that the action would be tried as the facts existed at the time it was filed. There the matter rested.

[1] On the foregoing facts we cannot find warrant for accepting the trial court's finding that the defendant "accepted" the quitclaim deed. It is true there was a manual delivery of the document to Silveira, who was unable, by reason of his illiteracy, to read it. He promptly handed the document

to his lawyer, who returned it to Rosenthal, only to learn that that party had, with precipitous haste, filed an action based on the alleged delivery of the deed, and would stand upon whatever advantage he had gained thereby. We are unable to find acceptance or acquiescence in this line of action. Neither do we share the view of appellant that on the foregoing facts defendant must be held to have made no objection to the tender of the quitclaim deed by plaintiff.

[2] The lower court found that—

> "Neither the Browns, nor Clarabelle Realty Company, nor any other person, other than plaintiff, had any right or title in or to said contract of sale, or to possession of said tract, or any portion thereof on December 30, 1914, when it was offered back to defendant, and the contract released to him by the quitclaim deed."

This finding is contrary to the evidence. The contract between the realty company and the Browns, for the purchase of five acres of the tract, was entered into in May, 1914, and the papers were placed in escrow in the Farmers' & Merchants' Bank in Oakland. The sum of $500, and a deed to a certain lot, as part of the purchase price for the acreage, were handed to the bank with written escrow instructions, signed by the Clarabelle Realty Company and by the Browns. The latter went into immediate possession, and, according to the evidence, as we read the uncontradicted record, were in possession at the date of the attempted rescission by plaintiff. They apparently had no thought of abandoning their contract until the plaintiff in person went to them and asked to be released from the contract. In spite of the effort of the plaintiff, in the lower court, to fix the date of the alleged surrender of possession by the Browns as being prior to December 30th, the record fails to substantiate the finding of the court. On the contrary, the record does show that it was not until January 15th, following the filing of the action, that the escrow was ended. On that day, under written instructions bearing the same date, and signed by the Clarabelle Realty Company by its proper officers, the bank redelivered to Mrs. Brown the $500 theretofore paid and the deed, given as part of the same purchase price for the five-acre tract. Furthermore, the Browns left their furniture in a building on the tract and some of it was still there at the time of the trial. No quitclaim deed from the Browns, or any release by them of plaintiff, or the Clarabelle Realty Company, other than the receipt for the $500, and "all papers in connection with above escrow," appear in the record.

Again, there is nothing in the record by which it may be determined that the party, whose name is unknown, but referred to as the "German," had no right or title in the property, as vendee of the Clarabelle Realty Company.

[3] As before stated, on February 6, 1914, plaintiff made a quitclaim deed of the property in question to the Clarabelle Realty Company, which deed was duly recorded in the office of the county recorder of Alameda county. While this deed, by some inadvertence, possibly, does not appear to have been actually admitted in evidence, its existence and the fact of its execution appear to have been considered before the court by all parties. Its substance, and the date and book and page of its recordation, were read into the record by counsel during the trial. On this statement of counsel the court made its finding. Plaintiff is therefore estopped from objecting to the deed now being considered in evidence. Baker v. Eilers Music Co., 175 Cal. 652, 166 Pac. 1006. It was under this quitclaim deed and right of ownership in the contract of sale thereby conveyed that the contracts between the realty company and the Browns, and the unnamed German, were made. No reconveyance of the property was ever made by the realty company to plaintiff or defendant until during the trial, two years, and more, after the filing of the action. The lower court's finding in that regard is as follows:

> "Defendant at the time of the tender and receipt by him of the quitclaim deed, executed by plaintiff, did not state any objection to the form or substance of such tender, nor until at the trial, when the fact of the record of the deed to the Clarabelle Realty Company was raised. Plaintiff thereupon tendered to defendant a duly executed and acknowledged deed of said Clarabelle Realty Company, dated January 18, 1916, conveying to plaintiff the said record title, which defendant thereupon refused to accept."

[4] It thus appears from the evidence, and from the court's finding, that, when Rosenthal and wife quitclaimed to defendant and wife the property covered by the contract of sale, the quitclaim deed, so tendered, conveyed nothing to defendant. "A quitclaim deed * * * purports to convey and does convey, no more than the present interest of the grantor, and does not operate to pass an interest after acquired." Ann. Cas. 1913C, 368. Rosenthal had already conveyed to the Clarabelle Realty Company, by deed of record, all his interest and right in the property. His quitclaim deed to defendant, therefore, did not revest the defendant with the title to the property freed from the cloud created by the contract of sale. The right to whatever claim or demand might be asserted thereunder was legally vested in the realty company, at the time the action was commenced. The finding of the court last quoted, therefore, is contrary to, and inconsistent with, its earlier recital that the Clarabelle Realty Com-

pany had no right or title in the contract of sale, or possession of the land, when plaintiff offered it back to defendant, and the contract was released to him by the quitclaim deed of Rosenthal and wife, on December 30, 1914.

[**5, 6**] The contract of sale between plaintiff and defendant was a divisible and separable one. It was such a contract that full performance of one part might be made by both parties without affecting the subsequent performance, or right of performance, as to the remainder. The cash payment of $5,000, made by plaintiff to defendant upon the execution and delivery of the agreement of sale, was nothing more than "a general payment on the price of the tract as an entirety, required in order to provide a margin sufficient to safeguard the seller against loss, from the conveyance of one or more lots upon the subsequent payment" of the required amount per acre. San Diego Construction Co. v. Mannix, 175 Cal. 548, 166 Pac. 325. A reading of the plain terms of the contract forbids any other construction. The defendant was therefore right in his refusal to execute the deed for the 16⅔ acres of land, first demanded by the plaintiff on the occasion of the visit to Hayward on the evening of December 29th.

[**7**] The agreement was to convey the entire tract for the total sum of $30,000. Five thousand dollars was paid as the initial payment, the balance to be paid at any time, at the option of the plaintiff (the vendee), within four years, together with interest and taxes. At the time of the attempted rescission by plaintiff, and even at the date of the trial, the time of payment of the balance of the purchase price had not yet elapsed. There could not, therefore, have been any default as to the entire contract without the exercise by plaintiff of his option, and the tender or payment by him of the balance of the unpaid purchase price, interest, and taxes. There was not, therefore, any abandonment by defendant of the whole contract, but at most a refusal on his part to carry out that portion of the agreement which provided for the conveyance of a single acre, or more, on payment of $300 for each acre so conveyed. Plaintiff was therefore not entitled to recover any part of the initial payment of $5,000, which the lower court included in its judgment. San Diego Construction Co. v. Mannix, supra. In that respect, therefore, the judgment was erroneous.

[**8**] We are of the further opinion, also, that plaintiff was not entitled to any judgment. The lower court found that—

> "At all times plaintiff has performed each and every obligation agreed by him to be performed in and by the terms of the said agreement of sale."

This finding is not supported by the evidence. Plaintiff was by the terms of the contract required to pay the taxes on the property he agreed to purchase, from the date of June 30, 1913. The part sold to plaintiff was a part of the larger tract owned by defendant. When the taxes for the fiscal year 1913–14 were levied on the tract in question, they were included in the tax of the larger parcel. Plaintiff did not pay his proportionate share, and rather than have the tax go delinquent, with added penalties to pay, defendant paid the whole amount. It was not until much time elapsed, and considerable correspondence on behalf of defendant through his banker, that he was able to collect the amount from plaintiff. The following year the same procedure was followed by the county assessor in regard to the levy of the tax on the property in question. Defendant was again compelled to pay the tax on the property. At the time of the alleged rescission on December 30, 1914, plaintiff had not repaid his proportionate amount thereof to defendant. He never paid the amount, and never tendered or offered to pay it. Even if it be true, as found by the lower court, in that connection, on the sharply conflicting evidence, that, at the time of the settlement between the parties for the 1913–14 taxes paid by defendant, it was agreed between them "that on the succeeding year of 1914–15, said Silveira should pay the total taxes in similar manner, and that the parties should thereafter meet and arrive at a pro rata adjustment of the amount between themselves, and that, pursuant to said agreement, said Silveira paid the said total taxes for 1914–15, but said parties never met to apportion the amount to be paid by each, and that Silveira never requested repayment of the amount so paid by him," the fact remains that plaintiff, at the time he was seeking to put defendant in technical default in the matter, was indebted to him for the amount of the taxes so advanced. He never repaid or offered to repay the amount, and the court's finding in the matter does not present any legal or equitable ground for his refusing so to do.

In yet another particular the finding of the court, as to full performance of the contract by the plaintiff, is not sustained. As the contract did not provide when the semiannual payment of interest should be made, it was payable at the end of each semiannual rest. Plaintiff paid his interest in full to July 2, 1914. Consequently, when, on December 30th of that year, he served his notice of rescission and cancellation and the quitclaim deed, interest on the contract had accrued for the entire period of six months, less four days. When the action to recover the amount of the purchase price paid, and to rescind the contract, was commenced, the interest for the six months last preceding, amounting to the sum of $750, was due.

[9] Respondent seeks to avoid the issue of failure to pay, or tender the amount of the taxes, and interest, by reliance upon the fact that when he produced and tendered the $300 for the Atthol deed, defendant made no objection, either to the amount of the tender, or to the form of the offer, and that no objection was made to the quitclaim deed, or to the offer of rescission. As defendant very promptly returned the deed (although it was remailed to his attorney after suit brought), and as promptly made a counter demand for the payment of the unpaid taxes and interest, we are not impressed with plaintiff's argument. Under the agreement between plaintiff and defendant, neither could maintain an action thereon against the other without having performed all the conditions previously to be performed by him. Concurring opinion of Mr. Justice Harrison in Glock v. Howard, 123 Cal. 19, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17.

[10] We see nothing in the record of this case which will warrant us in holding that plaintiff was in any manner excused, or released, from the full performance of the obligations imposed on him by the terms of the severable contract of sale. The effort of plaintiff to rescind the contract just before the semiannual payment of interest became due, and after his pro rata of taxes was past due, coupled with his personal activity in securing from the Browns a release from their contract on which they had paid a considerable amount, and with which they do not appear to have been dissatisfied, taken in connection with all the facts and circumstances surrounding the attempt to secure the execution by the illiterate defendant of the two deeds on the evening of December 30th, followed, as it was, by the precipitous haste in tendering the quitclaim deed and the immediate filing of the action in rescission—all these matters are to us indicia that defendant's characterization of plaintiff's action was correct, and that he is not in court with hands so clean, or intention so far removed from guile, as to entitle him, on the showing made, to the judgment he has secured. We find nothing in the record indicating a rescission of the contract of sale by mutual consent of the parties, and the plaintiff has not shown equitable grounds entitling him to such right in equity. Glock v. Howard, supra.

Other matters are called to our attention on this appeal; but, in view of the conclusion reached, we do not deem them worthy of consideration.

The judgment is reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

(181 Cal. 315)

PEOPLE v. TOM WOO et al. (Cr. 2247.)

(Supreme Court of California. Oct, 1, 1919.)

1. CRIMINAL LAW 🔑1160 — VERDICT WILL NOT BE SET ASIDE IF SUPPORTED BY SUBSTANTIAL EVIDENCE.

It is the function of the jury in the first instance, and of trial court after verdict, to determine what facts are established by the evidence, and before a verdict, which has been approved by the trial court, can be set aside on appeal, on the ground of insufficiency of evidence, it must clearly appear that there is no substantial evidence to support the conclusion reached.

2. CRIMINAL LAW 🔑562 — EVIDENCE MUST SHOW CRIME COMMITTED BY PERSONS CHARGED.

To sustain a conviction there must be proof that the offense charged was committed, and, second, that it was perpetrated by the person or persons accused.

3. CRIMINAL LAW 🔑1159(2) — ASSUMPTIONS AS TO SUFFICIENCY OF EVIDENCE ON APPEAL.

Where the sufficiency of the evidence to sustain a conviction was attacked on appeal, the appellate court must assume in favor of the verdict the existence of every fact which the jury could have deduced from the evidence, and determine whether such facts are sufficient to support the verdict.

4. CRIMINAL LAW 🔑552(1), 554—EVIDENCE INSUFFICIENT TO SUSTAIN CONVICTION.

Neither mere opportunity to commit a crime nor perjured testimony are sufficient to support verdict of guilty; nor are false statements or suspicious circumstances sufficient.

5. HOMICIDE 🔑253(1) — EVIDENCE SUFFICIENT TO SUSTAIN CONVICTION OF MURDER IN FIRST DEGREE.

Evidence, when considered as a whole, *held* sufficient to sustain a conviction of murder in the first degree.

6. CRIMINAL LAW 🔑308—PRESUMPTION OF INNOCENCE IS DISPUTABLE AND MOTIVE TENDS TO OVERTHROW SAME.

There is a presumption of innocence in favor of the person accused of crime, but this presumption is disputable, and may be overcome by other evidence, and the presence of a motive is evidence of guilt tending to rebut the presumption, while the absence of a motive tends to support the presumption of innocence.

7. CRIMINAL LAW 🔑22—EVIDENCE OF MOTIVE NOT ESSENTIAL TO CONVICTION.

While the absence of a motive tends to support the presumption of innocence, proof of motive is not essential to convict of a crime, where the other evidence established its perpetration.

8. WITNESSES 🔑389—DEFENDANTS MAY BE IMPEACHED BY EVIDENCE OF EXTRAJUDICIAL STATEMENTS.

Where the testimony of defendants, who were charged with murder, as to their movements on the afternoon of the crime, was clearly contradictory of extrajudicial statements as to their movements imputed to them, and defendants on cross-examination neither admitted nor denied the statements, it was competent for the prosecution to impeach them by proof of such statements.

9. CRIMINAL LAW 🔑763, 764(13)—INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE NOT OBJECTIONABLE AS ON WEIGHT OF EVIDENCE.

In a prosecution for homicide, where circumstantial evidence was relied on, an instruction that the evidence was legal and competent, and if of such character as to exclude every reasonable hypothesis other than guilt the jury should convict, is not objectionable, as tantamount to telling the jury that the evidence was sufficient.

10. CRIMINAL LAW 🔑763, 764(13) — INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE NOT OBJECTIONABLE AS URGING CONVICTION.

Where the evidence in a homicide case was circumstantial, instructions that because of conditions circumstantial evidence had to be relied upon, that the jury should examine the evidence, and that if the circumstances proved beyond a reasonable doubt led to a conclusion of guilt, and such conclusion pointed to guilt beyond a reasonable doubt, the jury should so find, notwithstanding that testimony of eyewitnesses might be more satisfactory, are not objectionable as exhorting the jury to convict and excusing the evidence.

In Bank.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Tom Woo and Wong Gow were convicted of murder in the first degree, and from the judgment of conviction and order denying new trial they appeal. Affirmed.

W. H. Carlin, of Marysville, Frank Freeman, of Willows, and Seth Millington, of Colusa, for appellants.

U. S. Webb, Atty. Gen., John H. Riordan and J. Charles Jones, Deputy Attys. Gen., and Alva King, of Colusa, for the People.

LAWLOR, J. The defendants were charged with the murder of one Ah Moy on August 29, 1917, near the town of Grimes, in Colusa county. They were jointly tried and convicted of murder in the first degree, with the punishment fixed at life imprisonment. A motion for a new trial was interposed and denied, whereupon the court pronounced judgment and sentence in accordance with the verdict. The appeal is from the judgment and from the order denying the motion for a new trial.

The judgment and order were reversed by the District Court of Appeal for the Third Appellate District, on the ground of the insufficiency of the evidence to support the verdict. Mr. Presiding Justice Chipman delivered the opinion of the court, which was concurred in by Mr. Justice Hart, who filed a separate opinion. Mr. Justice Burnett, in a separate opinion, dissented. The Attorney General petitioned for a hearing herein, and it was granted, because we were not satisfied that the judgment and order should have been reversed. The opinion of the Presiding Justice fully and fairly states the evidence and we shall therefore adopt that portion thereof and make it a part of this opinion. It reads as follows:

"A public highway runs from the town of Colusa to the town of Grimes, about 13 miles southerly. About one mile north of Grimes, a byroad, called Morris lane, intersects this highway, coming in from the west. On August 29, 1917, between the hours of 5 and 6 o'clock p. m., deceased, Ah Moy, a Chinaman, was shot on his way from Grimes to the Morris ranch, where he had been working as cook for several years. It was his habit after the noonday meal to go to Grimes, about 3 miles distant, on his bicycle to spend the afternoon with his countrymen, returning in time to prepare the evening meal. His course took him along Morris lane, to and along the Colusa-Grimes highway, to the town of Grimes. All that was shown of his movements on the day of his death was that he left the Morris ranch about 1 o'clock p. m., and was found dead in the Morris lane shortly after 6 o'clock p. m., lying in the road about 200 yards from its intersection with said highway. Apparently he had been shot through the head while going west, and fell with his bicycle across the road. There was no evidence of any struggle, or indications of resistance on his part, or of personal conflict between him and his assailant, nor was there evidence indicating robbery. He had been shot, and apparently had fallen dead from his wheel, and lay where he had fallen without moving, as was testified to by Coroner McNary, who also testified that the wound was not probed and that there was no autopsy; that the course of the bullet was from a point above the left ear and out almost back of the right ear, but he could not say on which side of his head the bullet entered. He spoke of another wound on the left cheek bone, which he discovered after washing the face. This wound was not described, and it did not appear whether or not it was a gunshot wound. He also testified that the face was powder-burned, but he gave no description of the markings. The coroner swore in a jury on the spot from among the assembled neighbors, and after verdict rendered he put the body in a basket and took it to Colusa. This inquest was held at the scene of the homicide about the hour of 10, the night of August 29th.

"Wong Gow, one of the defendants, had lived in and around Colusa for many years. Tom Woo, the other defendant, had formerly lived in and around Oroville, and more recently, for some months, at Colusa. At the time of the homicide they had a lease of some broom corn land across the river from Colusa a mile or two distant. Their claim and their testimony was that about 1 o'clock of the 29th day of August they left the garage in Colusa in an automobile belonging to Tom Woo, and drove across the river on the Colusa bridge and spent the afternoon of that day on the east side of the river, returning to Colusa shortly before 6 o'clock; that they had supper about 6 p. m.; that Wong Gow went to Williams to hire help for harvesting their broom corn, and Tom Woo spent the evening reading the newspapers; that Wong Gow returned the next morning, and, learning that the sheriff wanted him, he went to the office of the latter and was there arrested. Tom Woo had been taken in custody at his sleeping room about 11 o'clock the night of August 29th and was in jail when Wong Gow returned from Williams.

"Witness Londsen testified that he sold to Tom Woo the automobile he was using; that he, the witness, on the evening of August 29th, had gone to the post office for his mail and some stamps 'and was talking to Mr. Kline'; that it was shortly before 6 o'clock and the post office closed at 6; that he saw Tom Woo driving the car into the garage at that time, and his recollection was that no one was with him in the car.

"Witness Kline testified that he was standing at the post office, 10 or 15 minutes before the office closed on August 29th, talking with Londsen, and saw Tom Woo driving his car into the garage; that he was acquainted with him, and had sold him the car through Londsen's agency.

"Two witnesses were called in rebuttal by the prosecution, who testified that the general reputation of Londsen in the community for truth, honesty, and integrity was bad.

"There was evidence, introduced by the prosecution, that defendants were seen and identified, both as to their persons and the automobile they were driving, at different points along the Colusa-Grimes highway and at different hours after 2 o'clock p. m. of August 29th. Some of the witnesses speak of a third man as one of the party in the automobile at some of the points where they were seen. This third man is not accounted for, and it is not shown that a third man was with the defendants when they arrived at Colusa. We will endeavor to present the evidence as shown by the record.

"Witness Charles Dunning was hauling hay in the vicinity and north of the Morris lane on the afternoon of August 29th. He testified to having seen the defendants and a third man about 2 o'clock 'in Gene Vann's field' near a grove of trees about a mile north of Morris lane. He testified that an Overland automobile was standing by the roadside near this grove. 'It was an old car—Overland car; the top was loose and shaken down some on the right-hand side.' He returned with a load of hay about 4 o'clock, and saw them again 'pretty near at the same place. One of them was in the machine, and the other was standing near the machine. They didn't seem to be doing anything in particular. There was a third man, who was in or near the grove at the time. I should judge I was about a quarter of a mile from them when I saw them first, and this last time I was about 20 feet from them.' After unloading his hay he returned, passing over the same road, and going after another load of hay. He testified that he saw the defendants sitting in the car in the county road not far from where he first saw them; this was, as he testified, 'about a quarter to 5'; he went on to the Cole place for another load of hay, and returned 'something after 5 o'clock—I don't know the exact time,' and he saw 'the car over in the Cole field, but didn't see the defendants'; it had been moved farther down the road, pretty near the corner that leads to Morris. He was asked to point on the map 'where they had moved down to.' The witness indicated a point he thought '150 yards from that corner. Q. And how long did they remain there in the neighborhood? A. I could not say. I observed them there about 5 or 10 minutes and saw no more of them. Q. Approximately what time was that? A. Something after 5 o'clock—I don't know the exact time.'

"Witness Mahan testified that he left Grimes in an automobile 15 minutes before 5 o'clock p. m., August 29th; that he passed an automobile standing in the Colusa-Grimes road about 300 yards north of the junction of the Morris lane; that he saw two men with the car, one of whom he afterwards identified as Wong Gow; that he was on the first seat, and the other man was working on the engine, whom he could not identify. He saw no third man. Neither of these witnesses had personally known or had ever seen either of the defendants. Both of them testified to having based their identification upon such notice as they took of them passing them on the highway.

"Witness Staap, on the 29th day of August, was residing in the town of Sycamore, which is about 6 miles north of Grimes and 5 miles north of the Morris lane. He testified that he saw the defendants and a third man in an automobile traveling past his residence on the Colusa-Grimes road between 12 and 2 o'clock of that day, in the afternoon, going toward Grimes, and that about 15 minutes before sunset he saw them passing on the road towards Colusa. The sun set on that day at 6:37 p. m. He testified that the automobile in which they were traveling was the same as the one he afterwards identified in the garage at Colusa, which belonged to Tom Woo, 'by the top being smashed in.' He testified that he was standing in his dooryard about 75 or 80 feet from the road; that he had never seen either of the parties before; that there was nothing to attract his attention to them particularly; that the third man was on the back seat, and the two defendants on the front seat; that it was not unusual to see automobiles passing; that the third man was dressed the same as the others, whose clothing he described. He was asked if he could not identify the third man, if he saw him again, as easily as he could the others, and answered he 'could not say as to that'; that the only way he had to identify the machine was by the top—'it was sagged down. Q. Is it not a fact that you have seen many machines about that time—that was similar—had similar tops? A. Yes.' He described the third man as being 'a little taller' than the other two and 'a little more broad-shouldered. Q. Well, isn't it a fact, if you met that man on the street now, you would not recognize him? A. Probably I would not. Q. You had just as good a look at him as at the other two? A. Yes, sir. * * * Q. When was it you made up your mind that they were the same ones in the automobile that day? What caused you to come to that conclusion? A. They looked like the same men that I saw in the car. * * * Is there not a greater similarity between two or three Chinamen than the same number of white men? A. Yes; I think so. Q. Now, Mr. Staap, is it not a fact that you heard of the killing of Ah Moy and remembered seeing three Chinamen pass by your place there twice and come up the road here, and you thought they were the ones in the machine? A. Yes, sir. Q. But at that time—at the preliminary and now—the best you can say would be that you noticed the similarity, and you think they were the same men? A. I think they were the men in the machine that I saw.'

"Witness Heryford testified that he was employed as a jitney driver and lived at Colusa; that on August 29th he left Colusa in a Ford machine about 6 o'clock p. m. 'going to the sugar camp this side of Grimes'; that he met defendants traveling in an Overland machine going north toward Colusa, defendant Wong Gow driving; that he had seen Tom Woo around town for the past six months and 'had seen him driving that machine before,' and that it was his machine, and is the same the sheriff took into custody, and is an exhibit in the case; that where he met defendants was about 3 miles north of Grimes; that there were three men in the machine, 'two on the front seat and one behind'; that he had known Wong Gow for two or three years. On cross-examination he testified that 'it must have been half past 6' when he met defendants, as he left Colusa about 6 and it took him about half an hour to reach the point where he met defendants; that they were traveling at 25 or 30 miles an hour, and he at about the same rate. His attention was called to his testimony at a former trial, at which time he testified that he recognized only one man, Tom Woo, and that two were in the rear seat. 'Q. Did you testify that way at that time? A. Yes, sir. Q. Was that correct? A. I guess it was. * * * Q. Why did you say this time you recognized two men in the machine, and say at the preliminary examination that you recognized one man? A. I forgot, I guess.'

"The foregoing comprises the direct testimony tending to establish the fact that defendants were in the vicinity where the homicide occurred during the afternoon of August 29th. It does not definitely appear at what time deceased met his death. Witness Morris, at whose ranch he worked, testified that he (witness) left his house at about the hour of 4 o'clock on August 29th, going by the Morris lane road; that he saw an automobile in the lane approaching him, but it turned around some distance from him, and proceeded down the lane to the Colusa-Grimes road and turned north; that there were three men in it, but he did not know whether they were Chinamen or white men; that he drove on in his automobile to Grimes, where he remained an hour or more, and about 5 o'clock left Grimes, returning to his home by the same road; that he saw an automobile up the Colusa road, beyond the junction of the Morris lane; it was not moving and there were three men with it; one had got out; the machine was faced north; he thought it might be the same he had seen before, but it was too far away to tell much about it; he went on home, and at 6 o'clock received notice by telephone of Ah Moy's death.

"Witness Simpkins, a laborer on the Morris ranch, left the ranch by automobile, as he testified, by the Morris lane road on his way to Colusa; that about 6 o'clock p. m. he found the body of the deceased in the Morris lane; he walked around the body, saw that the man was dead, and went to Grimes, and notified Morris, and telephoned the coroner at Colusa, went on to Colusa and returned with the coroner to where the body lay.

"Witness Beckley testified that on August 29th he was living at Grimes, 'about three-fourths of a mile in an arrow line from the junction of the Morris lane with the Grimes-Colusa road. On the 29th day of August, 1917, between a quarter to 6 o'clock and 6 o'clock p. m. I heard a couple of gunshots. I was walking, and I heard one shot, and then I took about one step, when I heard another. They were pretty close together. They sounded from up the Morris road.'

"The testimony is next addressed to certain facts and circumstances discovered at and near the place where the body was found. Soon after witness Simpkins discovered the body, it became known in the vicinity, and a number of neighbors came to the scene in automobiles. When Simpkins first was at the place and walked around the body, he saw no tracks that attracted his attention. Later, when he returned with the coroner, he testified, as did others, to a man's track traceable from the body to a point easterly towards the Colusa-Grimes road about '30 steps' distant from the body, and where an automobile coming into the Morris lane had turned around and gone back to the Colusa-Grimes road. These tracks were not traceable beyond where this turn was made, and there were no corresponding or other tracks traceable to the body. Some one of the numerous persons congregated there discovered these tracks and drew a circle around two or three of them to preserve their identity. Witnesses testified to following these tracks from the place where the body had lain to the point where an automobile had turned around, and that these tracks grew wider apart as they approached the automobile, the inference being that whoever made them quickened his footsteps after leaving the body.

"Sheriff Stanton took into his possession Tom Woo's automobile on the morning of August 30th. He testified that he took it to the scene of the homicide that morning and had it driven along the Morris lane near to the point where the automobile had turned, above referred to; he backed and made a turn as nearly parallel as he could with the tracks found in the road. He was asked how the two sets of tracks compared and answered, 'They are identical.' He also took three measurements of the footprints leading away from where the body of the deceased had lain—one of them a footprint that had 'been circled around,' and two not thus preserved. He found a stick by the roadside, and marked on it the length of the footprint and length and width of the heel. He later took from his feet the shoes Wong Gow was wearing. He was not permitted to answer the question as to how his measurements marked on the stick corresponded with the measurements of the shoes, but the broken pieces of the stick and the shoes were admitted as exhibits. On cross-examination he explained that the dust was an inch or two deep and 'was a dust that would leave a distinct track.' His method of procedure is thus described: 'Q. Then, when you measured the other tracks, you guessed as to whether they were the same or not? A. I measured them about the same, as I recall. I just got the length and width of them—as you have stated, I would have to guess at it, to a certain degree or extent; that is, by pushing it down and then getting it, by laying it where the impression was made. Q. Well, by finding the length of it and taking this here (indicating the stick) you got the first impression? A. Yes, sir. Q. And then laid it on top of the dust and guessed as to what would be the width of the heel of the track? A. Yes; you can get it correctly, if you have to guess. Yes, I guess I did. Q. Oh, did you say the dust, it was much deeper at the point where you made the first impression than the last? A. That would be a guess, too. Q. Now, then, you did the same way in getting the width of the heel? A. Yes, sir. Q. And the length of the heel? A. Yes, sir. Well, I don't know whether I did or not, but I presume—you see, I used my knife there in marking it (indicating a place on the stick). Q. After getting the length of the heel, you would set it down in measuring the full length of the shoe? A. I guess I did that. Q. But you don't recall now just what part of the performance you did do? A. No. Q. In other words, you guessed the best way you could? A. Yes, sir. Q. If dirt fell into the tracks, or if anything moved the dirt, you would still have to make a greater guess, as to length, or how much dirt fell in? A. It might be. Q. And that was true? A. I presume so. Q. It doesn't make very much difference in the width of the shoe to make a difference in the tracks, does it? A. No.' He testified that the footprints he measured were probably 15 steps—45 or 50 feet—from where the body had lain. 'Q. And all tracks between those two points were all obliterated? A. I didn't find any. Q. You were looking for them? A. Yes.' He testified that he did not take Tom Woo's shoes or measure them, 'because he didn't have any on when arrested.'

Referring to Wong Gow's shoes, he testified that he thought he measured them by the stick before he took them off his feet. 'Q. Well, after you took them off, did you take them down and fit them into the tracks? A. No. Q. Why? A. I didn't think it would be possible to get an accurate impression, from the tracks—that the tracks by that time would have been obliterated. Q. They were all right when you made the measurements? A. Yes; but there was a great deal of travel on the road there. It would be of no use. Q. Didn't you try to find out whether it would be of any use or not? A. No.'

"There was no evidence tending to show whence the person came who made these tracks; there were no tracks traceable from any point to the body. There was evidence that on the north side of the Morris lane at that point the weeds next to the fence and near the traveled part of the road were 2 or 3 feet high. We presume the purpose of this evidence was to show that a man might have concealed himself in this cover and have shot the deceased from that point. There was also evidence that the tracks of an automobile similar to those described by Sheriff Stanton were seen some distance west, where an automobile had apparently made a similar turn, as if having gone into and out of the Morris lane. There was evidence that the automobile tracks referred to by the sheriff could be traced easterly and to the junction with the Colusa-Grimes road, where they apparently turned north toward Colusa, but were then obliterated. Several persons witnessed the experiments made by Sheriff Stanton with Tom Woo's automobile. The witnesses did not agree as to the kind and condition of the tires on the machine making the tracks. Witness Ainger testified: 'The two front tires were plain tread, and the two rear tires non-skid.' Witness Clip was asked whether he noted the impressions or markings by the tires of the automobile making this turn. 'Q. What kind were they? A. The left tire had holes in the tire marking the road. Q. Was that the front or rear? A. Hind tire. Q. And how about the right hind tire? A. Well, it left a kind of flat mark—the same as a wagon, only had triangles on it. Q. How about the front tire? A. It was smooth tire.' Witness Miller testified that he noticed particularly the markings on the ground. 'Q. What were they? A. One was an old tire and the other a new. Q. Which was which? A. The left one was a new one and the right was an old one.' Witness Stanton thus described the tires which made the tracks: 'The two front tires were smooth tread; the right hind tire was a Savage grip tire, and was worn pretty smooth. The left hind wheel made a distinct tread; a track like it was practically a new tire.' Our attention has not been called to any description in the record of the tires on the Tom Woo car. It was made an exhibit, and the jury visited the garage where it had been kept. Sheriff Stanton testified that it was in the same condition as when taken into his possession."

[1] 1. The principal question on this appeal is whether the evidence is sufficient to justify the verdict against the appellants. It is the position of their counsel:

"That giving to the testimony introduced on behalf of the prosecution all the weight to which it can be in any way entitled, the case falls short of proving the guilt of the defendants to that degree of certainty which is required."

In passing upon this question we will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground we are discussing, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below.

[2] The determination of a charge in a criminal case involves proof of two distinct propositions: First, that the offense charged was committed; and, second, that it was perpetrated by the person or persons accused thereof. In this case there can be no doubt of the first proposition, for it is clear that Ah Moy was the victim of a cold-blooded assassination, that the details were worked out beforehand, and that the plan was to strike him down as he, according to his daily habit, made his way along Morris lane to the ranch where he was employed to prepare the evening meal.

[3] Did these defendants commit or participate in the commission of the murder? What facts can we say the jury could have resolved from the evidence in order to justify the inference of guilt? We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.

[4, 5] Among the more important facts which we must regard as having been found by the jury are the following: That the appellants were seen by several witnesses loitering and waiting in the neighborhood of Morris lane for several hours during the afternoon of August 29th until a short time before the murder took place, and were seen by two witnesses driving along the highway in the Overland at the rate of 25 or 30 miles an hour towards Colusa shortly afterwards; that while on the highway the appellants tried to conceal their identity from the witness Dunning, who passed them four times during the afternoon; that the Overland which figures in the evidence was owned by the defendants, and that it was recognized at different times that afternoon in that vicinity by several witnesses; that the machine which the witness Morris saw about 4 o'clock in Morris lane and the one he observed on the highway at about 5 o'clock were identical, and although Morris' testimony was not

definite, the jury upon the entire evidence may have decided that on each occasion it was occupied by appellants; that the turning back of the machine in Morris lane without any apparent reason could have been regarded by the jury as having been done to avoid meeting Morris, and that it was therefore a suspicious circumstance, as may also have been the incident of the automobile making two trips into Morris lane without continuing west either time beyond the spot where the murder was committed; that, since the record does not show what, if any, tests the jury may have made, in connection with the testimony of Sheriff Stanton and the shoes and measuring stick admitted in evidence, touching the footprints traceable from near where the dead body was found to the automobile tracks we would be going outside of our province if we held that the jury could not have found that they were made by Wong Gow, that the alibi was a fabrication, that the appellants gave perjured testimony, and that they suborned witnesses in the attempted corroboration of their alibi. Apart from the perjured testimony, the jury may have found additional support for the inference of guilt in the manner and conduct of the appellants on the witness stand.

It is insisted that the evidence, considered in the light most favorable to the prosecution, shows only two incriminating circumstances having any tendency whatever to connect the appellants with the murder—that they were seen loitering and waiting in the vicinity all afternoon, and that their alibi was fabricated. This position ignores other incriminating facts, which, as we have pointed out, the jury may have found—the attempt of the appellants to hide their identity, the automobile tracks in Morris lane, showing that the car had been driven in there twice, the footprints, the turning back of the machine at the approach of Morris, and being seen on the highway in the automobile going toward Colusa after the murder.

In our opinion the facts which we have indicated could have been found by the jury are sufficient to sustain the verdict. It is the law that neither mere opportunity to commit a crime nor perjured testimony is sufficient to support a verdict of guilty. Nor are false statements nor suspicious circumstances sufficient. It may be conceded that no one of the facts summarized would, if standing alone, be sufficient to uphold the verdict; but, when all the circumstances which the jury may have resolved from the evidence are considered together, it cannot be held on appeal that they are not sufficient to warrant an inference of guilt.

[6, 7] Appellants contend that the evidence is insufficient, particularly because of the absence of proof of motive. It is true the prosecution did not offer such proof. But, as has been declared in many cases, it is not necessary to establish a motive for the perpetration of an offense. A presumption of innocence arises in favor of a person accused of crime. This presumption is disputable, and may be overcome by other evidence. The presence of a motive is evidence tending to prove guilt, for the reason that its tendency is to rebut the presumption of innocence. On the other hand, absence of motive tends to support the presumption of innocence. But the presence or absence of motive is essentially a question of fact, and, like any other fact, is not necessary to be proved, if the crime can otherwise be established by sufficient competent evidence. So, in this case, the absence of proof of motive is a fact to be reckoned on the side of innocence; but, if the proof of guilt is nevertheless sufficient to overthrow the presumption of innocence, the appellants must stand convicted, notwithstanding no motive has been shown.

It is proper to state that in some instances the proof was not complete. For instance, the court did not allow Sheriff Stanton to testify as to whether the shoes of Wong Gow corresponded in size to the measurements of the footprints as they were shown on the stick; the coroner testified that there were powder marks on Ah Moy's face, but the point was not pursued further; and, assuming that the footprints of Wong Gow were traced from the place where Ah Moy was killed to the automobile tracks, it was not shown that there were any footprints leading to the dead body. But, in spite of these discrepancies in the proof, we think the jury nevertheless could have found sufficient facts to be satisfied beyond a reasonable doubt that the appellants were guilty of the murder.

The part which the unidentified third man played in the proceedings that afternoon remains a mystery, and we shall not consider whether he was implicated in the crime, or what effect, if any, the evidence on this point may have had on the jury in reaching the verdict.

[8] 2. It is urged that the court erred in allowing the prosecution to impeach the testimony of the appellants over their objection. They testified on direct examination that they left Colusa at about 1 o'clock, and went to the Jap camp, and remained there until about 6 o'clock. On cross-examination, Tom Woo was asked if he did not, on the evening of the 29th of August, after he was arrested and lodged in the county jail, in a conversation with Deputy Sheriff Crayton, no one else being present, state to Mr. Crayton that he (Tom Woo) went to the garage at about 15 minutes to 12 on that day and tried to get his car; that Mr. Martin was working on the car, and that he fixed it up so it would run, "and you left the garage at about 30 minutes past 12 o'clock, and got to the Jap camp at 1 o'clock? Did you make that statement?" To which question the defendant answered: "I could not remember; maybe

I did." Mr. King, the assistant district attorney, asked of the defendant the further question: "Do you remember, in the fore part of September, a few days after you were arrested, there at the county jail, of having a conversation with Mr. Scoggins, Mr. Crayton, and myself? * * * Do you remember having a conversation with those parties named and yourself?" To which he replied: "Yes, sir; I did." Mr. King then asked the further question: "I will ask you, in the fore part of September, where you were detained in the county jail, yourself, Mr. Scoggins, Mr. Stanton, and myself being present, on that occasion and that place, if in the conversation that occurred there, you didn't state that on the 29th day of August you left Colusa and went to the Jap camp, saw Fuyikawa, and had a talk with him with regard to cutting corn? That you went out in the corn field, and had a talk with him in regard to cutting corn at that time? Did you make that statement then and there, at that time?" To which he replied: "Maybe I did." He was then asked: "If you made that statement, was it true?" And he answered: "I could not say; maybe I did, and maybe I didn't. Of course I don't remember now." Again he was asked: "If you made that statement at that time and place, was that statement true or false?" To which he answered: "I could not say." After the defense rested, Sheriff Stanton and the deputy sheriff testified, over the objection of the appellants, that the statements embraced in the foundation testimony were made by Tom Woo. The point to the objection was that Tom Woo had not as a matter of fact denied on cross-examination that he made the statement; that there was in fact no material inconsistency between the statements sought to be proved and the testimony of the appellants at the trial.

Questions of similar import were put to Wong Gow on cross-examination, with substantially the same result; the witness answering four or five times, "I don't remember," and in one instance saying, "Maybe I did." This was supplemented by a statement: "I was in jail. I was all mixed up." Testimony tending to impeach Wong Gow was allowed over similar objections.

The testimony of the defendants as to their movements that afternoon was clearly contradictory of the extrajudicial statements imputed to them. The inquiry was therefore material, and since it is plain from the record that the statements were neither admitted nor denied, the prosecution was entitled to impeach the appellants. 7 Ency. of Evidence, 71.

[9] 3. Appellants complain that the use of the words "legal and competent," as they appear in the following sentence taken from instruction I, is objectionable:

> "And I will say to you that the evidence which has been received in this case is legal and competent, and if it is, in your mind, of such a character as to exclude every reasonable theory or hypothesis other than that of defendants' guilt beyond a reasonable doubt, then and in that event it should be given the same weight by you as would direct evidence of the fact alleged."

The position of appellants is thus stated:

> "Theoretically, of course, the statement might be defended; but when addressed to a jury of laymen it is trenching upon questions of fact. The mere admission of the testimony in evidence stamps it as competent and legal from a legal standpoint. Then why turn to the jury, and tell them that this flimsy unsubstantial thing called 'circumstantial evidence' as it appears in this case, was 'legal and competent'? To the ordinary jury this was tantamount to saying 'this evidence is sufficient' and you can't get away from it."

We do not think the words "legal and competent" in the sense in which they are employed are objectionable, and clearly they carry no intimation to the jury that the court deemed the evidence, because it was "legal and competent," sufficient to convict. The point to the instruction is that the evidence, circumstantial in its nature, being "legal and competent," that is to say, proper evidence for the jury to consider, if found by the jury to be sufficient "to exclude every reasonable theory or hypothesis other than that of the defendants' guilt beyond a reasonable doubt," it should be accepted and acted upon just as if it were direct evidence having the same probative effect.

[10] It is contended that instructions II, III, and IV are objectionable, in that "they read more like an exhortation, a plea excusing the evidence, and quite nearly beseeching a verdict against the defendants." This criticism is entirely without foundation. Instruction II, after stating that all the evidence was circumstantial, proceeds to explain why, because of the conditions under which crimes are sometimes committed, circumstantial evidence must be relied upon. In instruction III the court directs the jury to carefully examine the evidence, and determine what circumstances have been proved to their satisfaction beyond a reasonable doubt, and then to consider what conclusion as to the guilt or innocence of the defendants should be drawn therefrom, and if such conclusion point to guilt beyond a reasonable doubt they should so find, "notwithstanding the fact that you might be more fully satisfied if you had the testimony of eyewitnesses." The court further instructed the jury that in cases supported by circumstantial evidence, either in whole or in part, as in cases supported by direct testimony, the jury are required only to be satisfied as to guilt beyond a reasonable doubt. Instruction IV is of the same general tenor as the other in-

structions treating of circumstantial and direct evidence. We think none of them is open to the objections made by appellants.

The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; MELVIN, J.; WILBUR, J.; OLNEY, J.

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MacDERMOT et al. v. GRANT. (S. F. 8420.)

(Supreme Court of California. Oct. 3, 1919. Rehearing Denied Oct. 28, 1919.)

1. Dismissal and nonsuit 🔑7(1)—Motion to dismiss after signing of findings and judgment, but before filing, granted.

An attempted dismissal of the action by three of the plaintiffs, so far as they were concerned, after the findings and judgment had been signed, but before they had been filed, cannot be given effect under any of the provisions of Code Civ. Proc. §§ 581, 581a, 581b, authorizing dismissal.

2. Dismissal and nonsuit 🔑7(2)—On trial by court case submitted when taken under advisement.

A case is submitted after the court trying the case without a jury has taken it under advisement at the close of the evidence and argument.

3. Dismissal and nonsuit 🔑16—Consent to dismissal ineffective unless signed by attorney of assenting party.

The written consent to dismissal of the action by plaintiff, referred to in Code Civ. Proc. § 581, subd. 2, is wholly ineffective unless signed by the attorney of record of the consenting party.

4. Dismissal and nonsuit 🔑15—In discretion of trial court to order dismissal.

It is within the discretion of the trial court to order a dismissal in certain cases not expressly indicated in Code Civ. Proc. §§ 581, 581a, and 581b.

5. Dismissal and nonsuit 🔑15—Judgment for one plaintiff after motion by others for dismissal.

In an action on a note, the trial court did not abuse its discretion in giving judgment for the whole sum in favor of a plaintiff despite the attempted dismissal of the action by three plaintiffs, so far as they were concerned, after the findings and judgment had been signed, because the note had been satisfied as to their interests; no legal showing thereof being made.

6. Judgment 🔑18(1)—Duty of court on informal suggestion of partial satisfaction of note in suit.

On a purely informal suggestion of partial satisfaction of the note in suit, the trial court was not bound on its own motion to direct some sort of an accounting between a plaintiff and defendant as virtual assignee of the rights of other plaintiffs, and to enter judgment against defendant only for the amount due the particular plaintiff who had not been paid.

In Bank.

Appeal from Superior Court, City and County of San Francisco; C. N. Andrews, Judge.

Action by Louis M. MacDermot and others, substituted as parties plaintiff for Louis M. MacDermot and another, as administrator and administratrix of the estate of Flora B. MacDermot, deceased, against William Grant. From judgment for plaintiffs, defendant appeals. Affirmed.

Henry Ach and Henry E. Monroe, both of San Francisco, for appellant.

Goodfellow, Eells, Moore & Orrick, of San Francisco, and Schwartz & Powell and Ostrander, Clark & Carey, all of Oakland, for respondents.

LENNON, J. This is an appeal from a judgment for the plaintiffs following a trial without a jury in an action on a promissory note owned in common by the plaintiffs Louis MacDermot, Flora Proctor, Mary Crawford, and Alfred MacDermot. The three plaintiffs last named attempted to dismiss the action, so far as they were concerned, after the findings and judgment had been signed but before they had been filed. It is the contention of appellant that the court erred in entering judgment in favor of all of the plaintiffs. The judgment was affirmed by the First Division of the District Court of Appeal for the First Appellate District, Mr. Presiding Justice Waste writing the opinion. The affirmance was correct.

[1] The purported dismissal cannot be given effect under any of the provisions of the Code which expressly authorize a dismissal. Code Civ. Proc. §§ 581, 581a, and 581b. The circumstances here presented clearly exclude the application of any of the provisions of the Code sections in question other than those contained in subdivisions 1, 2, and 4 of section 581 of the Code of Civil Procedure.

[2] Subdivision 1 authorizes a dismissal by the plaintiff at any time before the trial. The purported dismissal filed herein was not filed before trial. It is true that in construing a similar section of the Practice Act an early decision defined "trial" as meaning the determination or finding in the case. Hancock Ditch Co. v. Bradford, 13 Cal. 637. It is evident, however, from the concluding portion of the opinion in that case that the court construed the words "before trial" as meaning "before submission," and this is the sense in which they have been construed in subsequent cases. Heinlin v. Castro, 22 Cal. 100, 102; Casey v. Jordan, 68 Cal. 246, 247, 9 Pac. 92, 305; Westbay v. Gray, 116 Cal. 660, 48 Pac. 800; Goldtree v. Spreckels, 135 Cal. 666, 67 Pac. 1091. A case is submitted after the court, trying the case without a

jury, has taken the case under advisement, at the close of the evidence and argument. Ætna, etc., Ins. Co. v. Hamilton County, 79 Fed. 575, 25 C. C. A. 94; Warner v. Warner, 83 Kan. 548, 112 Pac. 97; Lawyers', etc., Pub. Co. v. Gordon, 173 Mo. 139, 73 S. W. 155; St. Louis Board of Education v. U. S. Fidelity, etc., Co., 155 Mo. App. 109, 134 S. W. 18.

[3] Under the provisions of subdivision 2, an action may be dismissed by either party upon the written consent of the other. Conceding that an action may be thus dismissed at any time before judgment, the fact remains that in the case at bar no effective written consent on the part of appellant to the attempted dismissal by Flora Proctor, Mary Crawford, and Alfred MacDermot was ever filed. It is true that a stipulation was filed consenting to the dismissal and signed by appellant personally and that oral consent was given by appellant's attorney, who was not, however, his attorney of record. But it is well settled that the written consent referred to in the Code provision now under consideration is wholly ineffective unless it is signed by the attorney of record of the consenting party. Commissioners v. Younger, 29 Cal. 149, 87 Am. Dec. 164, quoted with approval in Boca, etc., Co. v. Superior Court, 150 Cal. 153, 156, 88 Pac. 718.

Subdivision 4 provides for dismissal by the court where the plaintiff abandons the case before final submission. It is unnecessary to discuss the object and scope of this provision, for the reason that the attempted abandonment of the case by the three above-named plaintiffs was, as already noted, made after the final submission of the case.

[4, 5] It is true that it is within the discretion of the trial court to order a dismissal in certain cases not expressly indicated in the Code. Romero v. Snyder, 167 Cal. 216, 138 Pac. 1002; Johnston v. Baker, 167 Cal. 260, 139 Pac. 86. Assuming, without undertaking to decide the point, that, had there been any showing in any proper legal manner, as, for example, by affidavit, that the note had been satisfied as to the interests of the three plaintiffs who sought to dismiss the action, the court might in its discretion have ordered a dismissal, nevertheless the fact remains that no such showing was made. Under these circumstances, it cannot be held that the court abused whatever discretion it may have had in the matter in giving judgment for the whole sum in favor of all of the plaintiffs.

[6] Appellant contends, however, that the attempted dismissal at least placed before the court "evidence" showing that the obligation of appellant had been altered subsequent to the submission of the case, and that it was therefore error for the court to enter judgment solely upon consideration of the evidence received at the trial. The case, however, was not opened to receive evidence at any time subsequent to its submission, and the judgment is not in any sense against the evidence. What appellant really means is, apparently, that, upon the purely informal suggestion of partial satisfaction, the court was bound on its own motion to direct some sort of an accounting between Louis MacDermot and appellant as a virtual assignee of the rights of the other plaintiffs and to enter judgment against appellant only for the amount due to Louis MacDermot. This it was clearly not the duty of the court to do.

Appellant may now make a motion for the entry of partial satisfaction of the judgment, making all of the plaintiffs in the original action parties to the proceeding in order that the fact of his release by the three plaintiffs who sought a dismissal may be determined and in order that the extent of the interest of Louis MacDermot in the note and judgment may be ascertained.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; MELVIN, J.; LAWLOR, J.

181 Cal. 306

CITY OF MADERA v. BLACK. (Sac. 2659.)

(Supreme Court of California. Oct. 1, 1919.)

1. APPEAL AND ERROR 🔑1082(2) — IRREGULARITY IN REMOVING CAUSE TO SUPERIOR COURT CANNOT BE FIRST RAISED ON FURTHER APPEAL.

Where the parties appear in the superior court and submit the case without objecting that the court is without jurisdiction because of the irregular manner in which it reached the court from the recorder's court, by appeal instead of certification under Code Civ. Proc. § 838, on appeal subsequently taken to it the Supreme Court will consider the objection of lack of jurisdiction to have been waived so far as possible, and will treat the case as if begun in the superior court, and the parties had appeared without process and submitted the cause on merits.

2. TAXATION 🔑1 — "TAX" INCLUDES EVERY CHARGE ON PERSON OR PROPERTY IMPOSED BY LAW.

A "tax," in the general sense, includes every charge upon persons and property imposed by or under the authority of the Legislature for public purposes.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Tax.]

3. TAXATION 🔑1—"IMPOST" DEFINED.

The word "impost," in its broader sense, means any tax or tribute imposed by authority, and applies as well to a tax on persons as a tax on property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Imposts.]

4. Courts 🔑125—Sewerage charge a tax, impost, and toll within jurisdiction of superior court.

Sewerage rate or charge levied by ordinance of the city of Madera for use of sewers *held* a tax, impost, or toll within Const. art. 6, § 5, providing the superior court shall have exclusive original jurisdiction of any case involving the legality of such a charge; a "toll" being a sum of money for the use of something, generally applied to the consideration which is paid for the use of a road, bridge, or the like of a public nature.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Toll.]

5. Courts 🔑487(8) — Recorder's court should certify action to recover sewer tax to superior court.

In an action by the city of Madera in the recorder's court to recover from a sewer user a charge, levied upon him by ordinance, constituting a tax, impost, and toll within Const. art. 6, § 5, providing the superior court shall have exclusive original jurisdiction of a case involving the legality of any such charge, it appearing from the answer that the legality of the charge was involved, the recorder should have certified the papers and transferred the cause to the superior court.

6. Courts 🔑190(½)—Superior court properly assumed jurisdiction of sewerage tax case on appeal from recorder's court.

Where the particular objection that the superior court had no original jurisdiction of the case appealed from the recorder's court was not made when the case reached the superior court, and the case was within its jurisdiction, the superior court properly took jurisdiction and proceeded to determine the case on its merits.

7. Municipal corporations 🔑58 — Language defining powers to be strictly construed.

Language purporting to define the powers of a municipal corporation is to be strictly construed, and any fair, reasonable doubt concerning the existence of a power is to be resolved by the courts against the corporation.

8. Municipal corporations 🔑712—City of sixth class without power to tax sewer users for extension of plant.

A city of the sixth class is without power to lay taxes or tolls on those who may use its sewerage system in order to obtain money to build sewers in other streets for the special benefit of other property owners.

9. Evidence 🔑83(2) — Presumptions that officers intend necessary consequences of official acts.

Persons, even when acting officially, are presumed to intend the necessary consequences of their acts, especially if such consequences are known to them beforehand, so that it must be presumed that the higher rates for use of sewers were imposed by city officials on property owners to accumulate a fund for the general benefit of the city, and thereby enable them to assess a lower rate of tax for general purposes.

10. Municipal corporations 🔑712 — Charge for use of sewer excessive.

Monthly charge of a dollar per dwelling house, with penalty of $10 for failure to pay a charge, imposed by a city of the sixth class for the use of its sewerage system by property owners, *held* excessive and unreasonable; it having been intended to result in accumulation of a fund for the general benefit of the city enabling it to fix a lower general tax rate.

In Bank.

Appeal from Superior Court, Madera County; J. J. Trabucco, Judge.

Action by the City of Madera against Alex Black. From judgment for plaintiff defendant appeals. Reversed.

J. J. Coghlan, of Madera, for appellant.

F. A. Fee, of Madera, for respondent.

SHAW, J. Madera is a city of the sixth class. In the year 1909 it acquired, and it has ever since maintained, a system of sewers extending through certain of its public streets. Its ordinances required that all dwelling houses situated on lots abutting on a sewered street should be connected with such sewer, and forbade the disposal of sewage in any other manner. The defendant then owned and ever since has owned and occupied a dwelling house on one of said streets, and in compliance with the ordinance he put in the sewer connections and has ever since used the sewer to carry the sewage from his house.

In February, 1914, the city duly adopted an ordinance imposing a "monthly sewage rate or charge for the use of and connection with the sewer;" the rate for each dwelling house occupied by a single family being $1 payable in advance on the first day of each month. On May 16, 1916, it duly adopted another ordinance, the same as the former one, except that it provided that the charge should be deemed a debt due to the city from the persons whose duty it was to pay the same, collectible in a civil action by the city, and that for a failure to pay the charge when due the additional sum of $10 should be added to the charge, as a penalty for the delinquency. The defendant failed to pay the charge for 13 months in succession, beginning June 1, 1915, and ending June 30, 1916.

This action was begun on June 26, 1916, in the recorder's court of Madera, to recover the sum of $13 for the sewer rates or charges due for said 13 months, and $10 for the penalty imposed by the last-mentioned ordinance for the delinquency for June, 1916. The complaint alleged the facts as above stated and set forth said ordinances in full. The defendant demurred to the complaint on the ground that the case involved the possession of real property and the legality of a tax, impost, assessment, toll, or municipal fine, and, consequently, that it fell within the exclusive jurisdiction of the superior court, and the recorder's court was without jurisdiction thereof, under the provisions of the Constitution. Const. art. 6, § 5.

The demurrer was overruled and the defendant filed an elaborate answer, duly verified in which he denied the validity of the said ordinances and of the rates or charges attempted to be imposed thereby, and alleged facts tending to show that the said rates or charges were not reasonable, but were extravagant and exorbitant and were imposed for the purpose of raising revenue to defray the general expenses of the city government. The case was tried and judgment was given for the defendant in the recorder's court. From that judgment the plaintiff appealed to the superior court, where the cause was tried again, resulting in a judgment for the plaintiff in the sum of $13. The defendant appeals from the latter judgment.

Both in the recorder's court and in the superior court the parties agreed upon the facts. In the superior court the agreed statement used in the recorder's court was accepted as true for the purposes of the trial in the superior court and by stipulation the case was submitted thereon, "saving and excepting to each party herein, respectively, all of his or its objections, exceptions and remedies as to questions of law." It does not appear anywhere in the record that in the superior court either party made the specific objection that the superior court was itself without jurisdiction because of the fact that the case had come to it for determination by the process of appeal, instead of by the process of certification by the recorder, as provided by section 838 of the Code of Civil Procedure in cases where it appears by the verified answer of the defendant that the determination of the action will necessarily involve the legality of a tax, impost, assessment, toll, or municipal fine, or the possession of real property. Upon filing the verified answer in the recorder's court, the defendant there demanded that the case be certified to the superior court as provided in that section, but the demand was refused.

[1] Where, in such a case, the parties appear in the superior court and there submit the case to its determination on the merits, without there making the objection that the superior court is without jurisdiction of the action, because of the aforesaid irregular manner in which it has reached that court, and an appeal is thereafter taken to this court from the judgment given in the superior court, this court will consider the particular objection above noted to have been waived, so far as it is possible for the parties to waive it, and will treat the case as if it had been originally commenced in the superior court and the parties had appeared without process and submitted the cause for decision on the merits. Santa Barbara v. Eldred, 95 Cal. 381, 30 Pac. 562; Hart v. Carnall, etc., Co., 103 Cal. 140, 37 Pac. 196; De Jarnatt v. Marquez, 132 Cal. 700, 64 Pac. 1090. The result in this case is that if we find that the action was of a character originally cognizable exclusively in the superior court, we will consider the appeal on the merits, as if it had been begun in that court; but if we find that it was an action of which the superior court had not original jurisdiction, and consequently one in which an appeal would not lie to the Supreme Court or to the District Court of Appeal, we will dismiss the appeal on the ground that we have no jurisdiction of such attempted appeal. The respondent moves to dismiss the appeal on that ground.

It follows that the first question for our consideration is the one of jurisdiction; that is to say, the question whether the recorder's court or the superior court is the court having original jurisdiction of the case. If we consider that the determination of the case did involve the legality of a tax, impost, assessment, toll, or municipal fine, or the possession of real property, we will not dismiss the appeal, but will inquire further whether or not the decision of the superior court was correct, and whether the tax, impost, assessment, toll, or municipal fine, as the case may be, is valid; if we conclude that such legality or possession was not involved, we must dismiss the appeal.

The findings in the superior court state other facts material to the argument of the respondent. In 1908 a private corporation, the Madera Sewerage Company, owned a system of sewers extending over a part of the public streets of the city. The city determined to acquire and construct a sewer system to be operated by the city itself. In pursuance of this plan it issued and sold city bonds amounting to $25,000. In 1909, with the proceeds thereof it purchased the sewer system of the Madera Sewerage Company for $18,000 and with the remainder constructed the required extensions. In November, 1909, it adopted an ordinance imposing monthly charges for the use of and connection with said sewers, upon all persons having property so connected, including the plaintiff as aforesaid; the charges being substantially the same as those fixed in the later ordinances above mentioned. Ever since 1909 it has collected the charges so imposed and placed the money in its treasury to the credit of the fund called the "Sewer Fund." The total amount so received from November, 1909, to July 20, 1916, was $40,734.92. Of this money $21,775 has been transferred to the general fund of the city and expended for general purposes; $8,910 has been transferred to a fund designated as the "Water Fund" and used for the purposes for which that fund was created; and $1,234.37 has been transferred to the "Sewer Bond Redemption and Interest Fund," in which is kept the money raised by general taxes levied as required by law to pay the interest and principal of the bonds aforesaid. The remainder, $8,615.55, has been expended in some manner not specified in the record. It may have been expended for expenses of operating and maintaining the sewer. It also appears that the receipts from sewer rates amounted to $7,253.90 for the year ending June 30, 1915, and to $7,277.85 for the year ending June 30, 1916.

[2-4] A "tax," in the general sense of the word, includes every charge upon persons or property, imposed by or under the authority of the Legislature, for public purposes. Perry v. Washburn, 20 Cal. 350; People v. McCreery, 34 Cal. 454. The word "impost," in its broader sense, means "any tax or tribute imposed by authority, and applies as well to a tax on persons as to a tax on merchandise." Smith v. Turner (Passenger Cases) 48 U. S. (7 How.) at page 407, 12 L. Ed. 702. A "toll" is a "sum of money for the use of something, generally applied to the consideration which is paid for the use of a road, bridge, or the like, of a public nature." Bouvier's Dictionary, tit. Toll. The money for which the plaintiff sued was a charge upon persons; it was imposed by the legislative authority of the city of Madera for public purposes, and under these definitions it was a tax; also, it was a tribute or contribution required by legislative authority and to be used for public purposes, and so comes within the definition of the word "impost." It may also be considered as a charge made for the use of the sewer constructed and acquired by the city. If so, it would come within the definition of a toll as fully as would the charge for the use of a public street or road. Such tolls are imposed by or under the sanction of public authority. In this case the charge was directly imposed by the ordinance, and, if it is a toll, it comes within the constitutional provision.

[5, 6] The general purpose of that provision obviously is to give to the sovereign power of the state, whether exercised generally or locally, the protection of having the legality of any exaction of money for public uses or needs cognizable in the first instance in the superior courts alone. In view of this purpose, it is apparent that the words used should be applied in their broadest sense with respect to moneys raised for public purposes or needs. The conclusion necessarily follows that the particular charge here involved comes within the constitutional provision and that any case in which the legality of such a charge is involved is within the exclusive original jurisdiction of the superior court. Upon the filing of the answer it fully appeared that the legality of the charge was involved in the action. The recorder should thereupon have certified the papers and transferred the cause to the superior court. As we have said, the particular objection that the superior court had no jurisdiction was not made when the case reached that court, and, as the case was within its original jurisdiction, the superior court properly took jurisdiction and proceeded to determine the case on its merits. The result is that the motion to dismiss the appeal to this court was not well taken and the same is hereby denied. We find it unnecessary, in this connection, to consider the meaning of the term "municipal fine" as used in the constitutional provision. We proceed to the question whether or not the charge was lawful and valid.

The respondent's main argument is that the charge is not made against property and is not a sum exacted as payment of a license fee for any privilege or right given to the occupants of houses along the sewer, but that it is an ordinary debt owed by the defendant to the plaintiff for services performed by plaintiff for the defendant in carrying away sewage from his premises. There can be no doubt that it is not a charge levied upon property as such. None of the successive ordinances imposing the charge purport to make the same a lien upon property of any description. The respondent cites In re Zhizhuzza, 147 Cal. 328, 81 Pac. 955, in which this court held that an ordinance of the city of Oakland providing that no one should collect garbage from the residents of the city except the city itself, and fixing a sum per month which the residents were required to pay for the services of the city in collecting such garbage, was a valid police regulation for the protection of the public health, which the city, under its charter and under section 11, art. 11, of the Constitution, had the power to make. The ordinance was attacked by the persons who had previously collected garbage from the residents under private contracts. The question whether the charges imposed were in the nature of taxes, imposts, or tolls was not presented or decided. We do not perceive that this case has any bearing upon the question here presented. It does not appear that the ordinance prohibited the residents from themselves carrying away the garbage from their respective residences. Their rights and views concerning the nature of the charge were not involved.

[7] If the argument of the respondent that it is a debt is tenable, it must be upon the theory that the city, in its proprietary capacity, is the owner of the sewer and that it was operating the same in that capacity. This

necessarily assumes that the city, by its organic law, was authorized to construct and operate sewers in its proprietary capacity for profit or otherwise, as a private person might do. It is the settled law of this state and the general rule everywhere that—

> "Language purporting to define the powers of a municipal corporation is to be strictly construed, and that any 'fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.'" 1 Dillon on Municipal Corporations, § 89.

It is declared "as a 'general and undisputed proposition of law,' * * * that 'a municipal corporation possesses and can exercise the following powers and no others: (1) Those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; and (3) those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable." Oro Electric Corp. v. Railroad Commission, 169 Cal. 477, 147 Pac. 122. The court in that case cited Von Schmidt v. Widber, 105 Cal. 151, 38 Pac. 682, and Hyatt v. Williams, 148 Cal. 585, 84 Pac. 41, both of which fully sustain the quotations above made. Similar expressions are found in San Christina, etc., Co. v. San Francisco, 167 Cal. 771, 141 Pac. 384, 52 L. R. A. (N. S.) 676, Connelly v. San Francisco, 164 Cal. 105, 127 Pac. 834, Redondo Beach v. Cate, 136 Cal. 146, 68 Pac. 586, and Low v. Marysville, 5 Cal. 214.

[8-10] Madera being a city of the sixth class, its powers are defined solely by our statutes. Among those powers we find none authorizing it to acquire, construct, or operate sewers in its proprietary capacity for the purpose of obtaining revenue or profit therefrom. It is given power "to construct, establish, and maintain drains and sewers." Deering's General Laws, p. 1122, § 862, subd. 5. It is also given the power to levy and collect street poll taxes. Id. subd. 7. But this is probably forbidden by section 12, art. 13, of the Constitution, as amended in 1914. It has power to impose dog taxes and ordinary property taxes assessed upon a valuation in the usual manner, and also to license for revenue and regulation of all kinds of business carried on in the city and fix and collect the rates of license tax thereon. Id. subds. 8, 9, 10. It has been held that the power to construct and maintain sewers is possessed by cities, although not expressly conferred by any charter or statute, "as incident to the general and express power to construct and maintain streets." Kramer v. Los Angeles, 147 Cal. 674, 82 Pac. 334; Harter v. Barkley, 158 Cal. 745, 112 Pac. 556. But it is obvious that the power to construct and maintain sewers does not include authority to raise revenue for general purposes by means of a toll or tax for the privilege or right to use the sewer for the purposes for which it was constructed. Such means of raising revenue is so unusual and extraordinary that it cannot be implied from the general grant of power to lay and maintain sewers. In Harter v. Barkley, supra, the court decided that the power to lay and maintain sewers included authority, as incidental thereto, to impose a charge for the privilege of connecting a house with the sewer. It may be that the power to maintain a sewer may carry by implication the additional power to levy a monthly charge to raise money for the repairs and upkeep of such sewer. But the rates here imposed upon the sewer users were obviously for purposes additional to that of paying the expenses of repairs and maintenance. The facts found by the court show this conclusively. Substantially, the same sewer rates have been collected by the city continuously ever since the year 1909. The sum of $40,734.92 has been raised in this manner. More than three-fourths of this sum has been transferred to other funds and used for purposes other than repairs to the sewers and expenses of their maintenance. More than half of it has been paid out for the general expenses of the city government. It is not even made expressly to appear that any of it has been devoted to sewer repairs or maintenance. If any was used for extensions to the sewer system, such use was unlawful, for it cannot be doubted that the city has no power to lay taxes or tolls on those who may use the sewer, in order to obtain money to build sewers in other streets for the special benefit of other persons. The payment of the principal and interest of the bonds issued as aforesaid is to be paid out of money raised by a general tax upon property, as provided in the act authorizing their issuance. Stats. 1901, p. 27, § 7; Stats. 1907, p. 611, § 3. No money raised by sewer rates would be necessary to pay these bonds, or could lawfully be used in that manner. The city trustees must therefore be deemed to have known, long before the sewer rate ordinances of 1914 and 1916, respectively, were adopted, that the rates established were far in excess of the needs for repairs and maintenance. Persons, even when acting officially, are presumed to intend the necessary consequences of their acts, especially if such consequences are known to them beforehand. It must therefore be presumed that the high rates were imposed in order to bring about the known and inevitable result; that is, the accumulation of a fund for the general benefit of the city and thereby enable it to fix a lower rate of taxes for general purposes. That the courts may make such inquiry, see Dobbins v. Los Angeles, 195 U. S. 239, 25 Sup. Ct. 18, 49 L. Ed. 169. This would be an unjust discrimination and an unfair burden upon those who used the sewer, and it is clearly beyond any power possessed by the city. It follows that the charges were excessive and unreasonable. They were imposed upon the persons concerned without their consent, and payment was practically compelled by means of penal ordinances authorizing the city officials to remove the sewer connection from any house if the rates were not paid therefor, declaring such house a nuisance and forbidding any person thereafter to occupy the same. A court cannot apportion the charge or ascertain and allow such portion as it might find reasonable, assuming, but not deciding, that the city, under its organic law, is authorized to impose regular charges for such repairs and maintenance. The entire charge must therefore be declared invalid. The judgment of the court below cannot be sustained.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; LENNON, J; WILBUR, J.; MELVIN, J.; OLNEY, J.; LAWLOR, J.

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42 Cal. App. 766

FIDELITY & CASUALTY CO. OF NEW YORK v. LLEWELLYN IRON WORKS. (Civ. 2925.)

(District Court of Appeal, Second District, Division 2, California. Aug. 19, 1919. Rehearing Denied by Supreme Court Oct. 16, 1919.)

1. Appeal and error 🔑1002—Verdict on conflicting evidence not disturbed.

A verdict on conflicting evidence cannot be disturbed by the appellate court.

2. Master and servant 🔑243(2)—Agreement as to method of work not known to employé not binding on him.

An agreement as to the manner of doing work by an employer is not binding upon the employé unless the existence of such agreement is brought home to him.

3. Negligence 🔑136(27) — Contributory negligence jury question.

Where a general contractor's employé, standing on the outer end of a plank which he had placed across the elevator shaft, was killed by a fall when the employés of defendant, the contractor installing elevators in the building, moved an elevator so that the ascending counter weight struck the underside of the plank, the question of contributory negligence in being on the plank was for the jury.

4. Negligence 🔑33(2)—Workmen on building under construction not trespassers in elevator shaft.

A general contractor's employé, who places a plank across an elevator shaft for the purpose of doing work necessary for completion of the building, is not a trespasser in the shaft or a mere licensee to whom a contractor installing elevators owes no duty except that of not wantonly injuring him.

5. Master and servant 🔑226(1)—Servant does not assume risk of injury from employer's negligence.

An employé voluntarily putting himself in a place of danger does not thereby necessarily assume the risk of injury from the want of care of his employer.

6. Negligence 🔑65—Assumption of risk by employé of general contractor.

Where a general contractor's employé in doing his work placed a plank across an elevator shaft, he did not assume the risk of injury by the movement of an elevator operated by the employés of defendant, the contractor installing elevators, who did so without investigating his presence on the plank and without warning, although they knew other men were working in the shaft.

7. Master and servant 🔑347—Workmen's Compensation Act is valid.

The Workmen's Compensation and Safety Act *held* constitutional.

8. Constitutional law 🔑245, 301—Workmen's Compensation Act not violative of Fourteenth Amendment of United States Constitution.

The Workmen's Compensation and Safety Act is not open to attack as violating the specific injunctions of Const. U. S. Amend. 14.

9. Statutes 🔑114(2)—Title of Workmen's Compensation Act includes provisions as to subrogation of employer.

That portion of the title of the Workmen's Compensation and Safety Act which reads "providing the means and methods of enforcing such liability" includes those provisions in the act subrogating the employer or insurance carrier to the employé's right of action for injuries caused by the negligence of another, and the subrogation provisions are not open to attack on the ground that they were not included in the title.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by the Fidelity & Casualty Company of New York against the Llewellyn Iron Works. From judgment for plaintiff, defendant appeals. Affirmed.

Bowen & Bailie, Jones & Weller, and J. Crider, Jr., all of Los Angeles, for appellant.

R. P. Jennings, J. E. Shelton, and Parker & Collier, all of Los Angeles, for respondent.

THOMAS, J. This is an action brought to recover damages for the death of one James F. Goldsmith by the alleged negligence of defendant. The case was tried by the court and a jury, who brought in a verdict against the defendant for the sum of $10,000. The appeal is from the judgment so entered.

The facts, so far as material for our present purpose, are as follows: On July 24, 1914, James F. Goldsmith, the deceased, a painter, was accidentally killed by falling from a plank on which he was working, outside a window on the seventh floor of the Broadway Department Store building, in the city of Los Angeles, then under construction by Mr. Arthur Letts, as owner. Mr. C. B. Weaver was the general contractor in charge of the work, including the painting, and as such was the employer of said Goldsmith. The defendant had a contract for the installation of the elevators in the building, and was engaged in such work at the time of the accident. The elevator hatchways with which this case is concerned were five in number, located along the southerly wall of the building. These hatchways were all within one inclosure, formed by the wall of the building with a window opposite each hatchway on each floor, on the back, and a glassed-in framework on the front, with sliding doors. The glass was in process of installation at the time of the accident. In order to perform any work on the south wall of the building it was necessary for the workmen to reach this wall. This they did by erecting a staging within and extending across the hatchways. Up this wall in each hatchway is a pair of upright guiderails, between which are suspended heavy counterweights, which slide up or down contrary to the action of the elevator cage. One crew of men after another had so erected their staging and performed their work. Among these various workmen were plasterers, who plastered the walls of the shaft; carpenters, who put in the window casings; sheet metal men, who put in the metal window sills; glass workers, who put the glass in the front work; painters, who painted the window frames; and window painters, who stained the window sashes, each of whom, including Goldsmith, was engaged in doing a necessary and essential part of the building. Working simultaneously with these various crews were employés of defendant, engaged in the construction and installation of the elevators. At the time of the accident the only elevator which had been installed by defendant was elevator No. 5, the same being on the extreme right hand of a person looking into the hatchways from the floor space. Prior to the day of the accident, this elevator had been operated and used by defendant's employés for testing the same and for carrying up and down laborers and supplies in connection with defendant's work on this and the other four hatchways, and had been run, on the day of the accident, some four or five hours prior thereto. On the second day after being so employed by said Weaver, deceased went to the seventh story of said building, placed one end of a plank on a sawhorse on the floor space opposite hatchway No. 5, the plank extending over the hatchway between the two upright guiderails already referred to, through the open lower sash of the window on the wall side of the hatchway, and resting on the lower sill of said sash, so that about two feet of the plank projected out of the window and over the alley, seven stories below. On this board, and that particular portion thereof so extending over the alley, as aforesaid, the deceased stood and proceeded to paint. While so employed, and without any previous warning, said elevator descended, and at the same time the said counterweights ascended, striking the plank from the underside, causing deceased to fall therefrom to the alley below, resulting in his death.

The deceased left a widow and a minor child, who made claim for compensation for his death under the Workmen's Compensation Act (St. 1917, p. 831) of this state, against Arthur Letts and C. B. Weaver, as his employers, and against the Fidelity & Casualty Company of New York, plaintiff herein, their insurer. The Industrial Accident Commission, accordingly, on March 26, 1915, awarded compensation, and the said Fidelity & Casualty Company of New York, pursuant to the terms of its policy, assumed liability for the entire award, making the payments thereunder. Thereafter, joining Letts and Weaver as plaintiffs, this action was brought by the Fidelity & Casualty Company of New York for general damages, as hereinbefore set forth.

There was a demurrer to the complaint, which was overruled. In its answer defendant denied negligence, alleged one recovery—the award as made by the Industrial Accident Commission—precluding any other; that deceased was a trespasser, and, at most, a mere licensee; charged contributory negligence; and further alleged that the accident was caused by the negligence of the deceased. On the trial, Letts and Weaver were dismissed as plaintiffs. There was a motion for nonsuit, which was denied. There was a motion for a new trial, which was never passed upon by the trial judge, and hence, under section 660 of the Code of Civil Procedure, is deemed denied. The appeal here is from the judgment so entered.

Appellant urges as a basis for a reversal of the judgment: (1) Excessive damages given under the influence of passion or prejudice; (2) insufficiency of the evidence to justify the verdict; (3) that the verdict is against law; and (4) errors of law occurring at the trial. It also specifies 138 assignments of error.

Referring to the point made as to excessive damages given under the influence of passion or prejudice, suffice it to say that no evidence upon which such statement is based has been called to our attention, and we have failed to find anything in the record from which such an inference could be drawn, or that would justify such a conclusion.

[1] The trial court, after instructing the jury that contributory negligence, if found, would bar recovery, gave certain instructions designated as "P," "Q," and "R." Appellant contends that the verdict of the jury was in "complete disregard of the foregoing instructions, and against the law declared thereby," and urges that "these instructions in effect required a verdict for defendant." Appellant insists, with commendable vigor, that—

> "An examination of the evidence will show that every fact on which these instructions were predicated was shown without conflict, and if so a finding of contributory negligence and a consequent verdict for defendant were inevitable."

There is no doubt but that the instructions referred to were proper, were the facts as shown by the evidence in this case such as contended for by appellant; but, after an examination thereof, we are unable to agree with its statement of such facts. Beyond the pale of successful contradiction, we think, the record shows a very decided conflict on every fact upon which the said instructions were predicated. Upon these conditions there was no disregard by the jury of the court's instructions. There was evidence upon which the said instructions were predicated, and which, if believed by the jury, would have sustained a verdict for defendant; but, the jury having settled that conflict in favor of the plaintiff, this court cannot now disturb the judgment based thereon. Under these circumstances, it is obvious that discussion of the question as to whether instructions given by the court, right or wrong, became the law of the case, is unnecessary.

[2, 3] The next point urged by appellant is that of contributory negligence on the part of deceased. We are not able to agree with it in that contention. For instance, defendant contends that, even if its employés had seen the said plank, they would have no intimation that they might injure any one by moving the car. But we are compelled to conclude that the very fact of the known presence of the plank across the shaft was notice to defendant for further investigation of that fact, and such an investigation would have disclosed the presence of deceased on the outer end thereof, as before stated. It is also contended by defendant that there was an agreement between the employers that workmen should not use the shaft without notifying the foreman of defendant. But assuming such to have been the case, notice of that arrangement must be shown to have been given to deceased. There is not one word of evidence that this was done. The rule is, as we understand it, that an agreement as to the manner of doing work by an employer is not binding upon the employé unless the existence of such is brought home to him. Alabama Midland R. Co. v. McDonald, 112 Ala. 216, 20 South. 472; Brown v. Louisville, etc., R. Co., 111 Ala. 275, 19 South. 1001; Atchison, T. & S. F. Ry. Co., v. Plunkett, 25 Kan. 188. We are not informed of the existence of any rule of law which made it necessary for decedent to anticipate and guard against negligent acts of defendant. Morgan v. Robinson Co., 157 Cal. 348, 107 Pac. 695, and cases there cited; Herold v. Mathews, 179 Pac. 414. Although by looking up the shaft and seeing the plank, defendant's employés could not see the man, still, in contemplation of law, the man being where he was, was within the shaft, and, as already seen, care and further investigation would have disclosed his position at the place stated. At any rate, we are satisfied that the question as to whether or not deceased was guilty of contributory negligence in being on the outer end of the plank, and as to whether or not his being there was such as to endanger his safety, was one for the jury. McKune v. Santa Clara, etc., Co., 110 Cal. 480, 42 Pac. 980; Seller v. Market Street Ry. Co., 139 Cal. 268, 72 Pac. 1006; Herbert v. S. P. Co., 121 Cal. 227, 53 Pac. 651; Fox v. Oakland, etc., Ry. Co., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216; Loftus v. P. E. Ry. Co., 166 Cal. 464, 137 Pac. 34.

[4] Appellant's next contention is that decedent was not its employé, but was the employé of an independent contractor, and that, being such, he was a trespasser in the shaft at the time of the accident, or at the most a mere licensee, to whom defendant owed no duty, except that of not wantonly injuring him. Confronted with the record before us, we think this contention without merit. When we take into consideration the fact that in the construction of a modern business block—and the Broadway Department Store building of Los Angeles is such a block—there are required, including many others, such artisans as plasterers, carpenters, glass men, sheet metal men, and interior finish men, all of whom, according to the evidence here, had necessary work to do on the south wall of this building, and were under contract to do such work, we are at a loss to understand by what line of reasoning a conclusion can be arrived at that the employés of defendant (also just as essential in their part of the construction of such a block) were doing a more necessary work, and a work of such importance that the other contractors and their employés could be treated as trespassers. How any one reading this record, not to say anything of those who saw the witnesses and heard their testimony, would arrive at any other conclusion than that both before and after the time of the ill-fated accident, several workmen were continually engaged in work in the elevator shaft or hatchways, including the one—No.

5—in which was the elevator that caused the accident, that no less than seven men were working in this very hatchway on the day of the accident, and further that this fact was known to defendant during all of said time, we are unable to understand.

[5, 6] Defendant asks what more it could have done than it did for Goldsmith's protection. From the record before us we are justified, we believe, in suggesting that the answer to that inquiry is that it does not appear that anything was done, or any precaution taken by defendant, for the safety of deceased. Indeed, it appears that the things which ordinary prudence would have suggested were omitted. Not even was the presence of the board in the hatchway investigated, nor was the board removed. Notwithstanding the fact that other men than deceased were actually working in this very hatchway at the time, to defendant's knowledge, no warning was given. This in itself constituted negligence which deceased could not anticipate, and which, under the law and the evidence as disclosed here, he did not assume. "The authorities seem clear * * * that an employé voluntarily putting himself in a place of danger does not thereby necessarily assume the risk of injury from the want of care of his employer." Morgan v. Robinson Co., supra.

[7-9] Appellant next urges, throughout some 37 pages of its opening brief, the point that the plaintiff corporation has no legal capacity to sue in this case. It is also urged, among other things, that there is no proof that a lawful claim was made "in conformity with law"; that in the proceedings had before the industrial accident commission under the Workmen's Compensation and Safety Act defendant was not called upon to contest the question as to whether or not the claim was a lawful one, and whether or not a legal liability existed on the employer's part; that, if the award of the commission is made binding and conclusive by the terms of the act, then the provisions are unconstitutional, and, conversely, if the award is not binding, then no foundation was laid for plaintiff's right to sue, because there was no other evidence offered; that the provisions of said act in question violate specific injunctions of the Constitution of this state, and infringe also specific provisions of the Fourteenth Amendment to the Constitution of the United States; that the provisions of said act authorize a double satisfaction for the same tort; that the act contains more than one subject; and that the right of subrogation is not expressed in its title. We think, however, that the mere mention of these contentions will serve to make obvious their lack of merit. The constitutionality of the Workmen's Compensation and Safety Act has been upheld by the Supreme Court of this state in the case of Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 398, and practically all of the foregoing objections decided contrary to the contention of appellant here. The fact that the act does not specifically mention the matter of the subrogation of the employer, or his insurance carrier, to the rights of the injured employé, or, in the case of death, to the rights of the heirs or personal representatives, we think is immaterial. All that the act itself does is to provide that the payment of compensation shall be contingent upon the subrogation of the employer, or his insurance carrier, to the rights of the injured employé. This is a mere incident to the liability, or to the payment of compensation, and is included in the general language of the title of the act, and especially of that portion of the title providing for the creation of a liability. "The right to subrogation" is, we think, included within that portion of the title of the act which reads: "* * * Providing the means and methods of enforcing such liability." "Subrogation," under these conditions, is one of the essential steps necessary to the enforcement of such liability, and embraced within the title of the act. Does not this question of subrogation come within the purview of legitimate inquiry made by any person of ordinary intelligence? Would not such a person naturally be led to ask such questions as the following: What employers are compensated? Under what circumstances? Upon what conditions? What rights, if any, do the employers surrender or acquire by reason of their having to compensate their employés? What are the methods by which the compensation is made to inure to the benefit of the employé? We think the answer to our own query must be in the affirmative; for, certainly all of the foregoing hypothetical questions are, undoubtedly, germane to the purpose expressed in the title. Citations might be multiplied, but the following will, in our opinion, serve to support our present conclusions: In re Schuler, 167 Cal. 282, 139 Pac. 685, Ann. Cas. 1915C, 706; In re Maginnis, 162 Cal. 200, 121 Pac. 723; Matter of Yun Quong, 159 Cal. 508, 114 Pac. 835, Ann. Cas. 1912C, 969; Anglo-Californian Bank v. Field, 146 Cal. 644, 80 Pac. 1080; Gieske v. County of San Joaquin, 109 Cal. 489, 42 Pac. 446; Kings County v. Johnson, 104 Cal. 198, 37 Pac. 870; People v. Superior Court, 100 Cal. 105, 34 Pac. 492; San Francisco v. Kiernan, 98 Cal. 614, 33 Pac. 720; Ex parte Liddell, 93 Cal. 633, 29 Pac. 251; Francais v. Somps, 92 Cal. 503, 28 Pac. 592; Davies v. Los Angeles, 86 Cal. 37, 24 Pac. 771; Abeel v. Clark, 84 Cal. 226, 24 Pac. 383; Massachusetts, etc., Co. v. San Francisco, etc., Ry. Co., 178 Pac. 974; Stackpole v. Pacific Gas & Electric Co., 186 Pac. 354.

Appellant urges next that the court erred in giving certain instructions requested by plaintiffs, and in refusing to give certain other instructions requested by defendant. With this contention we are not able to agree. Having read every instruction given, as well as every requested instruction denied, we are of the opinion: (1) That the instructions given, objection to which is urged by appellant here, were ample, and as favorable to defendant—as disclosed by the record—as they properly could be on the questions presented. This is especially and obviously so, we think, when the instructions objected to are considered with, and in the light of, the other instructions given. (2) As to those denied, some were based upon a view of the case absolutely unsupported by the evidence, and therefore erroneous as a matter of law, while others had already been covered by instructions given at defendant's request, and also by the general instructions given by the court.

The remaining points urged, we think, need not be considered.

In our opinion the evidence is sufficient to support the verdict, and the verdict and judgment based thereon are, and each is, according to law.

Judgment affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

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42 Cal. App. 758

SWALL et al. v. LOS ANGELES COUNTY et al. (Civ. 2932.)

(District Court of Appeal, Second District, Division 2, California. Aug. 19, 1919.)

1. Highways 🔑90—Constitutionality of road district improvement act.

The road district improvement act of 1907 *held* not unconstitutional as not providing an opportunity for a property owner within a district to raise objection concerning the size of the assessment district or the inclusion of his property therein, in view of section 5.

2. Highways 🔑90—Road district act not unconstitutional in not requiring determination of benefits.

The road district improvement act of 1907 *held* not unconstitutional as failing to make express provision for determining benefits as a condition for including territory within the district.

3. Highways 🔑90—Road district act not unconstitutional in assessing property according to value.

The road district improvement act of 1907 *held* not unconstitutional in permitting the assessment of property within a district formed under it according to its value, rather than according to benefits conferred.

4. Evidence 🔑83(4)—Presumption of determination of benefits from inclusion of lands in road district.

It will be presumed from the action of a board of county supervisors in including lands in a road improvement district, formed under the road district improvement act of 1907, that the board determined that all the lands included would be benefited.

5. Highways 🔑90—Finding of benefits to land included in road district not reviewed.

When jurisdiction is given to a board to pass on the question of benefits to land from its inclusion in a road improvement district, the courts will not disturb their finding unless there appears a clear abuse of discretion.

6. Highways 🔑90 — Discretion of board as to inclusion of land in improvement district.

The only limitation on the power of a board of supervisors as to the inclusion of land within a road improvement district is that its exercise of discretion must not be arbitrary, and, if the conditions are so unreasonable as to outrage a common sense of fairness, the courts may interfere.

7. Highways 🔑90—Inclusion of land in improvement district not obvious abuse of discretion.

The inclusion of farm lands within a road improvement district, formed under the road district improvement act of 1907, as lands to be benefited by the proposed improvement, *held* not an obvious abuse of discretion by the board of supervisors of the county.

8. Highways 🔑90—Submission to jurisdiction of board to determine necessity for improvements.

Where owners of farm lands filed no written protest to organization of a road improvement district under road district improvement act of 1907, and made no objection to inclusion of their lands, they must be deemed to have submitted to jurisdiction of supervisors of county in determining necessity for improvements.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by William Swall and another against the County of Los Angeles and others. From judgment of dismissal, plaintiffs appeal. Affirmed.

Milton K. Young, of Los Angeles, and W. W. Middlecoff, of Visalia, for appellants.

A. J. Hill, County Counsel, Edward T. Bishop, Deputy County Counsel, and F. C. Austin, all of Los Angeles, for respondents.

SLOANE, J. The plaintiffs brought this action in the superior court of the county of Los Angeles for the purpose of avoiding a special assessment against their land for the construction of cement curbs and sidewalks under the "Road District Improvement Act of 1907" (St. 1907, p. 806). The defendants demurred to the complaint on the ground of its insufficiency to state a cause of action. The demurrer was sustained, and, plaintiffs declining to amend, judgment of dismissal was rendered. Plaintiffs have appealed on the judgment roll.

The grounds of attack upon the assessment, on which the sufficiency of the complaint depends, are the allegations: (1) That the lands of plaintiffs derive no benefit whatever from the curbs and sidewalks, but that, on the contrary, the lands, being farming lands, are injured by the curbs and sidewalks; (2) that no allowance was made for the difference in benefits which would accrue to the several parcels of land in the district, and that the supervisors particularly disregarded the question of benefits with reference to the properties of the plaintiffs; (3) that the estimated burden of the tax levied and to be levied under the assessments closely approximates the present assessed value of the land, and amounts to confiscation; and (4) that the road district improvement act of 1907 is unconstitutional.

[1-3] Taking up first the question of the constitutionality of the act: Appellant does not very clearly indicate in what respect the provisions of the road district improvement act in question are violative of any constitutional right. He objects that the act nowhere provides an opportunity for an owner of property within a district to raise an objection concerning the size of the assessment district or the inclusion of his property therein. This objection seems to be sufficiently met by section 5 of the act, which provides for a hearing of objections of landowners, and, specifically, that—

> "In the order of the hearing shall be heard such objections as shall be made to the boundaries of the district as set forth in the resolution of intention. Objections to the grades or to the boundaries of the district may be made by an owner of land lying within the district upon the hearing without any written statement of the same."

We do not understand the permission granted by this section to landowners to file written objection to ordering of the work as an entirety, to be a limitation upon filing other objections, but to provide a means by which a majority of the landowners may entirely block further proceedings. Thomas v. Pridham, 171 Cal. 98, 153 Pac. 933. Just what may be included in the objections to the boundaries of the district under section 5 is not indicated, but it might reasonably embrace an objection to the inclusion of specific land on the ground that it was not benefited by the proposed improvement. In denying a rehearing in Thomas v. Pridham, supra, the court says:

> "While the right of protest in writing is limited to owners of record as defined in the section, this limitation does not prevent all interested persons (including those not owners of record) from appearing before the board of supervisors and voicing their objections."

As to the violation of any constitutional right in failing to make express provision for determining benefits as a condition of including territory within the district, the District Court of Appeal, in the case of Hunt v. Manning, 24 Cal. App. 44, 140 Pac. 39, in passing on this precise point, says:

> "The act, it is true, does not provide that in determining the boundaries of the assessment district the board of supervisors shall include only property which it is considered will be benefited by the public work, but attention is called to no authority holding that such a provision is essential to the validity of such a statute. As the power to specially tax in the manner proposed by this act can only be exercised upon the theory that benefits will accrue to the property affected thereby, the presumption of good faith and fair action that accompanies the acts of public officers is entitled to be indulged, and it then must be assumed that the board of supervisors properly considered and determined that all of the property included within the established district would receive benefits from the doing of the work."

Furthermore, it is held in Thomas v. Pridham, supra, that this road district improvement act is not unconstitutional in permitting the assessment of property within the district formed under it according to its value, rather than in accordance with the benefits conferred. This covers all the points raised by appellants on the constitutionality of the act.

[4, 5] The allegation that the property was not benefited by the improvement does not aid the complaint. For the reasons heretofore stated, under the rule laid down in Hunt v. Manning, supra, it will be presumed from the action of the board in including these lands in the district that they determined that all the lands so included would be benefited. And it is well settled that when jurisdiction is given to a board to pass upon the question of benefits, the courts will not disturb their finding, unless there appears a clear and palpable abuse of such discretion. Quoting from Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661, we find this expression of the rule:

> "It is true that local assessments are said to be imposed on the theory that the property adjacent to the improvements receives special benefit therefrom. But this is a matter which is for the determination of the legislative authority of the state, acting through its established agencies for the government of political subdivisions, or directly by the Legislature of the state, as that body may see fit. It is enough for the local property owner that he has a right to be heard before the city council upon the question, by filing a petition of remonstrance, in the proceeding prescribed by law, setting forth his reasons why the improvement should not be made. * * * Stats. 1891, 196; French v. Barber Asphalt

Pav. Co., 181 U. S. 324 [21 Sup. Ct. 625, 45 L. Ed. 879]; Spencer v. Merchant, 125 U. S. 345 [8 Sup. Ct. 921, 31 L. Ed. 763]; Brown v. Drain, 187 U. S. 635 [23 Sup. Ct. 842, 47 L. Ed. 343]. * * * In Brown v. Drain [C. C.] 112 Fed. 582, the plaintiff sued the street superintendent and city treasurer of Los Angeles to obtain a decree declaring invalid the local assessment for a street improvement and to quiet his title to the land assessed. The Circuit Court of the United States in that case held that the offer of the plaintiff to allege and prove that the benefits accruing to his property from the improvements did not exceed $2,000, whereas the assessment was over $5,000, was wholly immaterial, and that these facts would not, if alleged and proven, affect the validity of the proceedings; the position of the court being that the determination of the city council on that subject, under the street work Act, was exclusive. This case was appealed to the Supreme Court of the United States, and the decision was affirmed by that court on the authority of French v. Barber Asphalt Pav. Co., 181 U. S. 324 [21 Sup. Ct. 625, 45 L. Ed. 879], and the other like cases above cited. * * * The question may therefore be considered as absolutely settled, and the decision in the Norwood Case [172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443], as thoroughly discredited, although not expressly overruled."

The further allegation of the complaint, that the assessment was levied upon the lands of appellants without reference to any ascertainment of the benefits to be derived by such lands from the improvements, does not entitle them to relief, for the reason that the assessment is authorized under the act in question according to the value of the property, rather than in accordance with the benefits conferred. As already pointed out, the validity of the ad valorem assessment under this road district improvement act is upheld in Thomas v. Pridham, supra. In Emery v. San Francisco Gas Co., 28 Cal. 346, the court, speaking through Mr. Justice Sawyer, says:

> "The result of our investigation is that there is no restriction in our Constitution upon the power of the Legislature to impose assessments to defray the expenses of public improvement in the nature of grading and planking streets, upon the property supposed to be benefited thereby in any district designated by the Legislature, or the proper officers of municipal governments acting under the authority of law, and that it is authorized to apportion the amount to be raised according to value, according to the benefits received, in proportion to frontage or the superficial contents, or to adopt any principle of apportionment that can be referred to the general sovereign right of taxation."

Under the act in question here the ad valorem assessment was provided for.

[6-8] There is one limitation on the power of the supervisors, or whatever board is intrusted with the discretion to form an improvement district and determine the lands to be included therein. The discretion granted is not arbitrary. If the conditions shown by the record, or coming within the judicial knowledge of the court, are so unreasonable as to outrage the common sense of fairness and justice, the courts may interfere. Spring Street Co. v. City of Los Angeles, 170 Cal. 24, 148 Pac. 217, L. R. A. 1918E, 197; Lent v. Tillson, 72 Cal. 404, 429, 14 Pac. 71; Iowa Pipe & Tile Co. v. Callanan, 125 Iowa, 358, 101 N. W. 141, 67 L. R. A. 408, 106 Am. St. Rep. 311, 3 Ann. Cas. 7. An attempt against the will of the owners to curb and sidewalk a remote and unoccupied quarter section of land in the sagebrush, and levy assessments therefor in excess of the value of the property, would be open to attack, irrespective of the closest adherence to the forms of law providing for such "improvement," unless the owners had slept upon their rights and were estopped thereby. Appellants here rely upon some such condition, in alleging in their complaint that their lands are farming lands, used and acquired solely for farming purposes; that only four families are residing thereon; that the construction of the improvements are of no benefit, but a detriment to their property, by reason of impeding ingress and egress to and from the same; and that the aggregate of the assessments will amount to $5,842.70 upon lands, the assessed value of which only amounts to $6,390. It does not, however, appear from the facts pleaded, nor from the record presented, that the surroundings and conditions of these and other lands of the road improvement district in question are such as to show the action of the supervisors an obvious abuse of discretion, in including them in the district as lands to be benefited by the proposed improvement. And, moreover, it does not appear that appellants filed any written protest to the organization of the district, or made any objection to the inclusion of their lands therein. They must be deemed to have submitted themselves to the jurisdiction of the board of supervisors in the determination of the necessity for the improvements for which the district was organized. Duncan v. Ramish, supra; United Real Estate, etc., Co. v. Barnes, 159 Cal. 242, 113 Pac. 167; Dillingham v. Welch (Sup.) 178 Pac. 512.

We find nothing in the authorities cited by appellant, in so far as they apply at all to the conditions presented on this appeal, inconsistent with the conclusions indicated in this opinion. The citations to United States Supreme Court decisions, referred to us by appellant in lieu of a closing brief, not previously cited—Myles Salt Co. v. Commissioners, 239 U. S. 478, 36 Sup. Ct. 204, 60 L. Ed. 392, L. R. A. 1918E, 190; Houck v. Little River Drainage District, 239 U. S. 254, 36 Sup. Ct. 58, 60 L. Ed. 266; and Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369—go no further than to hold that the courts will review the discretion of the local board to whom authority to act in the premises has been delegated only in the event of palpably arbitrary and plain abuse; as, for example, the inclusion of lands in a drainage or irrigation district which, from their topographical situation, could not be drained or irrigated by the proposed system.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

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42 Cal. App. 725

BARR v. BRANSTETTER et al. (Civ. 2003.)

(District Court of Appeal, Third District, California. Aug. 16, 1919.)

1. APPEAL AND ERROR 🔑219(2)—FINDINGS NOT OPEN TO ATTACK FOR FIRST TIME ON APPEAL.

In an action involving disputed water rights, where plaintiff, in referring to defendants' ditch, stated that they cleaned it out or repaired it, and that they turned in water, etc., a finding that defendants turned into the ditch more than a certain amount of water and thereby caused the lands of plaintiff to be overflowed, etc., is not open to attack for the first time in the appellate court on ground that plaintiff's testimony that "they" did certain acts did not refer to defendants.

2. WATERS AND WATER COURSES 🔑152(8)—FINDING AS TO AMOUNT OF WATER USED IN IRRIGATION WARRANTED.

Evidence *held* to warrant a finding that 121.3 inches of water was all that had been used by defendants in the irrigation of their lands.

3. APPEAL AND ERROR 🔑1011(1)—FINDINGS OF JUDGE ON CONFLICTING EVIDENCE CONTROLLING.

In an action tried to the court, findings on conflicting evidence are controlling on appeal.

4. WATERS AND WATER COURSES 🔑152(8) — EVIDENCE SUSTAINING ALLOWANCE OF WATER FOR IRRIGATION.

In an action involving disputes as to water rights and to enjoin defendants from turning into their ditch over plaintiff's lands more than a certain amount of water, findings that the amount allowed defendants was sufficient for the irrigation of their premises, etc., and that they had enlarged the ditch over plaintiff's lands, *held* warranted.

5. APPEAL AND ERROR 🔑1071(1)—ALLOWANCE OF WATER SUBJECT TO DEFENDANT'S RIGHTS HARMLESS AS TO HIM.

In an action involving disputed water rights, where defendants were given prior right to a specified amount of water, a finding that plaintiff was entitled to a specified amount of water is not prejudicial to defendants, for plaintiff's rights were made subject to those of defendants.

6. WATERS AND WATER COURSES 🔑143—DEFENDANT CONFINED TO WATER ALLOWANCE REGARDLESS OF SIZE OF DITCH.

Where defendants were entitled to only 121.3 inches of water for irrigation purposes, they were confined to that amount, regardless of the size of their ditch.

7. WATERS AND WATER COURSES 🔑152(7) — EVIDENCE ADMISSIBLE ON QUESTION OF FLOODING PLAINTIFF'S LAND.

In an action involving disputed water rights and to enjoin defendants from diverting into their ditch over plaintiff's lands more than a certain amount of water, evidence that on diversion of a greater amount lands lying lower than those of plaintiff were overflowed, whereupon defendants widened their ditch, *held* admissible.

8. EVIDENCE 🔑215(1), 272—OF WIDENING OF DITCH TO ACCOMMODATE EXCESSIVE FLOW OF WATER ADMISSIBLE.

In an action involving disputed water rights, a certified copy of an application filed by plaintiff with the state water commission for an increased appropriation of water is not admissible as a declaration by plaintiff against interest; such application merely being an attempt by plaintiff to lawfully obtain a greater amount of water than he was already entitled to, and was not an admission that he had no right to any of the water.

9. DAMAGES 🔑109—MEASURE OF DAMAGES FOR OVERFLOWING LANDS.

In an action involving disputed water rights, where plaintiff sought damages for the flooding of his lands when defendants turned an increased amount of water into their ditch, *held*, that the measure of damages for the flooding of the lands was not the fair rental value of the property overflowed, but under Civ. Code, § 3333, was an amount which would compensate for all the detriment caused thereby.

10. WATERS AND WATER COURSES 🔑152(11)—ALLOWANCE OF WATER MEASURED UNDER FOUR-INCH HEAD PROPER.

Notwithstanding St. 1901, p. 660, defining a miner's inch, a judgment in an action involving disputed claims to water for irrigation purposes, which allowed defendants 121.3 inches of water measure under a 4-inch pressure, is not open to attack on the ground that defendants, who claimed a greater number of miner's inches, were entitled to a measurement of their water under a 6-inch head.

11. WATERS AND WATER COURSES 🔑179(1)—COMPLAINT TO RESTRAIN FLOWING OF PLAINTIFF'S LAND SUFFICIENT.

A complaint seeking to enjoin defendants from diverting an increased amount of water into their irrigation ditch over plaintiff's lands, which, following Code Civ. Proc. § 426, contained a statement of facts constituting the cause of action in an ordinary concise manner, and which averred that defendants threatened to make enlargements of the ditch, followed by statements as to damage which would result, is not open to attack on the ground that there was no allegation that defendants threatened to make any material enlargement of the ditch.

12. WATERS AND WATER COURSES ⚿179(1)—COMPLAINT TO RESTRAIN FLOWING OF PLAINTIFF'S LANDS SHOWING IRREPARABLE DAMAGE.

A complaint seeking to enjoin defendants from increasing the amount of water diverted into their drainage ditch over plaintiff's lands, which alleged that plaintiff's lands would be overflowed and rendered unfit for cultivation, was a sufficient statement of irreparable injury.

Appeal from Superior Court, Siskiyou County; James T. Lodge, Judge.

Action by A. J. Barr against Martha E. Branstetter and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Braynard & Kimball, of Redding, for appellants.

Taylor & Tebbe, of Yreka, and Henry McGuinness, of Sisson, for respondent.

HART, J. Plaintiff brought the action to have defendants enjoined from diverting into a certain ditch which crossed plaintiff's lands more than 121 inches of water measured under a 4-inch pressure and from enlarging said ditch. Judgment was entered in favor of plaintiff as prayed for in the complaint, except that the amount of water to which defendants were entitled was found to be 121.3 inches measured under a 4-inch pressure. The appeal is by defendants from said judgment.

It was alleged in the complaint, which was filed June 6, 1917, that plaintiff was the owner of 80 acres of land (describing it) in Siskiyou county, upon which he raised crops of hay, fruit and vegetables; "that defendants Martha E. Branstetter, Mary McKenzie, John B. Stuck, and Philip Reed are the owners of a certain water ditch which diverts the waters of Cold creek to the amount of 121 inches measured under a 4-inch pressure over and across the said lands of plaintiff," which said ditch has been used by defendants for diverting said 121 inches of water during the time plaintiff and his predecessors have owned the land; "that during the year last past defendants, disregarding plaintiff's rights, have at times turned into said ditch, where the same crosses the land of plaintiff, more than 121 inches measured under a 4-inch pressure of the waters of said Cold creek, and said waters have overflowed a large portion of plaintiff's lands to such an extent that said lands have been covered with water and have been rendered unfit for cultivation," to the damage of plaintiff in the sum of $300.

Defendants filed an answer and cross-complaint, in which they denied that any more than 25 acres of plaintiff's land was agricultural land or had been cultivated, and alleged that a portion of plaintiff's land was rocky and unfit for cultivation; denied the allegation of the complaint that the four defendants named therein "were limited to the amount of 121 inches" of water, but alleged that they were entitled to 272 miner's inches of water and to divert the same over plaintiff's lands by means of said ditch, and set up adverse possession thereto. Defendants denied the allegation of the complaint which stated that they had turned into the ditch more than 121 inches of water and had thereby overflowed plaintiff's land, but alleged that they were entitled to turn into said ditch 272 miner's inches of water.

The cross-complaint of defendants set up affirmatively the ownership by said defendants of certain lands and the ownership of said Cold creek ditch, and also their right to use 272 miner's inches of water on said lands, which are dry and practically useless without such water; "that the amount of water reasonably necessary for the proper irrigation and development of said lands of said defendants, during the irrigation season of every year, is the whole of the natural flow of said Cold creek at the head of said Cold creek ditch, to wit, 272 miner's inches of water;" that plaintiff's claims to divert waters are wholly without right, and that during two years last past, "by means of dams, ditches, and other obstructions, he has wrongfully, unlawfully, and without right diverted large quantities of water, * * * and permitted his cattle to trample down and obstruct said Cold creek ditch where said ditch crosses his lands," thereby depriving said defendants of the use of said water, to their damage in the sum of $3,000.

[1] 1. Appellants attack several findings of the court as not supported by the evidence, but an examination of the record has convinced us that there is no merit in the contention. Findings 5, 6, and 7 are first referred to. They were to the effect that "defendants have turned into said Cold creek ditch * * * more than 121.3 inches measured under a 4-inch pressure, and thereby caused a portion of the lands of plaintiff * * * to be overflowed and covered with water"; that "defendants continued to turn" water into said ditch "in such quantities as to overflow plaintiff's lands and to damage the same and render said lands unfit for cultivation"; and that "plaintiff was damaged by the acts of defendants in the sum of $100."

The point made by appellant is that there is no evidence that *defendants* did the acts referred to in said findings. We think, though, that those findings derive sufficient support from the following testimony given by plaintiff:

> "The water was turned in on the 14th day of May, and I always cut the ditch—the head of the ditch was left open at the intake and the water came down and washed over my land. I

cut the ditch in one place, where it would run over the high ground and not do any damage, down into the pasture, so it wouldn't damage the property, and as they cleaned it out or repaired it in the spring, when it was time to turn the water in, they always repaired the ditch. Well, it seems as though they turned the water in and didn't clean out the ditch, and I supposed they had their ditch in repair, and the water run there until the 24th of May."

It is true that the plaintiff did not in so many words say the *defendants* turned the water into the ditch. His language was that *they* did so. The allegation in the complaint, with which the court was, of course, familiar, was that "defendants * * * have at times turned into said ditch" water, etc. If the court or counsel had entertained any doubt as to whom the witness was referring by his answer, it is reasonable to suppose the uncertainty would have been cleared up at the time. But the defendants at the trial, did not make the objection now urged, and it cannot be made for the first time in this court.

[2] It is next claimed that there is no evidence to support the finding that 121.3 inches of water is all that has been used by defendants for the irrigation of their lands. On direct examination, plaintiff testified that no greater quantity than 121 inches of water ever did run through the ditch. It appeared on his cross-examination that he was not a civil engineer, and that he had had no experience in measuring ditches or the flow of water, and appellants claim that his estimate was a mere guess and entitled to no credence. But the record shows that Harvey J. Sarter, the county surveyor of Siskiyou county, testified that he made surveys and measurements in June and September, 1917, and in April, 1918, and that the water flowing in the ditch on June 1, 1917, was 121.3 inches. This testimony is sufficient to support the finding, and in view of the testimony of the surveyor it becomes immaterial whether plaintiff was or was not qualified to express an opinion upon the subject.

[3, 4] As to the finding that 121.3 inches of water was sufficient for defendants' use, appellants criticize the testimony of the plaintiff and of his witness, Henry B. Ream. It may be conceded that the testimony of these witnesses on this point was of little value. The testimony as to the amount of land cultivated and irrigated by defendants was conflicting, and the court's finding in that regard must control. There was received in evidence a table prepared by the United States Agricultural Weather Bureau showing how many acre-feet of water are considered necessary for irrigation of certain crops on various kinds of soil. Applying the amounts stated in this table to the requirements of defendants' lands, it appeared that 121.3 inches would be about double the necessary amount of water. It was alleged in the answer and cross-complaint that "at the time of the commencement of this action the said Cold creek ditch was, and is, in first-class repair and order as an irrigation ditch." As seen, the action was commenced on June 6, 1917, and the testimony of the surveyor, Sarter, was that when he measured the ditch on June 1st it was full of water and overflowing at points.

Appellants next complain of the finding that the ditch across plaintiff's lands was enlarged, so that its carrying capacity was doubled. There was considerable testimony as to the ditch having been widened; the witnesses varying in their estimates as to the width from 4 to 27 inches. Appellants claim that what they did was merely to clean out the ditch. C. R. Weigel, a witness for defendants, testified that after the ditch had been enlarged, and on June 19, 1917, he made measurements and found that the carrying capacity of the ditch across plaintiff's land was about 272 miner's inches of water. The witness Sarter testified that he found the water in the ditch to be as follows: On June 29, 1917, 162.29 miner's inches; on September 16, 1917, 164.55 miner's inches; on April 28, 1918, 131.47 miner's inches. Sarter testified that when he made these measurements the ditch was not full of water.

[5] As to the finding that plaintiff is the owner of and entitled to 14 miner's inches of water, the plaintiff testified that about 14 years prior to the trial he had constructed a ditch about 2 feet and 8 or 10 inches deep across the corner of his land for about 600 feet; that he had used it every year since, and that when the creek was lowest the ditch contained about 27 inches of water. We cannot perceive how defendants would be injured by the finding. The court gave to them the prior right to 121.3 inches, and whatever amount was awarded to plaintiff was subject to that right.

[6] 2. Appellants claim that the court should have made a finding as to what the carrying capacity of the Cold creek ditch was across the land of plaintiff. In the cross-complaint it was alleged that the carrying capacity of the ditch was 272 miner's inches of water, and testimony was introduced tending to prove the allegation. It is contended that this was a material issue and should have been found upon. We think, however, that the carrying capacity of the ditch was not material. While it may have been capable of carrying 272 inches, the court found, upon what we regard as sufficient evidence, that defendants were entitled to 121.3 inches only; that being the amount that had been used by them for the irrigation of their lands. They were therefore confined to the use of that amount, regardless of what was the size of their ditch.

[7] 3. Over the objection of defendants, plaintiff was permitted to show that, on September 4, 1917, the Cold creek ditch over-

flowed on the land of one Mose Zelle, and that defendants widened the ditch through Zelle's land from 6 to 18 inches for a distance of 413 feet. Zelle's land is the next farm below that of plaintiff, and between the two tracts there is a fall or drop of about 20 feet. Respondent disclaims any right to damages by reason of the overflow of Zelle's land, but maintains that the testimony was pertinent to show that defendants had turned in so much more water than they had in former years that it could not be carried off Barr's place and into Zelle's without widening the ditch through Zelle's place.

The evidence was properly admitted. There was testimony showing that in former years the ditch through Zelle's land had always carried the water that was turned in it, and there had never been an overflow. It is true that, on cross-examination, Zelle testified that, prior to the overflow, 30 or 40 head of cattle had been pastured on the place and had trampled the ditch; but the damage done by the cattle could have been remedied without widening the ditch to the extent that it was widened. The inference seems irresistible that the widening of the ditch was for the purpose of accommodating the increased flow of water which Sarter testified he found in the ditch on September 16, 1917, 12 days after the overflowing of Zelle's land.

[8] 4. Defendants offered in evidence a certified copy of an application, filed by plaintiff with the state water commission in 1917, showing that construction work would be commenced about May 15, 1917, and that the notice of appropriation was posted before the commencement of the irrigation season of 1917, for the purpose of diverting 40 miner's inches of water from Cold creek. The document was offered as a declaration against interest. Plaintiff objected to its introduction as not being a declaration against interest and the court sustained the objection. Appellants cite 16 Cyc. 954, as follows:

> "Conduct of a party inconsistent with his present contention may tend to show that the latter is an afterthought, and proof of such contention is therefore competent as an admission"

—and contend that under that rule the offered evidence was improperly rejected. To this, respondent replies:

> "An application for water cannot be construed as an admission that the plaintiff had no water right in Cold creek. Any action of the commission would not affect existing rights, and plaintiff or any other party could have a right to make an application for the surplus water of Cold creek or any other creek."

We agree with the position taken by respondent. It is established by the findings of the court that plaintiff was entitled to 14 inches of the water of the creek. His application for 40 inches, or any other amount, could not affect his title to the 14 inches. Nor was the application an admission that he had no right to any of the water. It was simply an attempt legally to secure, if he could, more water than he at that time had. The objection to the admission in evidence of the application was properly sustained.

[9] 5. The plaintiff testified that he had been damaged in the sum of $300 from the overflowing and swamping of his land. Appellants insist that the admission of said testimony was error and that the true measure of damages would be the fair rental value of the ground which was overflowed, citing Crow v. San Joaquin, etc., Irrigation Co., 130 Cal. 309, at pages 314, 315, 62 Pac. 562, 1058. That case was an action for damages arising from a breach of contract, and the Supreme Court stated that the measure of damages was the detriment caused by the breach, as provided in sections 3330 and 3333 of the Civil Code. The citation of section 3330 was probably an error, as there is no such section. It was probably intended to be section 3300, which prescribed the measure of damages for breach of contract. Section 3333 covers the breach of obligation other than contract and provides that it "is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

In the cases of Dennis v. Crocker-Huffman, etc., Co., 6 Cal. App. 58, 91 Pac. 425, and Strecker v. Gaul, 35 Cal. App. 619, 170 Pac. 646, we held that the measure of damages for destruction of growing crops was that laid down by section 3333 of the Civil Code. While the testimony of the plaintiff was not as complete as it should have been as to the value of crops destroyed, he did testify as to potato ground and pasture being rendered useless and alfalfa being "killed out" by the water. The court evidently considered his estimate of $300 damages as too high, for the judgment gave him $100 for this item.

[10] 6. Appellants contend that they "are entitled to a judgment giving them a measurement of their water under a 6-inch head," while the court gave them 121.3 inches of water measure under a 4-inch pressure. Our statute defines a miner's inch of water as follows:

> "The standard miner's inch of water shall be equivalent or equal to one and one-half cubic feet of water per minute, measured through any aperture or orifice." Stats. 1901, p. 660.

Of this statute, we had occasion to say, in Lillis v. Silver Creek, etc., Water Co., 32 Cal. App. 668, 674, 163 Pac. 1040, 1043:

> "This makes the miner's inch equivalent to one-fortieth of a second-foot. Prior to the adoption of the above statute, an inch or miner's inch in this state was defined as the quantity of water passing through an orifice one inch

square under a 4-inch pressure, which would make the inch equivalent to one-fiftieth of a cubic foot per second."

In a work entitled "The Theory and Practice of Surveying," by J. B. Johnson, the following is said regarding the miner's inch:

> "This is an arbitrary standard, both as to method and as to volume of water discharged. It rests on the false assumption that the volume discharged is proportional to the area of the orifice under a constant head above the top of the orifice. Its use grew out of the necessities of frontier life in the mining west, and should now be discarded in favor of absolute units. The miner's inch is the quantity of water that will flow through an orifice 1 inch square, under a head of from 4 to 12 inches, according to geographical locality. * * * When the miner's inch can only be defined as a certain number of cubic feet per minute, it is evidently no longer of service and should be abandoned."

In Kinney on Irrigation and Water Rights (2d Ed.) vol. 2, § 890, it is said that in arriving at the quantity of water prescribed by the act of 1901 as constituting a miner's inch, "by computation the head of water must be under a 6-inch pressure."

It will thus be observed that, if the award to defendants had been 121.3 "miner's inches" of water, they would receive approximately 50 per cent. more water than they would if the number of inches were measured under a 4-inch pressure. But water users in the Western states have long been accustomed to measuring their water under the old method, and it is a fixed and ascertainable quantity in California. The plaintiff's surveyor in the present case made all his measurements "under a 4-inch pressure" and the court's award of that amount to defendants must control, though it is quite apparent that in such cases as this it would be advisable that any reference to a miner's inch of water should be "one and one-half cubic feet of water per minute," as a miner's inch is defined by the law, without specifying any particular pressure under which it should be measured.

[11] 7. It is finally contended that defendants' demurrer to the complaint should have been sustained for the following reasons:

> "(1) There is no allegation in the complaint that the defendants threatened to make any material enlargement of the ditch on plaintiff's land. (2) There is no allegation showing how or why the overflow from the ditch on plaintiff's land would cause plaintiff irreparable injury."

As to the first point: The complaint contains "a statement of the facts constituting the cause of action, in ordinary and concise language." Code Civ. Proc. § 426. The allegation therein that defendants threaten "to make enlargements of said ditch" is followed by statements as to the damage which will result to plaintiff in case the enlargements are made, which are sufficient to show that the damage would be serious. Inasmuch as the allegation is that such damage will flow from the "enlargements" previously mentioned, it would seem to be of no consequence that the word "material," as qualifying the "enlargements," should have been omitted.

[12] As to the second point, the appellants cite City Store v. San Jose-Los Gatos, etc., Co., 150 Cal. 277, 280, 88 Pac. 977, 978, and other cases, to the effect that—

> "General allegations of irreparable injury are never sufficient; the facts must be stated from which it will appear that irreparable injury will probably follow."

The complaint before us contains sufficient allegations in this respect. It is therein stated that the overflowing of plaintiff's lands will render the same unfit for cultivation and for raising crops because thereby they will be made too wet for cultivation. In connection with the allegation that said land is agricultural land and that plaintiff for 10 years has cultivated said land and raised crops of hay, fruit, and vegetables thereon, and that the land is valuable for such purposes, nothing further, in our opinion, is required to show that the damage which would probably result to plaintiff from the threatened acts of the defendants would cause him irreparable injury.

The demurrer to the complaint was properly overruled.

The judgment is affirmed.

We concur: **CHIPMAN, P. J.; BURNETT, J.**

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42 Cal. App. 796

JIRKU v. BROD. (Civ. 3013.)

(District Court of Appeal, First District, Division 1, California. Aug. 25, 1919.)

1. MALICIOUS PROSECUTION 🔑16—PLAINTIFF MUST PROVE MALICE AND WANT OF PROBABLE CAUSE.

In actions for malicious prosecution, plaintiff to recover must establish not only malice but want of probable cause, and the two elements must concur.

2. MALICIOUS PROSECUTION 🔑71(2)—WHERE EVIDENCE NOT CONFLICTING, WANT OF PROBABLE CAUSE QUESTION FOR COURT.

Where there is no conflict in the testimony in an action for malicious prosecution, the question whether or not the evidence introduced shows a want of probable cause is for the court, and it would be error to submit it to the jury.

3. MALICIOUS PROSECUTION 🔑22—RELIANCE IN GOOD FAITH UPON ADVICE OF COUNSEL AS AFFECTING PROBABLE CAUSE.

Where defendant before instituting a prosecution against plaintiff for criminal libel consulted an attorney at law in good standing, and also an assistant prosecuting attorney, and, upon the advice of each that a prosecution would lie, commenced such prosecution honestly relying on such advice, he acted upon probable cause.

4. MALICIOUS PROSECUTION ⚷18(2)—CIRCULAR PUBLISHED AS CONSTITUTING PROBABLE CAUSE FOR PROSECUTION.

In an action for damages for malicious prosecution of plaintiff for criminal libel, evidence including a circular containing the alleged libelous matter *held* of itself sufficient to constitute probable cause for the prosecution.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by John Jirku against J. M. Brod. Judgment for defendant, and plaintiff appeals. Affirmed.

A. R. Holston, of Los Angeles, and S. C. Schaefer, of San Pedro, for appellant.

Hudson P. Hibbard, of Los Angeles, for respondent.

WASTE, P. J. This is an action against defendant for a malicious prosecution, for causing the arrest of the plaintiff upon a criminal charge. At the conclusion of all the testimony in the case, the court, without hearing argument on the evidence, and of its own motion, instructed the jury to return a verdict for the defendant, which the jury did. Judgment was entered in favor of the defendant, and plaintiff appeals. The action of the court in instructing the jury to return a verdict for the defendant is the only error of which the appellant complains.

Plaintiff published and circulated a statement in the Bohemian language, in which he charged, among other things, that defendant did not speak the truth. The defendant thereupon made complaint before the clerk of the police court of the city of Los Angeles, charging plaintiff with having committed the crime of criminal libel. Plaintiff was arrested and imprisoned for a space of several hours, finally obtaining his release upon giving bail. After due trial in the police court, of the city of Los Angeles, before a jury, plaintiff was acquitted of the charge, and was not further prosecuted.

It appears without contradiction, from the record, that before defendant caused the arrest of plaintiff he consulted a regularly admitted and practicing attorney at law, in good standing. To him defendant made a full, fair, and complete statement of all the facts within his knowledge, in relation to the alleged libel. On the advice of counsel, he further consulted the deputy city prosecutor of the city of Los Angeles, who was intrusted with such matters, and to whom defendant again made a full, fair, and complete statement of all the facts relating to the matter, and submitted the objectionable publication. Defendant was advised by the attorney at law, and by the deputy city prosecutor, and by each of them, that an offense had been committed, and that there was probable cause to believe the plaintiff guilty of the offense, whereupon defendant, acting in entire good faith, believing such advice to be true, appeared before the clerk of the police court, and made the complaint which led to the arrest and trial of plaintiff. In addition to these facts, it also appears that before seeking the advice of the attorney, and of the deputy city prosecutor, defendant believed that the plaintiff had committed, and was guilty of, the crime of criminal libel.

[1] The trial court was therefore justified in directing the jury to return the verdict in favor of the defendant. There was no want of probable cause shown for the arrest of plaintiff. No principle is better established than that in actions for malicious prosecution the plaintiff must, in order to recover, establish, not only malice, but want of probable cause. These two elements are essential, and they must concur, or the action will not lie. Potter v. Seale, 8 Cal. 224; Smith v. Liverpool, etc., Ins. Co., 107 Cal. 432–436, 40 Pac. 540. One of the elements essential to maintain the action not being present, plaintiff had not made out his case.

[2] Where there is no conflict in the testimony, the question whether or not the evidence introduced shows a want of probable cause is for the court to decide. It is error in such cases, where there is no proof of want of probable cause, to submit any question to the jury. Davis v. Pac. Tel. & Tel. Co., 127 Cal. 312, 319, 57 Pac. 764, 59 Pac. 698.

[3] Defendant was entitled to the benefit of the rule announced in the foregoing cases that where one, before instituting such a prosecution, has, in good faith, consulted an attorney at law in good standing, particularly if such attorney be one charged with the prosecution of public offenses, and has stated to him all the facts in the case, and has been thereupon advised by such attorney that a prosecution will lie, and such person has acted honestly on that advice, this, of itself, constitutes probable cause. Johnson v. Southern Pacific Co., 157 Cal. 333, 338, 107 Pac. 611.

[4] Furthermore, the evidence in the case, consisting in part of the circular containing the alleged libelous matter, was of itself sufficient to constitute probable cause for the prosecution.

The judgment is affirmed.

We concur: RICHARDS, J.; BARDIN, Judge pro tem.

42 Cal. App. 785

HUGHES v. SILVA. (Civ. 2923.)

(District Court of Appeal, First District, Division 1, California. Aug. 22, 1919.)

1. TRUSTS 🔑44(1) — EVIDENCE SUPPORTING FINDINGS OF TRUST IN LAND.

In an action to impress a trust on land, evidence *held* to support judgment for plaintiff.

2. TRUSTS 🔑373 — COMPLAINT ON EXPRESS TRUST AND FINDINGS OF TRUST BY OPERATION OF LAW.

In an action to enforce a trust in lands, an amended complaint predicated on the averment of an express trust *held* not inconsistent with findings predicated upon a joint adventure for the purchase of the lands creating a trust by operation of law, where the findings follow almost the precise language and averments of the complaint, and further set out in hæc verba two written declarations of trust.

3. TRUSTS 🔑17, 18(1)—ORAL UNDERSTANDING FOR PURCHASE OF LAND MAY CREATE AN ENFORCEABLE TRUST.

An oral understanding between two parties for the purchase from others of land to be paid for by cutting the timber therefrom may give rise to an enforceable trust in favor of one of them.

4. TRUSTS 🔑21(1)—DECLARATIONS OF TRUST SHOWING EQUITABLE TRUST IN PROPERTY INVOLVED.

Where parties purchased property through the efforts of one of them to be paid for out of timber cut therefrom, declarations of trust in favor of one of them with reference to a loan secured to further the enterprise *held* to show an equitable trust in all the property in question.

5. TRUSTS 🔑365(2) — FAILURE TO CLAIM TRUST OR ACCOUNTING INSUFFICIENT TO SHOW LACHES.

Where plaintiff and defendant purchased land in defendant's name for which plaintiff borrowed money, that plaintiff made no claim for an accounting or declaration of trust during four years when the relations between the parties were intimate and cordial and consisted of interchanges of courtesies and services, and the property had not increased in value, did not show laches.

Appeal from Superior Court, Sacramento County; Wm. M. Finch, Judge.

Action by Joseph W. Hughes against Charles F. Silva, in which Nellie S. Hughes, as executrix of the plaintiff's last will and testament, was substituted for plaintiff. Judgment for plaintiff, and defendant appeals. Affirmed.

Devlin & Devlin, of Sacramento, and Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for appellant.

Arthur C. Huston, of Woodland, and Hughes & Bradford, of Sacramento, for respondent.

RICHARDS, J. This is an appeal from a judgment in the plaintiff's favor in an action wherein the present plaintiff's predecessor in interest sought to impress a trust in his favor as to several tracts of land lying in what is known as the Sutter Basin, in the county of Sutter, state of California. The particular tract of land as to the proceeds of which the judgment was in plaintiff's favor was known and is described in the record herein as the "Wilcoxson Point ranch," consisting of approximately 2,600 acres of land, and was originally owned by one Jackson Wilcoxson, and upon his death, in the early eighties, became the property of the Wilcoxson Estate. The present plaintiff's predecessor in interest, Joseph W. Hughes, was one of the heirs of said estate, his mother having been a sister of Jackson Wilcoxson, but his interest therein derived from this source was comparatively small, being only a one-ninetieth interest therein. Joseph W. Hughes was in those years an attorney at law in active practice in the city of Sacramento. He was not, however, the attorney for the estate or any of its heirs other than himself, but at times, and as a matter of accommodation, looked after the interests of the heirs in such of the property of the estate as seemed to require attention. Thus it was that in the year 1884 Joseph W. Hughes, for a period of about four months, was upon the Wilcoxson Point ranch looking after the property at the request of certain of the heirs. While there upon that occasion he first met and became well acquainted with Charles F. Silva, the defendant herein, who was then an employé upon the ranch. Some time thereafter said Charles F. Silva came to the said Hughes, who had in the meantime become one of the superior judges of the county of Sacramento, seeking to obtain a contract for the cutting of wood upon the ranch at a dollar a cord stumpage for the wood. Through the offices of Judge Hughes, Silva was able to secure such a contract, and began cutting the wood thereon under this contract. At that time this piece of property was not esteemed of great value, since it was subject to overflow during the major portion of the year, and aside from being occupied largely with timber was mainly usable for pasturage when not under water. During the year which followed the making of the woodcutting contract with Silva, he cut approximately 3,800 cords of wood upon the property, and Judge Hughes and he went together to the ranch to measure the wood which had thus been cut before its removal from the premises. While they were there upon this mission, Silva, according to the testimony of Judge Hughes, proposed to him that they go in together and buy the property from the heirs of the estate for the price of $5 per acre, and pay for it out of the wood which they could cut from it, having the land left as their profit. Judge Hughes was agreeable to this proposition and undertook to present the matter to the rest of the heirs. He preferred, however, not to be known in the transaction because of his interest in the estate. At that time one George H. Wilcoxson, one of the heirs, held a general power of attorney from all the rest of the heirs residing outside of California and representing the bulk of the estate. Judge Hughes either wrote to him or saw him personally and laid Silva's proposition before him. It was substantially to the effect that Silva was willing to pay $5 an acre for the property, or in round figures $13,000. In response to this proposition, George H. Wilcoxson stated he was satisfied the heirs would be willing to sell at that figure, and undertook to lay the matter before them by letter. In a short time he reported to Judge Hughes that he was authorized to sell the property at the price named, but would require a payment of $4,000 in cash. When this was reported to Silva, he agreed to it; but, when the transaction was about ready to be consummated, Silva was unable to raise the full amount of the cash payment required, whereupon Judge Hughes borrowed $1,400 from one Adolphe Jean, giving his note therefor. He also at the same time wrote out a declaration of trust for Silva to sign, declaring that he (Silva) held one-half of the said ranch in trust, first, as security for the payment of the amount of Judge Hughes' loan from Jean, and second, upon its payment to convey one-half of the ranch to Judge Hughes.

Having thus arranged for the initial payment upon the purchase price of the ranch, a conveyance was made by all of the Wilcoxson heirs to Silva, Judge Hughes joining with the rest in this conveyance. Some emphasis is sought to be laid by appellant upon the proposition that a fraud in some sort was perpetrated by Judge Hughes upon the other heirs of the Wilcoxson estate through his concealment from them in the course of this transaction of the fact that he was an interested party with Silva in the purchase of the property. We attach no significance to this suggestion, since it nowhere appears, either that Judge Hughes used any advantage which his position as an heir or otherwise gave him to promote the transaction, apparently with Silva, but really in part with himself, to their injury; nor that the price which Silva offered for the property was not the fair and full value thereof according to the then estimation of the value of similarly situated lands. So far as the record discloses, the Wilcoxson heirs, who were the only parties who could have been injuriously affected by any concealment of Judge Hughes' interest in the transaction with Silva, have never complained, and hence it does not lie in the mouth of Mr. Silva, who jointly with Judge Hughes profited by the transaction, to urge that it was attended with any unfairness on the latter's part. The purchase of the Wilcoxson Point ranch having thus been consummated by the deed to Silva, dated March 15, 1899, the duty of paying the balance of the purchase price devolved apparently upon Silva in accordance with the understanding of the parties that the revenues to be derived from wood to be cut upon the land would suffice to pay its purchase price. Silva went into possession of the property and entered into various activities with respect to it, and also to other properties of like location and quality in the same region. He delivered wood to the river boats, and established a woodyard in Sacramento to which wood he had cut upon this and other properties in which he became interested was brought in launches or barges and there sold. Several years went by. The note which Judge Hughes had made to Adolphe Jean became due and was about to outlaw, when, in the year 1904, a new note was executed by Judge Hughes, and a new declaration of trust, in the main similar in terms to the former trust declaration, was executed by Silva. Several years more went by during which the activities of Silva were being extended in various directions and he was making considerable money, being aptly described by Judge Hughes in his deposition as "an energetic and thriving fellow." When the time arrived, in 1908, for the renewal of the Jean note, it was renewed by Judge Hughes by a writing to that effect upon it; but the declaration of trust was not then reexecuted by Silva. In the year 1911 the Jean note was paid by Silva out of funds which, according to the contention and testimony of Judge Hughes, had been derived by him from the proceeds of the property. During all of these years the relations of the parties continued to be of a friendly and confidential nature. Judge Hughes from time to time rendered legal services of various kinds to Silva in connection with his varied activities, and for which, according to the testimony of the former, he made no charge and received no pay. On the other hand, Silva from time to time, according to his testimony, loaned Judge Hughes money, furnished him wood, and contributed to his election expenses. In the year 1912 the Wilcoxson Point ranch, in common with other like properties in that region, became greatly increased in value by reason of reclamation projects undertaken by the federal and state governments, aided by private enterprise, and looking to the drainage, protection and reclamation of the lands of the Sutter Basin. As a result of this increase in value, Silva was able in the latter year to make a sale of this ranch to the Sutter Basin Company for the sum of $100,128.71. Not long thereafter Judge Hughes sought an accounting with

Silva, but being unable to obtain it, began the present suit.

In his complaint herein, filed in December, 1913, Judge Hughes undertook to set forth in a single cause of action his claim that a trust relation had arisen and existed between himself and the defendant Silva in respect to four separate tracts of land, embracing in all 6,263 acres lying in the Sutter Basin, which it was asserted in said complaint had been purchased by the latter pursuant to an understanding and agreement between himself and the defendant that the latter was to hold the legal title thereto but that Hughes was to be the equitable owner of an undivided one-half interest in said lands, and that said defendant had subsequently sold all of said lands for the price of $50 per acre, realizing therefrom the sum of $313,168, or thereabouts, of which said sum the plaintiff was entitled to have an accounting and an equitable division of one-half thereof. The plaintiff subsequently filed an amended complaint amplifying the averments of his original pleading into five separate causes of action. The first of these causes of action related to the lands above referred to as the Wilcoxson Point ranch; the other causes of action had reference to other tracts of land alleged to have been purchased and held by the defendant Silva under a like understanding as that above detailed as to the Wilcoxson Point ranch. The prayer of the plaintiff was for an accounting as to each and all of these properties. The answer of the defendant put in issue all of the material averments of this amended complaint. In the meantime Judge Hughes died, and his widow, as the executrix of his last will and testament, was substituted as the plaintiff herein. Upon the trial of the action the court made its findings sustaining the plaintiff's contention as to the existence of a trust relation as to the Wilcoxson Point ranch, and as the result of an accounting taken as to said property and the proceeds thereof found and decreed that the plaintiff was entitled to recover from the defendant the sum of $45,175.40, as being one-half of the net amount realized by said defendant as the result of his holding, management and disposition of the Wilcoxson Point ranch. As to the tracts of land referred to in the other counts of plaintiff's amended complaint the findings and judgment of the court were in the defendant's favor, and as to these the plaintiff was held entitled to take nothing.

[1] The defendant has appealed from said judgment in so far as the same is in the plaintiff's favor. A voluminous record has been presented upon said appeal. From the large mass of testimony presented by said record the foregoing statement as to the facts of this case has been prepared by us as embracing a summary which is in harmony with the findings of the court and which supports said findings, and which is in turn sustained by the testimony in the case. In so far, therefore, as the argument of the appellant upon this appeal is directed to his contention that the findings and judgment of the trial court are not supported by the evidence in the case, we hold without further discussion that this contention is without merit, in view of the substantial conflict in the testimony of the two original parties as to the facts pertaining to their relation and dealings in respect to the particular tract of land in question during a long series of years.

This brings us to a consideration of the appellant's several contentions as to the law of the case.

[2-4] The first of these is his contention that there is a variance between the plaintiff's amended complaint and the findings herein, in this, that said complaint is predicated upon the averment of an express trust in the lands in question, whereas the findings are predicated upon the fact that the parties engaged in a joint adventure for the purchase of said lands out of which a trust arose by operation of law. We are unable to discover the inconsistency of which the appellant complains. The findings of the court follow in almost their precise language the averments of the plaintiff's amended complaint. They then go further and set forth in hæc verba the two declarations of trust signed by Silva in connection with the loan from Adolphe Jean. That an oral understanding between two parties of the kind in question here may give rise to an enforceable trust in favor of one of them is abundantly supported by a long line of authorities in this state, of which the following are a few: Brison v. Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; Bradley Co. v. Bradley, 165 Cal. 237, 131 Pac. 750; Younger v. Moore, 155 Cal. 768, 103 Pac. 221; Arnold v. Loomis, 170 Cal. 95, 148 Pac. 518; Lamb v. Lamb, 171 Cal. 577, 153 Pac. 913; Willats v. Bosworth, 33 Cal. App. 710, 166 Pac. 357; and in the case last-cited this court held that such a trust could at the same time be an express and a resulting trust, and that the fact that the trustee of such trust had made a written declaration of trust did not change the character of the trust itself, but merely furnished additional proof of its existence. The criticisms which the appellant herein aims at the two written declarations of trust executed by him in connection with the making and renewal of the plaintiff's note to Adolphe Jean thus lose much of their force; but, apart from this, they are not justified by the terms of these writings taken as a whole, for, while it is true that they were made with express reference to the transaction with Adolphe Jean, they both expressly declare the existence of a trust entitling the plaintiff to an equitable interest in the property in question, and in its proceeds in the event of a sale of such interest in order to pay said

note, while the fact that the appellant and not the maker of the Jean note did eventually pay the same in no wise changes the situation, since according to the original understanding of the parties the entire purchase price of the property was to be paid out of itself, and this, according to the finding of the court, was what was actually and eventually done.

[5] The appellant's next contention is that the plaintiff's claim for accounting is barred by laches for the reason that between the years 1909 and 1913 he made no assertion of a claim of interest in the property nor made any demand for an accounting. The evidence abundantly shows, however, that during all these years the relation between the parties was intimate and cordial, consisting of interchanges of courtesies and services, and that down to a short time before the sale of the property its character and value had remained about the same as when it was purchased by them, and hence that there was no reason for a balancing of accounts between them. It was not, in point of fact, until the rather unexpected rise in the values of this and similarly situated property made its advantageous sale a possibility, and until it was actually sold to such advantage, that the occasion for an accounting and settlement between the parties arose; and it was only a short while after this that a demand for an accounting was made and refused and that the present action was instituted. We think the contention that the plaintiff was guilty of laches under these circumstances cannot be sustained.

The other contentions of the appellant herein we find upon a careful examination of the quite elaborate briefs of counsel to be either covered by the point that they are not reviewable because based upon conflicting evidence, or by the other points already discussed, or else that they are not of themselves of sufficient importance to warrant consideration or to justify a reversal of the case.

The judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

43 Cal. App. 45

MATHEWS v. SAVINGS UNION BANK & TRUST CO. (STATE, Intervener).

(Civ. 2807.)

(District Court of Appeal, First District, Division 2, California. Aug. 26, 1919. Rehearing Denied by Supreme Court Oct. 23, 1919.)

1. CONSTITUTIONAL LAW 🔑48—CONSTRUCTION FAVORING VALIDITY OF STATUTE.

Unless the language of a statute is express and unmistakable, courts will not attribute to the Legislature the purpose of invading the common right, and violating those fundamental constitutional provisions by which the individual is protected against arbitrary action by government.

2. ESCHEAT 🔑4—RIGHT OF OWNER TO BANK DEPOSIT AS AGAINST STATE AFTER TWENTY YEARS.

Under Code Civ. Proc. §§ 1269a, 1273, and Bank Act, § 15, as amended in 1915, a bank deposit on which, except for interest, neither deposits nor withdrawals have been made for 20 years, may be taken by the state only in the absence of claim by the true owner or his representative, the limitation period of 20 years being merely jurisdictional, and investing the state treasurer with right to sue for the deposit in the superior court of Sacramento county.

3. ESCHEAT 🔑6—UNTIL SUIT TO ESCHEAT OWNER CAN RECOVER DEPOSIT IN BANK AFTER TWENTY YEARS.

Despite Code Civ. Proc. §§ 1269a, 1273, and Bank Act, § 15, as amended in 1915, until suit is brought by the Attorney General in the superior court of Sacramento county to recover for the state as an escheat a bank deposit on which no deposits or withdrawals have been made for 20 years, the court, having jurisdiction of an action by any one for property withheld by another without right, is open to the owner of the deposit as well after as before the expiration of the 20-year period.

4. PARTIES 🔑47—INTERVENTION MUST NOT RETARD PRINCIPAL SUIT.

An intervention must not retard the principal suit, nor delay the trial of the action, nor change the position of the parties.

5. STATUTES 🔑182—CONSTRUCTION TO AVOID UNCONSTITUTIONALITY AND PROMOTE JUSTICE.

The construction of a statute must be consistent with sound sense and wise policy, and with a view to promote justice.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Mack Mathews, administrator of the estate of William Anderson, deceased, against the Savings Union Bank & Trust Company, wherein the State intervened. From a judgment for the State, plaintiff appeals. Reversed.

Lovett K. Fraser, of San Francisco, Herbert V. Keeling, of Lakeport, and Ornbaun & Fraser, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for the State.

BRITTAIN, J. This appeal concerns the construction of sections 1269a and 1273 of the Code of Civil Procedure, and section 15 of the Bank Act, as they were amended in 1915. They relate to escheats of unclaimed bank deposits. The facts are admitted.

In 1868 William Anderson deposited with the Savings Loan Society Bank of San Francisco, the predecessor of the defendant, $1,500, which with the accumulations of interest grew to $12,525.12 by the 1st of January, 1917. Anderson died at his residence in Lake county in August, 1892. Under the provisions of section 15 of the Bank Act the defendant made report to the state treasurer that for 20 years prior to the 1st day of January, 1917, there had been neither deposit nor withdrawal of funds from the Anderson account, and no claim had been made nor address of the owner of the account filed within the 20-year period. On March 16, 1917, the public administrator of Lake county was granted letters of administration on the estate of Anderson, and on the day following he made demand upon the bank for payment of the deposit account, which being refused the administrator sued the bank at its place of business in San Francisco. The Attorney General intervened on behalf of the state. The judgment was against the plaintiff and in terms declared the money on deposit had escheated on January 1, 1917, nearly 9 months before the judgment was entered.

In this case there is no question of identity involved. The plaintiff, as the administrator of the estate of the depositor, stands in his shoes. His rights in regard to the money in question are neither greater nor less than those of the depositor. If, on December 31, 1916, either the depositor or the administrator of his estate had made demand on the bank, it was obligated to pay, because the money then on deposit rightfully belonged to the depositor or his estate. If payment had been refused, the superior court in San Francisco would have had jurisdiction of a suit against the bank, and upon the admitted facts its judgment must have been in favor of the depositor or his personal representative. Because the demand was not made until after January 1, 1917, the trial court determined, and the Attorney General here argues, that the moneys escheated on that day, that the right of the depositor to the immediate payment no longer existed, and that this result flowed from the amendments of 1915.

[1] So obnoxious to the sense of justice is the suggestion that the state may take for its own use the property of one of its citizens, without compensation and without hearing, that, unless the language of a statute is express and unmistakable, courts will not attribute to the co-ordinate law-making body the purpose of invading the common right and violating those fundamental constitutional provisions by which the individual is protected against arbitrary action on the part of the government. The language of the statutes here in question requires no such interpretation.

Section 1273 of the Code of Civil Procedure and section 15 of the Bank Act are correlative. They deal with bank deposits upon which, except for the accumulation of interest, neither deposits nor withdrawals have been made for a period of 20 years. The Bank Act provides that the moneys in such deposits—

> "which shall have remained unclaimed for more than twenty years * * * and where neither the depositor or any claimant has filed any notice with such bank showing his or her present residence, shall * * * be deposited with the state treasurer after judgment in the manner provided in the Code of Civil Procedure." Stats. 1915, p. 1106.

The general language of the Code section is the same, except that the last phrase reads "shall * * * escheat to the state." Code Civ. Proc. § 1273. The section then provides that, when the Attorney General shall learn of such deposits he shall bring suit in the superior court of Sacramento county, and that upon the trial, "if it be determined that the moneys * * * are unclaimed as hereinabove stated, then the court must render judgment in favor of the state declaring that said moneys have escheated," and commanding the bank to deposit the money with the state treasurer thereafter to be dealt with as other escheated property.

So careful is the state of the rights of its citizens that even after the adjudication, for a period of 5 years, any person not a party or a privy to the escheat judgment may sue the state to recover the money, and this time is extended to infants and persons of unsound mind for a period of one year after the removal of the disability. Code Civ. Proc. § 1272.

[2] In the suit commenced by the Attorney General any claimant may appear and present his claim of ownership. Code Civ. Proc. § 1273. The Attorney General argues that the only adverse claim which could prevail in the suit would be one based on the nonexistence of the very fact on which the suit is based, namely, that no claim had been made within the 20 years of dormancy. If this construction should be adopted, how unreliable would be the guaranty of justice contained in section 15 of the Bank Act, which provides that "any person interested may appear in such action and become a party thereto," and that "the court shall have full and complete jurisdiction over the state, and the said deposits, and of the person of every one having or claiming any interest in the said deposits, or any of them, and shall have full and complete jurisdiction to hear and determine the issues therein, and render the appropriate judgment thereon." This language is most appropriate to provide for a real trial of the claim of interest or ownership, and it is equally inappropriate to provide for a merely formal adjudication of the jurisdictional fact of nondemand for a period of 20 years. Just as the statute provides for a claim of ownership after the judgment, so does it provide

for a claim of ownership after the Attorney General sues and before the judgment. Of course, a claim may be made by the owner against the bank at any time before the expiration of the 20 years. There necessarily must elapse a period of time between the expiration of the 20 years and the commencement of the state's suit. What are the rights of the owner of the money during that intermission?

[3] The Attorney General argues that after the expiration of the 20 years no court save that in Sacramento county has jurisdiction to make any order in relation to the deposit. The Bank Act provides that, when summons is issued under section 1273 of the Code of Civil Procedure, the clerk shall also issue a special notice directed to all persons, requiring them to appear within 60 days after the first publication of summons to show cause why the money should not be paid to the state treasurer. This notice must be published with the summons; that is, for a period not less than 4 weeks. Code Civ. Proc. § 1273. Under the Bank Act it is not until the completion of publication that jurisdiction vests in the Sacramento court. The duties of the Attorney General are many; the demands upon his office are great. There may be most cogent reasons for delay in the bringing of suits of this nature. The suit in Sacramento concerning this deposit was not commenced until July 30, 1917, 7 months after the expiration of the 20-year period.

Suppose the depositor had not died, but, returning from a far country, had been delayed by stress of weather, so that a demand which would have been honored on December 31st could not be presented until January 2d; suppose, further, that he was in sickness, that his family was in distress, or that the fund he had thriftily laid by against the day of his dire need alone would save him from the bankruptcy court; and, suppose the bank should pay him what rightfully was his—is it conceivable that the court in Sacramento would require the bank again to pay the amount of the deposit to the state? If the bank should refuse to pay upon such a demand, as it did in this case, would the admitted owner of the deposit be compelled to wait until the Attorney General should find time or be willing to open the door of the Sacramento court, so that he might as a defendant present his claim? Under such a rule he might be driven into bankruptcy, and he and his family become public charges. It would be no answer to say he might by the roundabout method of mandamus force the Attorney General to throw open the door of the Sacramento court. The rule that justice shall not be denied is no more sacred than is that which declares it shall not be delayed. Until suit is brought by the Attorney General in Sacramento county, the court having jurisdiction of an action by any one for property which another without right withholds, is open to the depositor, as well after as before the expiration of the 20-year period. In the exercise of its constitutional jurisdiction (article 6, § 5) the superior court in San Francisco had power to entertain the suit of the plaintiff, and its jurisdiction having attached, it necessarily had power to determine the substantial rights of the parties before it (Hibernia, etc., Soc. v. Lewis, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; Peck v. Jenness, 7 How. 612, 624, 12 L. Ed. 841).

[4] In the present case, in view of the fact that the enactments of 1915 had received no judicial interpretation, the bank refused to pay, and upon suit being brought submitted itself to the judgment of the court. Under the provisions of 1269a of the Code of Civil Procedure the Attorney General intervened in this action. That section was adopted at the same session of the Legislature at which the amendments under discussion were adopted, and no doubt to protect the interests of the state in the contingency of a claim being made in the interim which must elapse in every instance between the report of the bank and the commencement of the suit in Sacramento county. It provides that whenever the Attorney General is informed that property has escheated or is about to escheat, he may commence an action on behalf of the state to determine its rights to the property "or may intervene on its behalf in any action * * * and contest the rights of any claimant or claimants thereto." The statute does not say that upon his intervention the court in which the action is brought shall be divested of its jurisdiction pending the bringing and determination of another suit. There is no suggestion that any different rules of law shall apply to an intervention under this section of the Code than those which ordinarily control in such cases. It has been broadly stated that the intervener must take the suit as he finds it. A better statement is that the intervention must not retard the principal suit, nor delay the trial of the action, nor change the position of the parties. Hibernia, etc., Soc. v. Churchill, 128 Cal. 634, 61 Pac. 278, 79 Am. St. Rep. 73; Van Gorden v. Ormsby, 55 Iowa, 664, 8 N. W. 625; Boyd v. Heine, 41 La. Ann. 393, 6 South. 714; Mayer v. Stahr, 35 La. Ann. 57; Ragland v. Wisrock, 61 Tex. 391; Cahn v. Ford, 42 La. Ann. 965, 8 South. 477. The fact found by the court that after the commencement of this action the statutory suit was commenced by the Attorney General in Sacramento county had no bearing upon the determination of this case. Jurisdiction having attached, the court should have determined the issue of ownership of the money. Dunphy v. Belden, 57 Cal. 427; Sharon v. Sharon, 84 Cal. 424, 23 Pac. 1100.

[5] What has already been said concerning the question of jurisdiction applies equally to the substantial rights of the parties. A

construction of section 1273 of the Code of Civil Procedure and section 15 of the Bank Act by which title to money on deposit would pass to the state absolutely on the expiration of 20 years, without compensation to the owner and without notice and hearing before his property should be taken, would be intolerable. Not only must a statute be construed, if possible, to avoid unconstitutionality, but the construction must be consistent with sound sense and wise policy, and with a view of promoting justice. San Joaquin, etc., Inv. Co. v. Stevinson, 164 Cal. 229, 128 Pac. 924; In re Mitchell, 120 Cal. 386, 52 Pac. 799; Merced Bank v. Casaccia, 103 Cal. 645, 37 Pac. 648.

In the present case the identity and death of the depositor are admitted and the appellant is the administrator of his estate. As the personal representative of the depositor he was entitled to payment of the deposit at any time the admitted facts were established. Code Civ. Proc. §§ 1552, 1726, 1732. The facts were established by the findings in this action to which the state was a party. Upon the facts found the plaintiff was entitled to judgment. This conclusion is in consonance with the reasons underlying the decision of the Supreme Court in the somewhat similar case of People v. Roach, 76 Cal. 297, 18 Pac. 407.

The judgment is reversed.

We concur: LANGDON, P. J.; HAVEN, J.

(43 Cal. App. 39)

MILLER v. BOYLE, Auditor of City and County of San Francisco. (Civ. 3089.)

(District Court of Appeal, First District, Division 1, California. Aug. 26, 1919. Rehearing Denied by Supreme Court Oct. 23, 1919.)

1. Municipal Corporations 🔑214(2) — Board of Public Works Can Contract Specially with Architects.

Under its implied powers, the board of public works of the city and county of San Francisco is authorized in its discretion to secure by special contract the services of architects in any special case, as the projection of a schoolhouse, to prepare such plans and specifications as may be needed.

2. Municipal Corporations 🔑236—Board Can Contract with Architect without Calling for Bids.

The board of public works of the city and county of San Francisco was authorized to contract with an architect for the preparation of plans and specifications for a projected school house at the usual rate of compensation for such services in the city without calling for bids and awarding the contract to the lowest bidder.

Application for writ of mandate by J. R. Miller against Thomas F. Boyle, as Auditor of the City and County of San Francisco, etc. On demurrer to the petition. Writ directed to issue.

Cullinan & Hickey, of San Francisco, for petitioner.

George Lull, City Atty., and Maurice T. Dooling, Jr., Asst. City Atty., both of San Francisco, for respondent.

J. G. De Forest, of San Francisco, amicus curiæ.

WASTE, P. J. This is an application by the petitioner, who is a duly licensed, certified, and authorized architect, for an alternative writ, to be directed to the defendant as auditor of the city and county of San Francisco, requiring him to approve a claim and demand of petitioner for the sum of $1,205.66, alleged to be due as fees for services as architect, rendered the city and county. The claim was properly presented and duly allowed and approved, until it reached the defendant, who declined to audit the same, upon the ground that the petitioner herein was not employed in accordance with the civil service provisions of the charter of the city and county of San Francisco, and that the claim is not for a regular, stated salary, or based on a per diem. He further contends that the contract for the preparation of the plans and specifications of the schoolhouse, and supervision of such construction, should have been let to the lowest bidder, in accordance with the provisions of sections 14, 15, 16, 17, and 18 of chapter 1 of article 6 of the charter. The facts behind the application are admitted to be correctly set forth in the petition. The matter is submitted to this court on questions of law, raised by the demurrer of respondent.

It appears that, by ordinance of the board of supervisors of the city and county, the board of public works is authorized in its discretion, to obtain plans, drawings, specifications, and details for the erection of public buildings for the city and county of San Francisco, to be erected under the supervision and direction of the board of public works, and for that purpose to engage the services of architects, either by selection or by competition. The method of competition in case the architects, for the purposes specified in the ordinance, are selected by competition is to be determined by the same board. Likewise, that board is authorized to pay for the preparation of details, plans, and drawings and necessary supervision of the work of construction a sum which (including the cost of the preparation of the contract, plans, and specifications) shall not exceed 6 per centum of the entire cost of the building to be constructed. The ordinance further authorizes the board of works to enter into contracts with architects for the purpose of engaging the services therein contemplated.

Another provision of the ordinance declares that nothing therein contained shall be deemed, or construed, as preventing the board of public works from appointing a city architect, or such persons as that board may deem necessary, to perform architectural services for the city and county, or to inspect and supervise the construction of public buildings; it being the intent and purpose of the ordinance, so it declares, to place in the discretion of the board of public works the manner and method of obtaining plans and specifications for public buildings, and the supervision of the construction thereof.

The board of education of the city, after proceedings duly and regularly had in that behalf, requested the board of public works to prepare plans and specifications for a certain schoolhouse, to be known as the Jefferson School, and to be constructed in and by the city and county. The board of public works thereupon, by resolution duly adopted, appointed petitioner, the architect, to prepare plans and specifications for such schoolhouse at an estimated cost of construction of approximately $100,000, and in and by said resolution it was provided that the fee of petitioner for such services should be 6 per cent. of the total cost of the construction of the said schoolhouse, and that the services of the petitioner should include the necessary supervision of construction. It was further agreed by and between the board of public works, acting for the city, and petitioner, prior to his entering into his work, that the fee of 6 per cent. should be paid at certain times and amounts, one-fifth of the fee to be paid upon completion and approval of the preliminary studies for the plans and specifications of the schoolhouse. It was likewise agreed that until the actual cost of the construction of the schoolhouse should be ascertained the payments on account of petitioner's fee were to be based on the estimated cost of the construction thereof.

Thereupon, petitioner prepared the preliminary studies for the plans and specifications of said schoolhouse. In the preparation of these studies for the plans and specifications petitioner used his own private office and materials and employed draftsmen and assistants, paying the cost of said materials and the wages of said draftsmen and assistants, out of his private funds. The estimated cost of the construction of the school, when the preliminary studies for its plans and specifications were completed, was $100,471.66. These preliminary studies for the plans and specifications were delivered to, and accepted and approved by, the board of education and the board of public works. Thereupon, petitioner presented, as before stated, to the proper officers of the city and county, his bill and demand, in proper form, for $1,205.66. That claim the auditor refuses to approve.

It appears as a fact in the case that the fee of 6 per cent. of the actual cost of the construction of the Jefferson School is not greater than the compensation paid to architects on similar employment in the city and county, and is the reasonable value of such services petitioner agreed to render. The fee of 6 per cent. and the times and amounts of progress payments, and the mode of payment, are the usual and customary mode, times, and amounts, respectively, of paying architects in the city and county of San Francisco, whether said architects be employed by the said city and county, or by private persons.

The board of public works of the city and county of San Francisco has charge, superintendence, and control, under such ordinances as are from time to time adopted by the supervisors, of the construction of any, and all, public buildings, and structures, under plans duly approved by the various departments, including all schoolhouses, and fire department buildings, and the repair and maintenance of any, and all, buildings and structures owned by the city and county. Charter of the City and County of San Francisco, subd. 6, § 9, c. 1, art. 6. The same board has power to employ such clerks, superintendents, inspectors, engineers, surveyors, deputies, architects, and workmen, as shall be necessary to a proper discharge of their duties under the article of the charter, and to fix their compensation; but no compensation of any of said persons shall be greater than is paid in the case of similar employments. Charter, § 3, c. 1, art. 6. The first question to be decided in this case is whether, by this language of the charter, the board of works is bound to engage architects exclusively as "employés," at stated monthly salaries, or at a given per diem, or whether it may engage an architect by special contract, to prepare plans and specifications at his own time and expense, for a stipulated fee based on the cost of the construction work to be planned and supervised by him.

[1] The board of public works may employ any number of architects, as it employs all needed clerical forces and workmen, necessary to a proper discharge of the duties imposed by the charter. It may also fix their compensation on a monthly basis. Charter, § 1, c. 4, art. 3. Such architects, when thus regularly employed, would, in our judgment, become employés of the city, and subject to the civil service provisions of the charter, except in the case of the city architect, with which case we are not now dealing. However, we do not find anything in the charter provisions, or in the general law, as we understand it, which will prevent the board of public works, in its discretion, securing the services of skillful architects, in any special case, to prepare such plans and specifications as may be needed. When the charter permits a certain result to be accomplished, but does

not prescribe the means, any reasonable, or suitable, means may be adopted. A municipal board not only has the powers expressly enumerated in the organic act, but also those implied powers which are necessary to the exercise of the powers expressly granted, except in the instances where such implied power is expressly, or impliedly, prohibited. Harris v. Gibbins, 114 Cal. 418–421, 46 Pac. 292.

The right to employ an architect, and prepare plans and specifications, therefore, was incident to the general power of the city to erect schoolhouses. Dillon on Municipal Corporations, § 701; Spalding v. Chamberlain & Co., 130 Ga. 649, 61 S. E. 533. We find nothing in the charter which makes the employment of architects at a regular fixed salary, or per diem, the exclusive method by which the city might carry out this incidental power. The board of public works, clothed with general authority to construct and acting under the ordinance of the board of supervisors had power to accomplish a certain result, which could not be accomplished by it without the employment of other agencies, to wit, of architects, to prepare the plans and specifications for such erection. In this case, the charter not directly prescribing that such plans and specifications could only be prepared by such architects as might be regularly employed by the board of public works, it must be construed to afford opportunity for the adoption, as was said in Harris v. Gibbons, supra, "of any reasonable, and suitable, means."

[2] The claim of respondent that the contract between the board of public works, and the petitioner, should only have been awarded after compliance with the provisions of the charter, relative to letting contracts to the lowest bidder, has been disposed of adversely to his contention. The same cases also seem to establish that the board of public works, in employing a duly authorized architect, and upon the terms and conditions prevailing in the community, were adopting reasonable and suitable means, these decisions holding that the engagement of an architect to prepare plans and otherwise render services in connection with the erection of city buildings on a percentage basis is not in violation of the provisions of municipal charters requiring a written contract with the lowest and best bidders. "The reasonableness of such construction," said the court in one of these cases, "is most strikingly illustrated in the present case. An architect is an artist. His work requires taste, skill, and technical learning, ability of a high and rare kind. Advertising might bring many bids, but it is beyond peradventure that the lowest bidder would be least capable and most inexperienced and absolutely unacceptable. As well advertise for a lawyer or civil engineer for the city and intrust its vast affairs and important interests to the one who would work for the least money." Cudell v. Cleveland, 16 Ohio Cir. Ct. R. (N. S.) 374; Stratton v. Allegheny Co. et al., 245 Pa. 519, 91 Atl. 894; City of Newport News v. Potter, 122 Fed. 321, 58 C. C. A. 483; City of Houston v. Glover, 40 Tex. Civ. App. 177, 89 S. W. 425.

It being admitted that the terms and conditions of compensation provided in the contract entered into between the petitioner and the city are just and reasonable, and are the usual terms and conditions covering the rendition of similar services in this community, we are of the opinion that the petitioner is entitled to the relief sought.

Petitioner is also invoking the doctrine of estoppel, claiming that the city and county of San Francisco has received the benefit of his labor and expenditure of time and money, and should not now be heard to say that he should not be compensated. In view of the conclusion we have already announced, it is not necessary to rest our decision upon that contention, but we are of the opinion that what we said in a very recent case (Warren Bros. Co. v. Boyle, 183 Pac. 706) does apply to the facts of this case.

Let the writ issue as prayed for.

We concur: RICHARDS, J.; BARDIN, Judge pro tem.

43 Cal. App. 34

REID v. BOYLE, Auditor of City and County of San Francisco. (Civ. 3087.)

(District Court of Appeal, First District, Division 1, California. Aug. 26, 1919. Rehearing Denied by Supreme Court Oct. 23, 1919.)

MUNICIPAL CORPORATIONS 🔑220(1)—ARCHITECT NOT EMPLOYÉ OR OFFICER DRAWING MONTHLY SALARY.

City architect exempted from civil service under City and County of San Francisco Charter, art. 13, § 11, subd. a, and appointed by resolution of board of public works to draw plans for and supervise construction of public buildings and improvements when directed to so do by the board, for a compensation specified in resolution, the resolution having been made pursuant to ordinance authorizing such board to obtain plans for erection of public buildings, was not, in the ordinary sense, an employé or officer of the city and was not required to be paid a fixed monthly salary under chapter 4, art. 3, § 1.

Mandamus by John Reid, Jr., against Thomas F. Boyle, as Auditor of the City and County of San Francisco, etc. Writ granted.

Cullinan & Hickey, of San Francisco, for petitioner.

George Lull, City Atty., and Maurice T. Dooling, Jr., Asst. City Atty., both of San Francisco, for respondent.

J. G. De Forest, of San Francisco, amicus curiæ.

WASTE, P. J. In this proceeding, as was the case in Miller v. Boyle, 184 Pac. 421, this day decided, the petitioner is seeking an alternative writ of mandate directed to the respondent as auditor of the city and county of San Francisco, requiring him to audit a claim in the sum of $180, alleged to be due as architect's fees for the preparation of preliminary studies for plans and specifications for a residence building, for the use of the chief of the fire department of the city and county. The facts are in all particulars, with one essential difference, so similar to those presented in the Miller Case, supra, that we will only state the additional matter in controversy. The two cases were argued and submitted to us for decision upon the facts set forth in the petition, and the law as raised by the demurrer.

After the passage of the ordinance authorizing the board of public works, in its discretion, to obtain plans, drawings, specifications, and details for the erection of public buildings, referred to in the Miller Case, the board of supervisors of the city and county, by resolution regularly adopted, directed the board of public works to prepare plans and specifications for a building, suitable and adapted for residential purposes, for the chief engineer of the fire department of the city, and to submit the same, when so prepared, first to the board of fire commissioners, and then to the board of supervisors for approval and action thereon. Thereafter, by resolution, duly adopted, the board of public works, appointed John Reid, Jr., the petitioner here, city architect. The resolution provides:

> "That the duties of the city architect shall be to prepare plans and specifications for all public buildings, works, or improvements, for which the board of public works shall direct him to prepare such plans and specifications, and to supervise the construction of all public buildings, works, or improvements, the construction of which the board of public works shall direct him to supervise."

The resolution also provides:

> That the compensation of such city architect "shall be six per cent. of the total cost of the construction of the respective public buildings, works, or improvements, plans and specifications of which he shall so prepare, and the construction of which he shall so supervise; provided, however, that if he prepares the plans and specifications, when directed by the board of public works, as aforesaid, but is not directed to, or does not, supervise the construction of any particular public building, work, or improvement, his compensation in preparing such plans and specifications alone shall be four and one-half per cent. of the total cost of the construction of such building, work, or improvement."

The resolution then provides for partial payments as the work progresses, one-fifth of the entire compensation for the entire work to be paid upon the completion of the preliminary studies for plans and specifications for any particular public building. Until the actual cost of construction of any particular building, work, or improvement, shall be ascertained, the payments on account of such compensation of the city architect shall be based upon the estimated cost of the construction.

The resolution recites the authorization and direction to the board of public works, by the board of supervisors, to prepare plans and specifications for the fire chief's house, then directs the city architect to prepare plans and specifications for that building, and superintend its construction, his compensation for such services to be 6 per cent. of the total cost of the building, which total cost is estimated at $20,000. Further direction to prepare plans and specifications for the Galileo high school is contained in the resolution.

Immediately after the adoption of the resolution of the board of works last mentioned, the petitioner accepted such appointment as city architect, upon the terms stated in the said resolution, at once entered upon the performance of his duties as such, and ever since has been, and now is, the duly appointed and acting city architect of the city and county of San Francisco. In the discharge of these duties he thereafter prepared and completed the preliminary studies for plans and specifications of the fire chief's residence, the estimated cost of the construction of which, when said preliminary studies were completed, was found to be $15,000. The preliminary plans were delivered to, and accepted by, the board of public works. One hundred and eighty dollars is the correct amount of the installment of the fee due under the terms of his employment, which, as in the case of Miller v. Boyle, supra, are the identical terms of employment for architects engaged in the general practice of the profession of architecture in the city and county of San Francisco.

Under the provisions of the charter of the city and county of San Francisco (subdivision A, § 11, art. 13), the city architect is exempt from the provisions thereof relating to classification of employés by the civil service commission. The respondent in the instant case makes no contention, therefore, that the civil service provisions of the charter apply to petitioner, but bases his refusal to audit the claim on the ground that it arises out of a fee and compensation of an architect computed upon the cost of the construction of a public building. In other words, as we understand it, respondent's contention is that, under the provisions of the charter, the city architect is an employé of the city under the appointment by the board of public works, and that his compensation must be a fixed salary, payable monthly. He relies upon section 1, c. 4, art. 3, which, in part, reads:

> "The salaries and compensation of all officers, including policemen, and employés of all classes, and of all teachers in public schools, and others employed at fixed wages, shall be payable monthly."

No express provision is made by the charter of the city and county of San Francisco creating the office of city architect. The only reference to such position found in the charter is its enumeration in the list of positions exempted from the civil service provisions. No salary is fixed and no method of compensation is provided. Assuming, therefore, that under its implied powers it created such an office, there still remains the question as to how the compensation attached to the office shall be paid. There seems to be a reasonable analogy between the situation thus presented and the facts existing in the line of cases in which the right has been upheld of city councils and boards of supervisors of counties to employ special assistants, particularly for the rendition of legal services, and to compensate them by a certain amount of the amount recovered in litigation. We are not inclined to hold that the ordinance directing the board of public works, in its discretion, to obtain plans for public buildings of the city and the resolution of the board of public works appointing petitioner city architect can be held to make petitioner thereby an employé, or an officer of the city, in the ordinary sense, or an employment requiring a definite fixed monthly compensation. His duties are to prepare plans and specifications only for such public buildings, works, or improvements as may be directed by the board of public works, and for a compensation already agreed upon and fixed by resolution. Until the board directs performance of the services, and they are performed, no claim arises against the city by virtue of the office. Nothing contained in oral argument, or in the briefs of the parties, causes us to waver in our opinion that, under such circumstances, the board of public works adopted a reasonable and a customary means of availing itself of the services of petitioner. Under the facts of the instant case the question whether or not petitioner holds the position styled "city architect" is a false quantity for consideration.

No reason presents itself to us why the city was not empowered by its charter to enter into the arrangement made with the petitioner. Having done so, through its authorized agency, the board of public works, and petitioner, with his own private organization, having performed his part of the contract, the fruits of which have been accepted by the city, petitioner is entitled to compensation for his work.

If, in the judgment of the board of public works, which has full power and authority over such matters, the employment of petitioner was proper and in accord with the conduct of such business in the community, the compensation agreed upon appearing to be just and reasonable, we see no reason why petitioner is not entitled to have his claim audited.

What we said in the case of Miller v. Boyle, supra, disposes of all other contentions made by the respondent.

Let the writ issue as prayed for.

We concur: RICHARDS, J.; BARDIN, Judge pro tem.

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43 Cal. App. 67

DUPES v. DUPES. (Civ. 2951.)

(District Court of Appeal, First District, Division 1, California. Aug. 28, 1919.)

1. Divorce 🔑186 — Dismissal of appeal for contumacy of appealing defendant wife.

In view of the nature of the action, an appeal from a judgment granting a husband divorce and custody of minor children, who were later placed in a children's home by order of court, will not be dismissed because the wife wrongfully secured possession of the minor children and removed them from the jurisdiction.

2. Divorce 🔑184(4, 6, 7)—Trial court exclusive judge of credibility of witnesses.

In a divorce suit, the trial court is the exclusive judge of all questions of credibility of witnesses and weight of evidence, and on appeal will be assumed to have considered all such evidence in the light of such rules laid down by law for the guidance of court and jury.

3. Divorce 🔑184(6) — Decision as to cruelty reversed only when without substantial support in evidence.

Whether acts and conduct constitute such cruelty as warrants granting a divorce is a question of such nature that the conclusion of the trial court is necessarily entitled to great weight, and it is only where it is without any substantial support in evidence that it will be disturbed on appeal.

4. Appeal and error 🔑757(3)—Objection to evidence not reviewable when part objected to not in brief.

Where appellant made no attempt to print in the briefs any portion of the testimony relative to, or having even the most remote bearing on, alleged errors with reference to rulings on matters of evidence, as required by Code Civ. Proc. § 953c, the appellate court is under no compulsion to examine a voluminous record with reference to alleged errors in admission of evidence.

5. Divorce 🔑184(12)—Error in admitting evidence as to mother-in-law harmless.

In an action by a husband for divorce on the ground of wife's extreme cruelty, where he maintained that his mother-in-law exercised an immoral control over his wife, *held*, that error in allowing too wide a latitude in the examination of witnesses relative to the character and conduct of the mother-in-law was harmless; the matter being collateral.

6. DIVORCE 🔑27(14) — WHETHER ABSENCE CONSTITUTES EXTREME CRUELTY.

Whether specific absence of one spouse from the family home without consent of the other constitutes extreme cruelty depends on the facts and circumstances of each particular case.

7. DIVORCE 🔑27(18)—EXTREME CRUELTY IS QUESTION OF FACT.

Whether any particular acts or course of conduct constitutes extreme cruelty, warranting granting of a divorce, is a question of fact to be deduced from the circumstances of each case.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by T. W. Dupes against Eugenia N. Dupes. From a judgment for plaintiff, defendant appeals. Affirmed.

MacKnight & Fitzgerald and P. N. Myers, all of Los Angeles, for appellant.

E. J. Emmons and Chas. N. Sears, both of Bakersfield, and T. C. Gould, of Los Angeles, for respondent.

BARDIN, Judge pro tem. The plaintiff instituted an action against the defendant for divorce upon the ground of extreme cruelty. The defendant denied the allegations of cruelty and cross-complained against plaintiff, seeking a decree of divorce upon the grounds of extreme cruelty, habitual intemperance, and willful neglect. Judgment was for the plaintiff, and he was awarded the custody of the two minor children of the parties. Two proceedings have already been disposed of by the higher courts of the state involving the custody of these children. In re Dupes, 31 Cal. App. 698, 161 Pac. 276; Dupes v. Superior Court, 176 Cal. 440, 168 Pac. 888.

[1] Before taking up the consideration of this appeal from the judgment of the lower court upon its merits, it will first be proper to dispose of a motion to dismiss the present appeal because of the claim of respondent that appellant has so interfered with the custody of said children, since taking the appeal, that she has placed herself in contempt of the order of the superior court of the county of Kern, sitting as a juvenile court, and ought not, therefore, be permitted to press her appeal to a conclusion upon its merits. A number of reasons are urged for the dismissal of the appeal, but the only one meriting the particular attention of this court relates to alleged willful and contumacious conduct on the part of the appellant with reference to the custody of the children of the parties to this action.

Briefly, the facts, stated in form of affidavit, surrounding such alleged misconduct of the appellant, which, since they are not denied, may, for the purpose of this discussion, be assumed to be true, are these: Very shortly after the decision in Re Dupes, supra, the juvenile court of Kern county, by its order, caused these unfortunate children to be placed in the custody of the Children's Shelter of the city of Bakersfield; C. P. Badger, truant officer of that county, having direct charge of them, pending the hearing of a petition placed before it to have them declared wards of that court. Leave was given the appellant by the judge of the juvenile court to visit the children on January 17, 1918; but, in violation of the terms of that permission and in contempt of the order of said juvenile court, the appellant took possession of said children and shortly thereafter removed them, it is believed, from the jurisdiction of the state of California, as the whereabouts of defendant and of the two children has ever since been unknown to plaintiff and to said court, although plaintiff has expended a large amount of money and has been very diligent in endeavoring to ascertain their whereabouts.

The point made for the dismissal of the appeal is not different in principle from that urged for the dismissal of three appeals in the case of Vosburg v. Vosburg, 131 Cal. 628, 63 Pac. 1009, and on the authority of that case the motion to dismiss the appeal must be denied. Not only are we guided to this end by the sound logic of that particular case, but also by the analogous case of Johnson v. Superior Court, 63 Cal. 578. And we may here add that consideration for the welfare of the minors and of their probable ultimate disposition, as well also the interest the state has in the maintenance of the marital state, require that appeals involving the merits of such actions should not be dismissed, except upon clear authority so to do.

In Deyoe v. Superior Court, 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73, Mr. Justice Angellotti, speaking for the court, said:

> "While an action to obtain a decree dissolving the relation of husband and wife is nominally an action between two parties, the state, because of its interest in maintaining the same, unless good cause for its dissolution exists, is an interested party. It has been said by eminent writers upon the subject that such an action is really a triangular proceeding, in which the husband and the wife and the state are parties."

And in McBlain v. McBlain, 77 Cal. 507, 20 Pac. 61, it is stated that:

> "The parties to the action are not the only people interested in the result thereof. The public has an interest in the result of every suit for divorce, the policy and the letter of the law concur in guarding against collusion and fraud,

and it should be the aim of the court to afford the fullest possible hearing in such matters."

The cases cited in support of the motion to dismiss the appeal are from other jurisdictions, and are directed to the contumacious conduct of the husband relative to the payment of money for the prosecution of the wife's cause of action, or for alimony, or such kindred matters. As stated in the note to the case of Brown v. Brown, 22 Wyo. 316, 140 Pac. 829, in 51 L. R. A. (N. S.) 1119:

> "Some of the courts lay down the rule that the proper remedy for failure * * * to comply with an order of the trial court for the payment of counsel fees, etc., is by dismissal of the appeal or suspension of final judgment" (citing cases).

But other courts have adopted rules analogous to and in support of the principle stated in Vosburg v. Vosburg, supra. See Eastes v. Eastes, 79 Ind. 363; Dwelly v. Dwelly, 46 Me. 377.

[2, 3] Numerous charges of misconduct on the part of the wife are made in plaintiff's complaint, but the principal allegations thereof relate to defendant's departure from the home of plaintiff and defendant with one of their children of very tender years, under peculiar and unwarranted circumstances, the plaintiff not being advised as to her whereabouts or that of the child until her return to Bakersfield after an absence of over four months, and that shortly after her return she suffered a miscarriage by reason of her own willful act, being actuated by the desire to conceal from plaintiff her sinful and adulterous conduct while away from him. The plaintiff also alleged in his complaint that the defendant permitted plaintiff's mother-in-law to exercise an immoral influence and control over her, subverting her morals, undermining her character, and causing her to pursue a course of apparent illicit intimacy with other men.

It will serve no useful purpose to go into a detailed survey of the evidence produced to substantiate the husband's charges, and which the trial court by its findings found to be true, only a portion of which are here referred to. Suffice it to say, in a general way, that the findings are responsive to the pleadings and are sufficiently supported by substantial evidence, and, where necessary, corroborated as required by section 130 of the Civil Code, and that the trial judge was fully warranted in his view of the merits of the case, so far as we can discover from the cold pages of the transcript.

The plaintiff's charge, found to be true, that the wife had suffered a miscarriage by reason of a self-inflicted abortion, giving birth to a fetus of such growth as to preclude the belief that conception had taken place by reason of the accessibility of the plaintiff, was sufficiently corroborated. The probable age of the evacuated fetus was testified to by the surgeon called in to administer to defendant. The husband's testimony of the admission on the part of the wife as to the instrument which she had used, was corroborated by the discovery by a third party of such instrument in defendant's home, which, by the testimony of another physician, was proven to be well suited to the operation complained of.

The following language from the learned author of the opinion in the case of Robinson v. Robinson, 159 Cal. 203, 113 Pac. 155, is relevant to the present case:

> "The trial court was the exclusive judge of all questions of credibility of witnesses and weight of evidence, and must be assumed to have considered all the evidence given in the light of such rules as are laid down by the law for the guidance of court and jury in the determination of questions of fact. It should further be borne in mind that the question whether acts and conduct constitute such cruelty as, under all the circumstances shown, warrants the granting of a divorce, is of such a nature that the conclusion of the trial court is necessarily entitled to great weight, and it is only where it is clear that it is without any substantial support in the evidence that it will be disturbed on appeal."

The defendant has assigned a number of errors claimed to have been committed by the trial court in the admission and exclusion of evidence, and which, it is contended, warrants a reversal of the judgment.

[4] The reporter's transcript of the testimony in this case embraces 852 pages of typewritten matter. No attempt was made to print in the briefs of the appellant any portion of the testimony relative to, or having even the most remote bearing upon, the alleged errors of the court with reference to rulings upon matters of evidence, as required by section 953c of the Code of Civil Procedure. While this court does not feel under any compulsion to examine the very voluminous record with reference to these alleged errors referred to in the briefs of appellant, it has, nevertheless, done so under the feeling that the welfare of two children is vitally concerned, and that this is an action in which the state is also an interested party, and that to require counsel now to file a supplement to appellant's brief would be to entail further delay.

[5] After a careful examination of each of such asserted grounds of error, we cannot find error of any substantial weight. We are inclined to believe that there was too wide a departure from the issues of the case permitted in the examination of witnesses relative to the character and conduct of the mother-in-law of plaintiff, but such error, being upon a collateral matter, is of no grave importance.

[6] The court did not commit error in admitting evidence in support of the allegation

concerning defendant's departure from the family home. Smith v. Smith, 62 Cal. 466, does not purport to establish a rule of evidence, nor attempt to state a positive rule of law to be applied to other like cases where the conditions are not identical. Whether or not any specific absence of one spouse from the family home, without the knowledge or consent of the other, constitutes extreme cruelty, depends entirely upon facts and circumstances of each particular case. In the instant case, however, the mere absence of the defendant from the family home without plaintiff's consent is not made the basis of his cause of action. That is but a single element in the theory of plaintiff's case.

[7] Whether or not any particular acts or course of conduct constitutes extreme cruelty within the meaning of the law is a question of fact to be deduced from all the circumstances of each case. Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660.

Certain of the findings of the court, beside that already stated, are made the object of attack as not having the proper support in the evidence. Commenting briefly upon these criticisms, we may say that an examination of the record of the case shows such attacks to be without merit. There was sufficient evidence to show that the defendant left her home against the will and over the protest of the plaintiff; that the defendant's mother was an inmate of the home of plaintiff and defendant, and was permitted to exercise an evil influence over her daughter; that in the absence of plaintiff the defendant was in the habit of inviting men who were strangers to plaintiff to the home of plaintiff and defendant; that defendant was in the habit of frequenting dances and associating with persons unknown to plaintiff; and that defendant suffered the miscarriage already referred to in order to conceal from plaintiff her condition of pregnancy for which plaintiff was not responsible. These findings are sustained by the testimony of either the husband with proper corroboration, or by the testimony of other witnesses.

The claim of counsel for defendant that the findings against the truth of certain of the allegations contained in her cross-complaint are not sustained by the evidence may be dismissed with the remark that, since the trial court was the judge of the credibility of the witnesses below, who gave conflicting testimony upon the subject of defendant's allegations, this court cannot now weigh the evidence in order to see where the preponderance of proof lay.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

43 Cal. App. 74

PARK v. ORBISON. (Civ. 3011.)

(District Court of Appeal, First District, Division 1, California. Aug. 29, 1919.)

1. MUNICIPAL CORPORATIONS 🔑705(5)—DRIVER OF AUTOMOBILE INJURING PEDESTRIAN NEGLIGENT.

Defendant, who ran plaintiff down at a busy street intersection, *held* negligent in operating his automobile at a speed in excess of 10 miles an hour while his wind shield was obscured by rain, etc.

2. MUNICIPAL CORPORATIONS 🔑705(2)—DRIVERS OF AUTOMOBILES AND PEDESTRIANS MUST USE ORDINARY CARE TO AVOID INJURY.

While pedestrians walking across busy public streets are required to use ordinary care, drivers of vehicles must also use ordinary care to prevent injuries to pedestrians.

3. MUNICIPAL CORPORATIONS 🔑705(10)—PEDESTRIAN CAN PRESUME THAT OPERATOR OF VEHICLE WILL OBSERVE LAW.

A pedestrian crossing a busy street has the right to presume that a motorist will not approach, either on the wrong side of the street or at an excessive rate of speed, and will endanger him without warning in violation of Vehicle Act 1913, §§ 12, 20, and 22.

4. MUNICIPAL CORPORATIONS 🔑706(7)—CONTRIBUTORY NEGLIGENCE OF PEDESTRIAN JURY QUESTION.

Plaintiff, a pedestrian, who was run down by a motor vehicle proceeding at an excessive rate of speed on the wrong side of the street, *held* not contributorily negligent as a matter of law in failing to keep a lookout for vehicles coming from the direction from which the defendant's motor approached, where plaintiff had no reason to anticipate injury; the question of his negligence being one of fact.

5. APPEAL AND ERROR 🔑996—FINDINGS OF FACT ON CONFLICTING EVIDENCE CONCLUSIVE.

A finding of fact by the trial court on a question from which conflicting inferences might be drawn is conclusive on appeal.

6. TRIAL 🔑90—COUNSEL SHOULD MOVE TO STRIKE OUT OBJECTIONABLE PORTION OF ANSWER.

Where a question was answered without objection, counsel if deeming the answer objectionable, should move to strike out the objectionable portion.

7. APPEAL AND ERROR 🔑237(2) — WHERE QUESTION WAS ANSWERED WITHOUT OBJECTION MOTION TO STRIKE NECESSARY TO REVIEW.

Where counsel failed to move to strike objectionable portions of an answer, the question having been answered without objection, the matter is not available in the appellate court though counsel, after the question was answered, made objections.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Andrew Park against Thomas J. Orbison. From a judgment for plaintiff, defendant appeals. Affirmed.

Duke Stone, of Los Angeles, for appellant.
Wheaton A. Gray, of Los Angeles, for respondent.

BARDIN, Judge pro tem. Plaintiff was awarded a judgment for $1,000 for damages suffered by him through the alleged negligent operation of an automobile of the defendant at the intersection of Hill and First streets in the city of Los Angeles. The defendant denied negligence upon his part, and in further defense to the action pleaded affirmatively the contributory negligence of the plaintiff.

The accident took place on the evening of December 16, 1914, at about the hour of 7 o'clock p. m. and at a time when it was dark and stormy. The plaintiff was proceeding eastward on the south side of First street and intended to cross Hill street at its intersection with First street. When he reached the outer edge of the sidewalk and before stepping out into Hill street proper, he looked and listened for approaching vehicles coming from both directions on that street. He was carrying a typewriter in his hands at the time, and lap robe over his shoulders. At about 200 feet to the north of the intersection of the streets referred to, the traffic on Hill street is accommodated by two tunnels, one for the use of a railway and the other for the use of automobiles and pedestrians. Plaintiff testified that he heard the sound of an automobile emerging from the tunnel to the north and coming towards him, and that he saw, near the intersection of Hill and Second streets, which would be to the south and approximately 400 feet distant, the light of an automobile approaching from that direction. Estimating that he had an abundance of time to cross the street without danger from the machine approaching from his right, he continued his journey across Hill street, with his eyes fixed upon the machine approaching from his left, and which was close at hand. At the instant the plaintiff reached the center of Hill street, which at that point is 56 feet wide from curb to curb, he looked to his right, that is, to the south, and saw the flare of the light of the automobile driven by the defendant, and attempted to escape the impending danger by stepping backward. When he first observed this machine it was distant, so plaintiff testified, about 15 or 20 feet and coming rapidly towards him. Plaintiff heard no warning of its approach, and it is not claimed by the defendant that any such warning was given. The effect of its projected light was overcome by the light of cars approaching from the opposite direction. The particular street crossing was well lighted at the time by street lights.

The plaintiff, unable to escape collision, was knocked down and received personal injuries for which, and for loss of earnings by reason thereof, the court awarded him judgment.

The plaintiff, a lawyer and publisher by occupation, stated that he was, at the time of the accident familiar with the terms of the statute regulating the use of motor-driven vehicles upon streets and highways and believed that he was exposed to no danger from any vehicle approaching from the south until he had passed the center of the street.

It may be stated that the automobile tunnel already referred to is situate at the east side of Hill street, the west wall of which projects 23 feet out into the street. By reason of this, all automobiles using this tunnel are accustomed to make the east side of Hill street in the near vicinity of the tunnel, the principally traveled part of that highway, such use extending to about the intersection of First street, of which practice both parties to the action were familiar.

The defendant testified that at the time of the accident he was traveling very slowly and on the right-hand side of the street. The evidence is sharply conflicting upon both these elements. An eyewitness to the accident estimated the speed of defendant's automobile at that time to be at the rate of from 10 to 12 miles per hour, while the plaintiff testified the rate to be from 15 to 20 miles per hour. If the offending machine traveled as far as 400 feet, or substantially that distance, while the plaintiff was walking from the curb to the center of the street, a distance of 28 feet, it follows that the speed of defendant's automobile had, at least immediately previous to the accident, been very rapid. It is very plainly shown by direct and indirect evidence produced at the trial that the defendant was not traveling on his right-hand side of the street as claimed, and that the plaintiff was struck while at a point west of the center of Hill street.

[1] It appears very clear to us that the defendant did not operate his automobile at the time of the accident in a careful and prudent manner and with due regard for the safety of pedestrians. His view of the crossing at the intersecting streets was obscured and obstructed by reason of the condition of his wind shield because of the falling rain, yet, notwithstanding this, he was traveling at a rate of speed in excess of one mile in six minutes. He blindly ran his machine across these intersecting streets where pedestrians might very well be expected to be. He did not see the plaintiff until it was too late to avoid striking him. He sounded no warning of his approach at the street crossing. He was not traveling upon his right-hand side of

the street as the statute and common usage required, and there was no obstruction or condition of the street requiring his departure from this rule of the road. The evidence abundantly supports the findings of the trial court as to the defendant's negligence.

[2] It is insisted that the plaintiff should be precluded from recovering in this action for the reason that his conduct clearly established contributory negligence in that it was plaintiff's duty to keep a sharp lookout for the approach of vehicles coming from both directions and at all times and at every point while crossing the street; and that, having seen the lights of automobiles coming from both his left and his right, he should have kept a lookout for both approaching machines, although he had not passed the center line of the street at the time of the accident.

While it is true that pedestrians walking across busy public streets are required to use ordinary care to see that they do not collide with or are run over by vehicles, it is likewise true that the drivers of vehicles must use ordinary care to prevent injury to pedestrians under such circumstances. Brown v. Brashear, 22 Cal. App. 135, 133 Pac. 505; Wiezorek v. Ferris, 176 Cal. 353, 167 Pac. 234.

[3-5] The scene of the accident was in the business section of a populous city. The plaintiff did as a prudent man would have done under like circumstances. He was justified in his belief that he had ample time to at least reach the center of Hill street before there could be any danger coming from his right. He was warranted in believing that any machine approaching from that direction would, as required by law, and in conformity with the customary usage of the street at that particular place by reason of the local conditions well known to both plaintiff and defendant, and already referred to, travel on the east side of Hill street. And he furthermore was entitled to the assurance that the driver of any vehicle approaching from his right would use such care and circumspection as the circumstances required, and that such machine would not approach at an excessive rate of speed nor endanger him without warning. Vehicle Act 1913, §§ 12, 20, and 22; Stats. 1913, c. 326. For the trial court to have held as a matter of law that the plaintiff's conduct was such as to constitute negligence under the circumstances set out would have required the adoption of a standard of care and circumspection on the part of a pedestrian crossing intersecting streets not in accord with the customary use of streets by pedestrians under like circumstances, nor obedient to any rule of law which has been brought to our attention.

The cases of Niosi v. Empire Laundry Co., 117 Cal. 257, 49 Pac. 185, and Brown v. Pacific Electric Railway Co., 167 Cal. 199, 138 Pac. 1005, do not justify the contentions made by appellant on this particular point. The question of whether the conduct of plaintiff, upon the occasion referred to, amounted to negligence or not, is to be determined from the attendant circumstances. He was not bound to look and listen for approaching vehicles when he started across the street, regardless of the circumstances of his environment. There might well be circumstances when to fail to do so would amount to negligence. Mann v. Scott, 182 Pac. 281, decided June 13, 1919. And for like reasons it cannot be said, as a matter of law, that plaintiff was negligent in not keeping a vigilant lookout for approaching machines coming from both directions before he reached the center of the street.

But in the instant case the evidence shows that, whether required by any positive rule of law or not to look and listen for approaching vehicles coming from both directions before crossing the street, the plaintiff did in fact so act. It is true that he did not look to his right again until he reached the center of the street; but, as a reasonably prudent man, he was justified in this conduct by reason of the attendant circumstances. Not only had he estimated that he had ample time to cross the street before he would be liable to any danger from the defendant's automobile on account of its relatively great distance from him when he took up his journey across the street, but he had the right to assume that the driver of that machine would perform his duty and obey the law. Harris v. Johnson, 174 Cal. 55, 161 Pac. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560; Scott v. San Bernardino Valley, etc., Co., 152 Cal. 604, 93 Pac. 677.

The question of plaintiff's alleged contributory negligence was a question for the trial court, and the following language from the somewhat similar case of Blackwell v. Renwick, 21 Cal. App. 131, 131 Pac. 94, may well be applied to this case:

> "In this case, under the state of the evidence, as we have briefly summarized it, it became the duty of the court to determine the question as to the negligence of the defendant and as to whether plaintiff was, under all of the circumstances shown, guilty of contributory negligence, and with the conclusions thereon made, under the authorities, an appellate court cannot interfere."

[6, 7] There is no merit in the claim that the court committed error in admitting hearsay evidence when it permitted the plaintiff to testify as to the effect attacks of dizziness, stated to have resulted from the injury complained of, had upon his mental feelings. The question was a proper one, and not objected to. In answer to this question it was testified that upon one occasion, a considerable time after the accident, when attacked

by dizziness, plaintiff saw a former business associate with a broad smile upon his face, who asked the plaintiff "where he had gotten his drink." Counsel for the defendant was silent until the question had been fully answered, and then said, "We object to that as incompetent, irrelevant, and immaterial." The claim is now made that a portion of the answer was hearsay and was a conclusion of the witness and too remote in time to be admissible at all. The proper remedy was for counsel for the defendant to have made a motion at the time this testimony was given to strike out the objectionable portion of the answer, if it contained any such matter. People v. Swist, 136 Cal. 520, 69 Pac. 223; People v. Cole, 141 Cal. 88, 74 Pac. 547. Having failed to avail himself of the remedy at hand, defendant may not now complain, even though the objection made at the trial be now subject to amendment so as to include grounds of objection not then stated, which, of course, cannot be granted. The portion of the answer now criticized, while perhaps not directly responsive to the question, was relevant and material to the issue of damages.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

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42 Cal. App. 674

BECK et al. v. RANSOME-CRUMMEY CO. et al. (Civ. 2880.)

(District Court of Appeal, First District, Division 2, California. Aug. 14, 1919. Rehear-Denied by Supreme Court Oct. 9, 1919.)

1. CONSTITUTIONAL LAW 🔑290(1)—ASSESSMENT FOR IMPROVEMENTS INVALID WHERE LOCAL BOARD HAD NO JURISDICTION.

Owner attacking assessment on ground that local board failed to acquire original jurisdiction may rest on the constitutional guaranty that his property may not be taken without due process of law.

2. MUNICIPAL CORPORATIONS 🔑488, 489(5)—WHERE ASSESSMENT VOID, OWNER NEED NOT APPEAL BUT RESIST ENFORCEMENT ON JURISDICTIONAL GROUNDS.

If the invalidity of the initial resolution of intention is apparent on its face, the owner is not required to seek its correction by appeal to the council, but may stand upon his rights whenever an attempt is made to assert any claim based on a void assessment.

3. CONSTITUTIONAL LAW 🔑251—DUE PROCESS OF LAW AS A DEFENSE.

Constitutional guaranty against taking of property without due process of law is always and everywhere present to protect the citizen against arbitrary interference with his rights.

4. CONSTITUTIONAL LAW 🔑251—"DUE PROCESS OF LAW" DEFINED.

"Due process" of law is the exact equivalent of the "law of the land" as used in the Magna Charta, and, broadly speaking, means that before a man's life, liberty, or property may be taken by the state, he must be given notice of the proceedings which may terminate in the taking, and be given an opportunity to be heard in his own defense, the notice to be a real and reasonable one, and the hearing such as ordinarily or at least reasonably is given in similar cases.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

5. CONSTITUTIONAL LAW 🔑278(1)—PERFORMANCE OF INITIAL STATUTORY ACT NECESSARY TO DUE PROCESS OF LAW.

If the statute requires, as the initial step in the process of depriving a man of his property, the performance of a specifically defined act, that act must be performed substantially, or no jurisdiction exists for further action in that proceeding against him.

6. MUNICIPAL CORPORATIONS 🔑408(1)—ACTS REGARDING SPECIAL ASSESSMENTS TO BE LIBERALLY CONSTRUED.

Legislative acts regarding special assessments for public improvements are to be liberally construed.

7. CONSTITUTIONAL LAW 🔑309(1)—SUMMONS NOT IN COMPLIANCE WITH STATUTE WANTING IN DUE PROCESS OF LAW.

If any statement expressly required by Code Civ. Proc. § 407, to be made in summons, is entirely omitted, service of summons does not give the court jurisdiction to proceed against the defendant; such service not constituting the notice to defendant essential to due process of law.

8. PROCESS 🔑104—COMPLIANCE WITH STATUTE NECESSARY FOR CONSTRUCTIVE SERVICE.

Where constructive service is permitted, the substantial requirements of the statute regarding the matters to be stated in the published notice must be fulfilled.

9. MUNICIPAL CORPORATIONS 🔑513(7)—BURDEN ON THE STATE TO SHOW NOTICE OF PROCEEDINGS FOR STREET IMPROVEMENT.

The burden is on the state, and those claiming under it adversely to the individual pursuant to proceedings for street improvements under the Vrooman Act, to show that the individual had notice of the proceedings; notice in such case being implied from publication.

10. LIMITATION OF ACTIONS 🔑1—PUBLIC POLICY REQUIRES ENFORCEMENT OF STATUTE.

Statutes of limitations are upheld and enforced regardless of personal hardship because public policy requires it.

11. MUNICIPAL CORPORATIONS 🔑450(1)—FILING OF MAP AND REFERENCE THERETO IN RESOLUTION OF INTENTION MANDATORY.

In street pavement proceedings under Vrooman Act, the filing of map or plat showing territory to be included in assessment district, and the reference thereto in resolution of intention under St. 1913, p. 406, are mandatory and jurisdictional requirements.

12. CONSTITUTIONAL LAW ⚷289—OMISSION OF STATUTORY REQUIREMENT IN PROCEEDING FOR STREET IMPROVEMENTS RENDERS IT INVALID.

Where a clear statutory requirement is omitted from the initial resolution or process which is the means of imparting notice of proceedings, the rule of liberal construction must yield to the constitutional guaranty of due process of law.

13. MUNICIPAL CORPORATIONS ⚷321(1)—FINDING THAT RESOLUTION OF INTENTION IS SUFFICIENT CONCLUSIVE.

If, in resolution of intention in improvement proceedings, there is not an entire omission of a statutory requirement, but merely a defect, a court may properly determine there has or has not been a substantial compliance with the statute; the trial court's determination being controlling in absence of abuse of discretion.

14. MUNICIPAL CORPORATIONS ⚷488, 489(5)—REQUIREMENT FOR FILING MAP OF IMPROVEMENT JURISDICTIONAL.

Owner's failure to object to street improvement proceedings on ground that map or plat was not filed or referred to resolution of intention was not waiver of the objection, under Vrooman Act, § 5½; such requirements affecting jurisdiction to which the statute has no application.

Appeal from Superior Court, Santa Clara County; Beasly, Judge.

Action by Fred Beck and others against the Ransome-Crummey Company and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

R. M. F. Soto, of San Francisco, for appellants.

Louis Oneal and Beggs & McComish, all of San Jose, for respondents.

BRITTAIN, J. Fred Beck, with 32 other property owners of San Jose, obtained a judgment against the Ransome-Crummey Company and the city treasurer of that city quieting the title to their respective lands as against any claim of lien, and enjoining the issuance of bonds, based upon work done by the Ransome-Crummey Company, under proceedings taken by the city council, for paving and otherwise improving north Thirteenth street in San Jose from Santa Clara street to the northerly limits of the city. The defendants appeal. The city treasurer has no personal interest in the controversy.

The appellants do not make any clear and direct attack upon the judgment, except that, the suit being one in equity, the judgment should be reversed on the authority of Coleman v. Spring Construction Co., 182 Pac. 473. The portion of that decision to which reference is made was to the effect that a property owner may not permit public work to be done and thereafter attack the validity of the jurisdictional proceedings leading to the assessment. The statement was unnecessary to the decision of the case, which involved the question of original jurisdiction. Further hearing was denied by the Supreme Court, with an expression of its disapproval of the statement. Coleman v. Spring Construction Co., 182 Pac. 473.

[1, 2] When an assessment is attacked on the ground that the local board failed to acquire original jurisdiction, the owner may rest on the constitutional guaranty that his property may not be taken without due process of law. If jurisdiction is lacking, no equities asserted by the contractor can prevail. Schwiesau v. Mahon, 110 Cal. 543, 42 Pac. 1065; Heft v. Payne, 97 Cal. 108, 31 Pac. 844. If the invalidity of the initial resolution of intention is apparent on its face, the owner is not required to seek its correction by appeal to the council. He may stand upon his rights whenever an attempt is made to assert any claim based on an assessment void on its face. City Security Co. v. Harvey, 176 Cal. 682, 169 Pac. 380. In this case the respondents maintain the resolution of intention was void because it provided for a district assessment and made no reference to a map of the district required to be on file when the resolution was adopted. On each side of this question the usual argument, supported by the usual citation of multitudinous authorities from this and other states, is made.

This court recently had occasion to analyze the able opinion written by Mr. Justice Shaw of the Supreme Court in the leading case of Chase v. Trout, 146 Cal. 362, 80 Pac. 81. Hearing was granted by the Supreme Court and is now pending in the case in which this analysis was made. Watkinson v. Vaughn, 28 Cal. App. Dec. 657.[1] Reference to the opinion of this court in Watkinson v. Vaughn is not, therefore, in present reliance upon it as an authority, but to avoid incorporating in this opinion a further analysis of Chase v. Trout.

Doubt existing in the minds of public officials and attorneys regarding the application of well-established rules of law has placed upon the property owners of the state and upon those engaged in the business of making public improvements a heavy burden of expense, annoyance, and delay through the litigation which is instituted either by property owners or the contractors in regard to practically every important public improvement. In every such suit the property owner relies on the constitutional guaranty of due process of law. In many, probably in most, of the cases the question of constitutional guaranty has no proper place. In the clear and learned opinion in Chase v. Trout, the principles governing the rule of due process of law in public improvement cases were discussed. Notwithstanding the fact that the decision in that case was rendered in 1905, and has probably been cited in every public improvement case arising in California since that date, the clear statement of the meaning of the constitutional guaranty of due process of law, as applied to such cases, seems to have been misapprehended.

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[1] Rehearing pending in Supreme Court.

[3-5] It is as impossible to define with precision "due process of law," as it is exactly to define "fraud" or "police power." As applied to different classes of cases, courts, by process of inclusion and exclusion, apply the principles involved in the phrase. The Supreme Court of the United States has said that without the constitutional guaranty the right of private property could not be said to exist in the sense in which it is known to our laws. Ochoa v. Hernandez y Morales, 230 U. S. 139, 33 Sup. Ct. 1033, 57 L. Ed. 1427. The guaranty is always and everywhere present to protect the citizen against arbitrary interference with his rights. Ulman v. Baltimore, 72 Md. 587, 20 Atl. 141, 21 Atl. 709, 11 L. R. A. 224. Due process of law is the exact equivalent of the law of the land as used in the Magna Charta. Murray v. Hoboken L. & I. Co., 18 How. 272, 15 L. Ed. 372. Broadly speaking, it means that, before a man's life or liberty or property may be taken by the state, he must be given notice of the proceedings which may terminate in the taking, and be given an opportunity to be heard in his own defense. It means further that the notice shall be a real and reasonable one, and the hearing such as ordinarily, or at least reasonably, is given in similar cases. Simon v. Craft, 182 U. S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165; Lent v. Tillson, 140 U. S. 316, 71 Sup. Ct. 825, 35 L. Ed. 419; Turpin v. Lemon, 187 U. S. 51, 23 Sup. Ct. 20, 47 L. Ed. 70; Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959. The law of the land does not necessarily mean simply statutory law, for no state can make everything due process of law, which by its own legislation it declares to be such. Burdick v. People, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, 41 Am. St. Rep. 329. On the other hand, if the statute requires as the initial step in the process of depriving a man of his property the performance of a specifically defined act, unless that act be performed substantially no jurisdiction—power—exists for further action in that proceeding against him.

[6-8] The analogy between the ordinary suit at law and proceedings for the levy of special assessments for public improvements is not exact, but the same broad principles of common right and common sense control the application of the law of the land to the question of jurisdiction in both instances. Legislative acts regarding special assessments for public improvements are to be liberally construed. So, too, are the provisions of the Code of Civil Procedure. Code Civ. Proc. § 4. Such acts usually prescribe with more or less particularity what the resolution of intention shall contain. The Code of Civil Procedure prescribes what shall be stated in the summons in a civil suit. Code Civ. Proc. § 407. If any statement expressly required by the statute to be made in the summons is entirely omitted, its service does not give the court jurisdiction to proceed against the defendant, because in legal effect he has received no notice at all of the proceeding. The law of the land in such a case has not been obeyed, and the defendant may rely upon the constitutional guaranty. The fact that a former statute may have required fewer or more or different facts to be stated does not change the rule. The requirements of the statute in force at the time the summons is issued must be subtantially obeyed, or its service does not constitute the notice essential to due process of law. A defective summons, which does not meet the requirement of substantial compliance with the statute, may be amended; but in that case notice is not complete and jurisdiction to proceed does not exist until after service of such a summons as the law requires. Because service of an unlawful or void summons is ineffectual to give the defendant notice, he is under no obligation to call its defects to the attention either of the court or the plaintiff. He may safely proceed with his own business as if no suit were pending. If in such a case the court should proceed to judgment, regardless of any change in the defendant's position or of any expenditure or loss sustained by the plaintiff, the defendant's property could not be taken on execution nor would the plaintiff be heard upon a claim that the defendant should have waived the protection of the Constitution. In cases where constructive service is permitted, the substantial requirements of the statute regarding the matters to be stated in the published notice also must be fulfilled. These rules of law relating to the matter of obtaining jurisdiction in a civil action are too familiar to every judge and practicing attorney to require citation of authority. Each essential requirement has its counterpart in the matter of initiating proceedings for charging private property with the cost of local improvements.

[9, 10] In proceedings under the Vrooman Act (St. 1885, p. 147), there is no provision for personal service. Notice is implied from publication. The notice is the essential thing as distinguished from knowledge. It must be the notice required by the statute, not some other publication. It must be substantially the same in all similar cases.

Otherwise, it would depend upon the personal views of different judges in successive suits, perhaps upon the same assessment, whether or not the original power existed to order the work done. Uniformity in the administration of justice is a substantial right. Ransome-Crummey Co. v. Bennett, 177 Cal. 565, 171 Pac. 304. The burden is on the state and those claiming under it adversely to the individual to show that he has had notice. In the matter of jurisdiction the individual is not required to show that he has not had knowledge. If the contractor in such cases signs a contract in disregard of the law requiring a particular kind of notice to be given, when he has expended his money he is in no worse position than if he disregarded the law concerning limitations of actions and neglected to bring suit on a promissory note within the statutory period. Statutes of limitations are upheld and enforced regardless of personal hardship because public policy requires it. Similarly that broader public policy which protects the individual against encroachment of the state without sanction of law requires that legislative enactments prescribing that certain things must be done to authorize the state to invade private rights must be enforced.

In the present case the common council of San Jose undertook to order the work done under the sanction of the Vrooman Act, which, among other things, provides that under certain circumstances the council may make the expense of a contemplated public improvement chargeable upon a district. The resolution of intention in such a case is required to "describe the said district and refer to a plat or map approved by the city council, which shall indicate by a boundary line the extent of the territory to be included in said assessment district, which plat or map shall be on file in the office of the city engineer before said superintendent of streets shall proceed with the publication and posting of notices of street work, and shall govern for all details as to the extent of the said assessment district." Stats. 1913, p. 406.

[11] The resolution of intention in question on this appeal is incorporated in the findings by a reference to a copy appended to the defendants' answer. It describes the work to be done, declares that in the opinion of the mayor and council the work is of more than ordinary public benefit, and that the costs and expenses are made chargeable to an assessment district which was declared to be the district benefited and which is described with reasonable certainty. It contains no reference to any plat or map approved by the city council, and there is no suggestion in the appellants' brief that such a map as was required by the statute to be on file at the time the resolution was passed was in fact on file. The requirement of the statute is as positive in regard to the reference to the map as that of section 407 of the Code of Civil Procedure that the summons must contain a notice that unless the defendant appears the plaintiff will take judgment or apply to the court for other relief demanded in the complaint. These requirements are mandatory and jurisdictional in the one case as in the other. Cooley, Const. Lim. (7th Ed.) p. 747; 1 Cooley, Taxation (3d Ed.) p. 639; 2 Cooley, Taxation (3d Ed.) p. 1241; Brown, Jurisdiction (2d Ed.) §§ 51, 169a,

[12, 13] Where a clear statutory requirement is omitted from the initial resolution or process which is the means of imparting notice of adverse proceedings, the rule of liberal construction must yield to the constitutional guaranty of due process of law. Courts cannot in a particular case dispense with any element of notice which the Legislature has enacted shall be given in all similar cases. If, either in the summons or in the resolution, there is not an entire omission of a statutory requirement, but merely a defect, a court may properly determine there has or has not been a substantial compliance with the statute dependent upon the facts of the particular case. This necessarily calls for the exercise of that faculty which Mr. Chief Justice White of the Supreme Court of the United States, in discussing the meaning of the word "reasonable" in the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209) designated as "practical common sense." Standard Oil Case, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734. This judgment of what is a substantial compliance with the statute is to be exercised in the first instance by the trial court. If the case is one where a requirement of the statute has not been entirely disregarded, its determination of the question of substantial compliance ought to be controlling in the absence of an abuse of discretion. In the present case the resolution shows the absence of any reference to the map or plat required by the statute.

[14] On behalf of the appellants it is argued that under section 5½ of the Vrooman Act (added by St. 1909, p. 31) all objections to any act or proceeding prior to the date of notice of award not made in writing within 10 days from the date of the first publication of notice of award of contract shall be deemed to have been waived. By the last clause of section 5½ matters directly affecting the jurisdiction of the council to order the work are excepted expressly from its provisions.

It is next argued that, since the Vrooman Act did not originally require that a map or plat should either be on file or referred to in the resolution, the requirement contained in the act under which these proceedings are taken was not a constitutional prerequisite.

Reference is made to a number of cases with a lengthy quotation from the opinion in Imperial Land Co. v. Imperial Irrigation District, 173 Cal. 660, 161 Pac. 113.

In that case the court construed certain curative provisions of the Bridgford Act (Stats. of 1897, p. 254). The legal effect of this and similar decisions is that, if constitutional prerequisites are met, the rule of due process of law has not been violated. This is simply another way of saying that the rule of due process of law requires reasonable notice of hearing and an opportunity to be heard. It does not determine what reasonable notice is, and no decision of any court of the United States has been cited which holds that anything less than substantial compliance with what the Legislature has determined shall constitute notice meets the constitutional prerequisite. After jurisdiction attaches different principles come into play, and the constitutional guaranty of "due process of law" is rarely involved. This phase of the general subject is discussed in the opinion of Hutchinson Co. v. Coughlin, 184 Pac. 435, No. 2723, filed this day.

The judgment appealed from might be sustained upon other grounds relied upon by respondents, but the lack of jurisdiction to order the work done, which is so plainly apparent by reason of the disregard of the requirement of the Vrooman Act, renders discussion of other questions presented by the briefs improper until their determination becomes necessary in connection with a case where such determination will have controlling force.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

(42 Cal. App. 664)

HUTCHINSON CO. v. COUGHLIN.
(Civ. 2723.)

(District Court of Appeal, First District, Division 2, California. Aug. 14, 1919. Rehearing Denied by Supreme Court Oct. 9, 1919.)

1. CONSTITUTIONAL LAW 🔑251 — PURPOSE OF GUARANTY OF DUE PROCESS OF LAW.

The purpose of the constitutional guaranty that property is not to be taken without due process of law is to exclude arbitrary power from every branch of the government; it being a restraint upon the legislative, executive, and judicial departments.

2. JUDGMENT 🔑660 — CONCLUSIVE WHEN FINAL NOTWITHSTANDING ERROR OF COURT.

After the court acquires jurisdiction of the defendant and subject-matter of a particular case, it may proceed to judgment, and the judgment, if within general power of court and within issues of particular case, is conclusive, when it shall have become final, upon the parties as to all matters adjudged, regardless of any error on part of court.

3. JUDGMENT 🔑441, 460(4), 461(1)—BURDEN OF PROOF IN SETTING ASIDE IN EQUITY FOR FRAUD.

Judgment may be attacked for fraud by a suit in equity in which the burden of both pleading and proving the fraud rests upon complainant.

4. JUDGMENT 🔑660—ATTACK FOR FRAUD OR ARBITRARY ACTION OF COURT.

If there is fraud or arbitrary action in excess of the jurisdiction of the court, either may be shown in a proper proceeding unless the injured party has waived his right by consent to the act or in some other way.

5. MUNICIPAL CORPORATIONS 🔑484(2) — FRAUD OR ARBITRARY ASSESSMENTS MAY BE ATTACKED IN PROPER PROCEEDINGS.

If there is fraud or arbitrary assessment in excess of jurisdiction in levying assessment, owner may attack assessment in proper proceeding; but the right to be heard does not necessarily require a determination in a court proceeding, and may consist of opportunity to present objections to local governing board.

6. MUNICIPAL CORPORATIONS 🔑484(2)—DECISION OF LOCAL GOVERNING BOARD AS TO ASSESSMENTS MAY BE CONCLUSIVE.

Decision of local governing board on objections to assessment, in absence of fraud, or arbitrary action amounting to fraud, may be as conclusive as the judgment of a court in a civil action.

7. FRAUD 🔑50—NEVER PRESUMED.

Fraud is never to be presumed.

8. MUNICIPAL CORPORATIONS 🔑568(1) — IN ACTION TO FORECLOSE LIEN, NO PRESUMPTION THAT CITY WOULD NOT HAVE CORRECTED ASSESSMENT.

Where owner did not appeal from action of superintendent of streets, who levied the assessment, to city council, it will not be assumed, in contractor's action to foreclose lien, that, if owner had just cause of complaint, the city council would not on appeal have ordered the assessment corrected.

9. MUNICIPAL CORPORATIONS 🔑488, 489(5) — INVALIDITY OF ASSESSMENT WAIVED BY FAILURE TO OBJECT.

If a property owner, having a right to defend against an erroneous assessment for work ordered after jurisdiction has been established, fails to assert that right in an administrative tribunal, which is vested with power to correct the error, he may not be heard, either as a plaintiff or defendant, in any litigation involving the assessment, to assert its invalidity without showing either fraud or the exercise of arbitrary and harmful power on the part of the administrative tribunal.

10. MUNICIPAL CORPORATIONS 🔑493(6) — CONCLUSIVENESS OF COUNCIL'S APPROVAL OF ASSESSMENT.

An erroneous, arbitrary, or even a fraudulent assessment would not be void, after the council approved it, either actually upon hearing, or impliedly because no protests were made, in view of Civ. Code, §§ 3515, 3516.

11. MUNICIPAL CORPORATIONS 🔑463 — ASSESSMENT EXCEEDING FORMER APPRAISAL NOT NECESSARILY CONFISCATORY.

That an assessment exceeds amount at which property had theretofore been appraised for taxation does not necessarily make assessment confiscatory, since it may be presumed that improvement will so benefit the property as to warrant an increased valuation more than equal to amount of assessment.

12. MUNICIPAL CORPORATIONS 🔑488, 489(5) — FAILURE TO APPEAL TO CITY COUNCIL BARRED ATTACK ON ASSESSMENT ON FORECLOSURE OF LIEN.

Where superintendent of streets had jurisdiction to levy assessment, and where assessment was regular on its face, owner's failure to appeal from assessment to city council precluded her, under Street Improvement Act 1911, § 26 (Stats. 1911, p. 745), from attacking validity of assessment in contractor's action to foreclose lien.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by the Hutchinson Company against Margaret Fay Coughlin. Judgment for plaintiff, and defendant appeals. Affirmed.

Walter J. Thompson and Henry F. Marshall, both of San Francisco, for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

BRITTAIN, J. The defendant appeals from a judgment foreclosing the lien of a street assessment on her four lots in Oakland.

The assessment proceedings were under the Street Improvement Act of 1911 (St. 1911, p. 730) as originally adopted. The work was grading, curbing, macadamizing, and guttering one block on Brooklyn avenue, between Lake Shore boulevard and Newton avenue, one block on Wesley avenue, between Lake Shore boulevard and Newton avenue, and the crossing formed by the intersection of Brooklyn, Newton, and Wesley avenues, in the city of Oakland. Newton avenue and Lake Shore boulevard are approximately parallel, and Brooklyn avenue connects them, running at right angles to Newton avenue. Wesley avenue runs diagonally across an imaginary square, two sides of which are formed by the lines of Newton avenue and Brooklyn avenue, extended, the other sides being represented by lines parallel to the two extended lines. The crossing formed by the intersection of the three avenues is represented by the triangle formed between the sides of Newton avenue and Brooklyn avenue, extended, and the lower diagonal side of Wesley avenue. The total cost of the work, with expenses, was $5,400.50, of which $1,630.90 represented the cost of the work on the block on Brooklyn avenue; $1,795.99, the cost of the work on the block on Newton avenue; and $1,855.28, the cost of the work on the crossing.

In the resolution of intention to do the work it was declared that it was of more than local or ordinary public benefit and that the expense should be chargeable upon a district. The district included seven entire blocks and parts of four other blocks. The blocks were not uniform in size nor shape. No part of the district extended across Lake Shore boulevard. The work done was in the southwest corner of the district, the improved portions of Brooklyn avenue and Wesley avenue abutting on the westerly boundary of the district. In the entire district there were 162 lots, of which 23 or 24 fronted on the work. Many of the lots, by reason of the diagonal direction of Wesley avenue, were small and of irregular shapes. Four of the lots of full size and rectangular in shape belong to the appellant. Two of them face Lake Shore boulevard and two of them face Wesley avenue. They extend lengthwise on both sides of the entire block of Brooklyn avenue, which was improved. The appellant's two lots fronting on Wesley avenue also abutted on the crossing.

After the work was done the assessment was made, and the appellant's lots were assessed, respectively, $419.96, $509.69, $442.19, and $576.27, aggregating $1,948.11. Of the 162 lots in the district, only 4, those belonging to the appellant, were assessed for more than $276; 27 for sums between $10 and $100; the remainder for sums under $10, of which 40 were assessed for but one cent apiece. The appellant claims the assessment is void, and to show its invalidity relies upon three propositions: First, that the district established by the resolution was ignored and disregarded by the superintendent of streets, who, it is claimed, in excess of his jurisdiction, imposed a frontage system of assessment; secondly, that the assessment appears on its face to be without uniformity and regardless of benefit; and, lastly, that the assessment upon each of the appellant's four lots is confiscatory.

The complaint is in the ordinary form in such cases. In her answer the defendant denied the essential allegations of the complaint and set forth the assessment, alleging that it "was without reference to, disproportionate to, irrespective of and contrary to any or all benefits received or to be received by each of said lots or portions thereof," and that "said purported assessment was and is disproportionately, unequally, and unjustly placed upon the various lots or portions of lots or subdivisions of land mentioned in said diagram and purported assessment, without regard to the district declared to be benefited in said resolution of intention of the city council and that said assessment was and is without uniformity and is confiscatory, and void." The findings negatived the appellant's allegations of fact, and support the conclusions of law.

While the usual number of cases is cited in the appellant's briefs, her reliance is chiefly placed upon the decision of the Supreme Court in Spring Street Co. v. City of Los Angeles, 170 Cal. 24, 148 Pac. 217, L. R. A. 1918E, 197. In that case in declaring an assessment void a statement of Mr. Justice Redfield of the Supreme Court of Vermont was quoted as follows:

> "We have no doubt that a local assessment may so transcend the limits of equality and reason that its exaction would cease to be a tax, or contribution to a common burden, and become extortion and confiscation. In that case, it would be the duty of the court to protect the citizen from robbery under color of a better name." Allen v. Drew, 44 Vt. 174.

In the Los Angeles Case it appeared that the city of Los Angeles having determined to widen one of its streets, condemnation proceedings were prosecuted to judgment to take a strip five feet wide from the lots fronting on either side of the street. The judgment in favor of the lot owners aggregated something over $226,000, of which $20,000 was awarded to the owner of one lot, which may be designated the Hamberger lot. Under the Los Angeles charter the duty of levying the assessment for the cost of the improvement rested in the board of public works. In its original assessment it charged the remainder of the Hamberger lot with $12,794.10. Protests against the assessment having been made, the city council adopted a recommendation of its street committee that the assessments on the lots fronting on the widened street should be the same in amount as that allowed in the condemnation proceedings, and that surplus costs of the improvement should be levied in accordance with the front-foot rule upon all the lots in the assessment district. The board of public works was directed to make a new assessment, which it did in accordance with the recommendation of the committee. In transmitting the new assessment the board of public works expressed its opinion that the original assessment was correct, and called attention to the fact that under the new method certain lots which received the larger benefits than others were assessed for the smaller amounts. Protests against the second assessment were overruled by the council. The court determined that the reassessment was not even a quasi judicial act of the board intrusted with the duty of making the assessment. The defense was that the property owners had had their day in court before the city council, and the action of the council in overruling their protests, in the absence of fraud, should be held conclusive. Citing Chase v. Trout, 146 Cal. 350, 80 Pac. 81, and other cases in the opinion, the Supreme Court said:

> The record "furnishes convincing evidence that the assessment was ordered prepared without the slightest exercise of judicial discretion, and so unwarrantedly, arbitrarily, and unjustly, as to work a confiscation of the property and to be, therefore, in no legal sense an assessment at all." Spring Street Co. v. City of Los Angeles, 170 Cal. 32, 148 Pac. 220, L. R. A. 1918E, 197.

[1] In neither the briefs in this case, nor in the opinion in the Los Angeles Case, is the phrase "due process of law" used. The facts in the Los Angeles Case and the language used by the Supreme Court clearly show that the determination was based upon the rule that property of the individual shall not be taken without due process of law. The purpose of the constitutional guaranty is to exclude arbitrary power from every branch of the government. It is a restraint upon the legislative, executive, and judicial departments. State v. Guilbert, 56 Ohio St. 575, 47 N. E. 551, 38 L. R. A. 519, 60 Am. St. Rep. 756; Ulman v. Baltimore, 72 Md. 587, 20 Atl. 141, 21 Atl. 709, 11 L. R. A. 224; Chicago, etc., R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979. In the Los Angeles Case the property owners were within the constitutional guaranty.

In the case of Beck et al. v. Ransome-Crummey Co. (No. 2880) 184 Pac. 431, the decision in which is filed coincidentally with this in discussing the application of the rule of due process of law, this court, for the purpose of illustration only, referred to the analogy between the steps necessary for a municipal corporation to acquire jurisdiction to order the performance of public work, the cost of which is to be made chargeable upon private property, and the steps necessary to be taken to vest jurisdiction in a court to proceed to hear and determine a civil cause. In considering the question of the erroneous, arbitrary, or fraudulent exercise of jurisdiction, the analogy is no less illustrative of the principles involved.

[2, 3] After the court acquires jurisdiction of the defendant and subject-matter of a particular case, it may proceed to judgment. So long as the judgment is one within the general power of the court extending over all similar cases, and within the issues of the particular case, the judgment, when it shall have become final, is conclusive upon the parties and in regard to all matters adjudged, regardless of any error on the part of the court. It may be attacked for fraud by a suit in equity in which the burden of both

pleading and proving the fraud rests upon the complainant. U. S. v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; Patterson v. Colorado, 205 U. S. 454, 27 Sup. Ct. 556, 51 L. Ed. 879, 10 Ann. Cas. 689; Central Land Co. v. Laidley, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. Ed. 91.

[4, 5] If there is fraud, or arbitrary action in excess of the jurisdiction of the court, either may be shown in a proper proceeding, unless the injured party has waived his rights by consent to the act or in some other way. These rules apply as well to assessment proceedings as to judgments of courts.

[6-8] The guaranty of the right to be heard does not necessarily require a determination in a court proceeding. The individual may by fully protected by an opportunity given to present to the local governing body his objections to an assessment such as is involved in this case. Its decision, in the absence of fraud, or arbitrary action amounting to fraud, may be as conclusive as the judgment of a court in a civil action. Lambert v. Bates, 137 Cal. 676, 70 Pac. 777. In the Los Angeles Case an appeal was made to the council, and its action in sustaining the assessment which it had procured to be made was so gross and arbitrary an action as to amount to fraud. In the present case the appellant did not appeal from the action of the superintendent of streets, who levied the assessment, to the city council. Fraud is never to be presumed. It cannot be assumed that if the defendant had just cause of complaint the council would not upon appeal have ordered the assessment corrected. In the Los Angeles Case the assessment was made without any exercise of official discretion, and the council arbitrarily refused to protect the property owner. In this case the discretion of the superintendent of streets was exercised, perhaps erroneously; but the property owner did not seek the protection of the council. In effect, she permitted a default judgment to be entered against her by a tribunal having jurisdiction of her cause.

On the trial, over the objection of the plaintiff, evidence was received showing that the appellant's four lots were assessed for taxes in the aggregate of $1,650. Evidence was also introduced showing that the superintendent of streets levied the assessment upon the lots by the exercise of a discretion in a manner which may have been erroneous but which involved the examination and determination of the comparative benefits he believed would flow to the respective lots by reason of the work. This examination and determination was essentially judicial in its nature. If either his method or conclusions were erroneous, the statute furnished a means for the property owners to protect themselves. At any time within 30 days after the date of the warrant issued upon the making of the assessment, the owners aggrieved may in writing, state their objections to the assessments. Thereafter, and upon notice, the council is required to hear such objections and may remedy and correct any of the acts or determinations of the superintendent of streets, confirm, amend, set aside, alter, modify, or correct the assessment in such manner as to it shall seem just, directing the superintendent of streets to correct the warrant, assessment, or diagram in any particular or to make and issue a new warrant, assessment, or diagram to conform to the decision of the council. All decisions and determinations of the council upon notice and hearing in this regard are made final and conclusive upon all persons entitled to appeal under the provisions of the section as to all errors and irregularities which the council might have avoided or remedied or which it can then remedy. The section continues:

> "No assessment, warrant, diagram or affidavit of demand and nonpayment, after the issue of the same, and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality, or other defect in the same," where the resolution of intention shall have been passed and posted in such manner as to give the council jurisdiction to order the work to be done. Street Improvement Act of 1911, § 26; Stats. 1911, p. 745.

If an appeal to the council had been made and it had fraudulently or arbitrarily affirmed an erroneous assessment or had refused the property owner a hearing, the courts would have been open for a direct attack on the action of the council, or on suit being brought to enforce the assessment, the rule in the Los Angeles Case might have been applied. In this case it does not appear from the face of the assessment that it was void, or not in entire accord with the law. It was sought to show by the evidence on the trial that the superintendent of streets erred in his judgment. This evidence would have been proper and might have been conclusive upon an appeal to the council. The fact that it was relied upon here shows the assessment was not void on its face, else it would have been unnecessary in support of the appellant's position. The case is akin to one where a collateral attack is made on a judgment regular on its face. If in a suit in ejectment the court should give such a judgment as could only be given in a suit in unlawful detainer, the judgment would be void because of matters appearing on the face of the record. If, in such a case, a judgment was entered regular on its face, after it became final it could not be invalidated by evidence that the court had mistaken the facts or misapplied the law.

[9, 10] The defaulting defendant in a civil action, after his property has been taken on execution of a judgment regular on its face and rendered after jurisdiction had been perfected, could not be heard in a federal court to say the taking was in violation of the provisions of the Constitution of the United

States regarding due process of law. To support such a suit it would be necessary for the plaintiff to allege and prove that he was not in default, and that the judgment was invalid by reason of fraud or such a gross abuse of judicial power apparent on the face of the record as to amount to fraud. Similarly, if a property owner, having a right to defend against an erroneous assessment for work ordered after jurisdiction has been established, fails to assert that right in an administrative tribunal which is vested with power to correct the error, he may not be heard, either as a plaintiff or defendant, in any litigation involving the assessment, to assert its invalidity, without showing either fraud or the exercise of arbitrary and harmful power on the part of the administrative tribunal. As the violation of the law by a referee to take evidence would not invalidate a judgment entered by a court on his report, neither would an erroneous, arbitrary, or even a fraudulent assessment render it void after the council approved it, either actually upon hearing or impliedly, because no protests were made. The failure to protest to the council in the one case has the same effect as the failure to object to the referee's report in the other. The law helps those who are vigilant. Silence under such circumstances amounts to a consent to the act. Civ. Code, §§ 3515, 3516. It is possible a case may arise where an appeal to the council from the nature of things might be futile and the assessment void, as, for instance, if an assessment should be levied to pay for work not included within the resolution, or to pay for work which had never been done, but no such conditions confront the court in this case.

[11, 12] The mere fact that the amount assessed against the appellant's four lots, situated as they are, exceeded the amount at which they had theretofore been appraised for taxation, does not necessarily lead to the conclusion that the assessment was confiscatory. In support of the regularity and honesty of the action of the municipal authorities and of the judgment of the trial court, it might well be presumed that the improvement in the block, in which the appellant's four lots occupied the entire frontage on both sides of the street, and the improvement in the crossing, upon which two of the appellant's corner lots abutted, so benefited them as to warrant an increased valuation more than equal to the amount of the assessment to be placed upon them. It is not necessary for the determination of this appeal to rest the decision upon any inferences in support of the judgment. The appellant, by reason of her failure to appeal to the local council for the correction of the assessment, neither pleaded nor proved facts sufficient to warrant a judgment in her behalf. Because of this failure of both pleading and proof in the matter essential to support a judgment adverse to the assessment, the evidence concerning the method in which the superintendent of streets exercised the function intrusted to him the evidence in regard to the assessed valuation for taxation purposes of the appellant's lots had no considerable weight.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

43 Cal. App. 87

MURPHY v. BRIDGE et al. (Civ. 2810.)

(District Court of Appeal, First District, Division 1, California. Aug. 30, 1919. Rehearing Denied by Supreme Court Oct. 28, 1919.)

1. **Judgment** ⚷661—**Effect of grant of new trial on conclusiveness.**

A judgment, in an action brought by a third person against plaintiff and defendant's predecessor, which found in accordance with the claim of defendant's predecessor that he was the sole and exclusive owner of the property, where set aside on motion for new trial by the third person, is not a conclusive adjudication in favor of plaintiff's predecessor and against his codefendant therein, plaintiff now, even though plaintiff did not move for new trial or contest the predecessor's claim of exclusive ownership; it appearing that the order granting the new trial was general.

2. **New trial** ⚷163(2) — **Grant opens up case as to all parties.**

An order granting a new trial which is general in its terms ordinarily opens up the entire case as to all parties, regardless of the fact that some of them may not have moved for a new trial.

Appeal from Superior Court, Alameda County; Stanley A. Smith, Judge.

Action by Ella M. Murphy against Arthur F. Bridge and May E. Bridge as administrators, etc., and May E. Bridge individually. From a decree for plaintiff, defendants appeal. Affirmed.

Haven & Athearn, of San Francisco, for appellants.

Edward C. Harrison and Maurice E. Harrison, both of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from an interlocutory decree adjudging plaintiff to be the owner of the real property described in the complaint subject only to a lien of defendant, May E. Bridge, for the unpaid balance of a certain debt. The suit is one in equity, brought by plaintiff against Arthur F. Bridge and May E. Bridge, as administrators with the will annexed of F. W. Bridge, deceased, and May E. Bridge, individually, to have it adjudged that the legal title to the property in dispute was held by F. W. Bridge in his lifetime in trust and as security for the debt of Herman Murphy, husband of plaintiff, to F. W. Bridge.

The complaint alleges that the debt has been practically all paid, and the prayer is that plaintiff be adjudged to be the owner in fee of the property, subject only to the lien of any unpaid balance upon the debt, and that an accounting be had to ascertain such balance, if any. Judgment went for plaintiff in conformity with her prayer. Defendants moved for a new trial, which motion was denied. From the interlocutory decree defendants have appealed.

The record title to the property in dispute is now in defendant May E. Bridge, as the successor in interest of F. W. Bridge, deceased, having been distributed to her under a decree of partial distribution in the estate of F. W. Bridge, deceased. The only ground upon which a reversal of the judgment is sought is the action of the trial court in rejecting as evidence the judgment roll in an action entitled "Miller v. Murphy," in which action it is claimed the rights of the parties to the property in dispute have been definitely settled, and that the judgment rendered therein is res adjudicata in the instant case.

The suit of Miller v. Murphy was one brought by the plaintiff therein against Ella M. Murphy and Herman Murphy, her husband, and F. W. Bridge and others, as defendants, to have it determined that the title to the property here involved was held by F. W. Bridge subordinate to and subject to the claim of such plaintiff. In that action plaintiff herein and F. W. Bridge answered, denying generally all the allegations of the complaint. Defendant Bridge, in his answer, further alleged that he was the sole owner of the property, and prayed that it be adjudged that neither Miller nor defendants, Herman Murphy or Ella M. Murphy, had any interest therein. The court, after a trial of that case, found that defendant F. W. Bridge was the owner of the property, and that he did not hold the same subject to any claim of the plaintiff whatsoever, and that none of the other defendants had any right, title, or interest in the property. Accordingly it was adjudged and decreed that defendant F. W. Bridge was the owner thereof. Thereafter the plaintiff Miller moved for a new trial, which motion was granted. Plaintiff herein, Ella M. Murphy, made no such motion, nor did she appeal from the judgment. Beyond question the judgment was the one she desired, for the record herein discloses the fact that she and her husband co-operated with Bridge in procuring it. It is the appellant's contention that as between defendant F. W. Bridge and his codefendant, Ella M. Murphy, the judgment in the suit of Miller v. Murphy became final, and that the judgment definitely determined the status of the property involved as between them, for the reason that the subject-matter in that case was the same as the subject-matter of the instant case, and that therefore the judgment rendered therein is res adjudicata in the case at bar.

This contention presents two questions: First, was the judgment as originally rendered in Miller v. Murphy an adjudication upon the claim of the plaintiff in this case? and, second, if it was, did the granting of a new trial in that case have the effect of entirely vacating the judgment as such an adjudication?

[1, 2] The principles involved in the first question, namely, whether or not the plead-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ings in Miller v. Murphy raised an issue which was or could have been litigated between the parties hereto, or whether or not they were adverse parties within the meaning of that term, are questions we do not deem it necessary to discuss or determine, for we are of the opinion that the order granting a new trial in Miller v. Murphy vacated and terminated the judgment rendered therein.

The order granting the new trial was general in its terms. The effect of such an order, generally speaking, is to open up the entire case as to all the parties regardless of the fact that some of them may not have moved for a new trial. 1 Hayne on New Trial and Appeal, § 167; Kent v. Williams, 146 Cal. 3, 79 Pac. 527; Joost v. Dore, 27 Cal. App. 729, 151 Pac. 29.

It is appellants' contention, however, that the rule applies only where the judgment is such that it could not be set aside as to one without being set aside as to all, and that the rule has no application where the judgment is severable. Conceding this to be true, no such situation is here presented. The motion for a new trial and the order granting the same were both general in terms. The judgment was predicated upon the issues tendered between the plaintiff and all the defendants, and was rendered against all of them; and the subsequent order, general in its terms, granting a new trial, vacated the entire judgment, and had the effect of placing the parties in the position they held before any trial had taken place. Undoubtedly, the parties herein could have litigated, under appropriate pleadings in the Miller Case, the rights here involved, but no such relief was sought by them; they contenting themselves in that case with defeating the claim of the plaintiff therein.

For the reasons given, the judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

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43 Cal. App. 60

PEOPLE v. WILLIAMS. (Cr. 852.)

(District Court of Appeal, First District, Division 1, California. Aug. 27, 1919.)

1. CRIMINAL LAW 🔑1023(8)—MOTION IN ARREST OF JUDGMENT NOT APPEALABLE.

Order denying motion in arrest of judgment is not appealable.

2. WITNESSES 🔑387—MAY BE QUESTIONED ON CROSS-EXAMINATION AS TO TESTIMONY AT PRELIMINARY EXAMINATION.

In prosecution for larceny where defendant was charged with having stolen pocketbook of prosecuting witness while sharing his room over night, prosecuting witness, having testified on direct examination that he had asked defendant when defendant entered the room during night to turn on the light and having denied on cross-examination that defendant had turned on light without having been asked to do so, was properly asked on cross-examination if he had stated during preliminary examination that he had asked defendant to turn on the light.

3. WITNESSES 🔑270(3)—CROSS-EXAMINATION LIMITED TO MATERIAL EVIDENCE.

In prosecution for larceny committed while defendant was sharing prosecuting witness' room overnight, where prosecuting witness had testified that he had told defendant that he would be unable to keep him overnight, as he was going to have company, cross-examination, as to whom such company was, was immaterial.

4. WITNESSES 🔑388(2)—CROSS-EXAMINATION FOR IMPEACHMENT, WITHOUT FIRST LAYING PREDICATE, ERROR.

In prosecution for larceny committed while defendant was sharing room of prosecuting witness overnight, where prosecuting witness had testified as to what had taken place during night, and had testified on cross-examination that he had made no effort to hold defendant a prisoner, he was properly asked, under Code Civ. Proc. § 2048, if he had not told proprietor of the hotel that he had held defendant until arrival of police, without first laying predicate under section 2052.

5. WITNESSES 🔑388(2)—IMPEACHING TESTIMONY, WITHOUT PREDICATE PROPERLY STRICKEN.

Testimony of witness that prosecuting witness had made a statement to him inconsistent with testimony of prosecuting witness during trial was properly stricken, where the proper predicate had not been laid for such impeachment by examining prosecuting witness relative thereto under Code Civ. Proc. § 2052.

6. WITNESSES 🔑387—LATITUDE GIVEN IN CROSS-EXAMINATION OF COMPLAINING WITNESS.

The utmost latitude compatible with rules of evidence should have been permitted in the cross-examination of complaining witness as to inconsistent statements.

7. LARCENY 🔑65—EVIDENCE SUFFICIENT TO SUSTAIN CONVICTION OF PETIT LARCENY.

In prosecution for larceny committed by stealing prosecuting witness' pocketbook while sharing prosecuting witness' room overnight, evidence *held* to sustain conviction of petit larceny.

8. CRIMINAL LAW 🔑1186(4)—ERROR IN RULINGS ON EVIDENCE HARMLESS WHERE EVIDENCE OTHERWISE FULLY SUFFICIENT.

In prosecution for larceny committed by stealing prosecuting witness' pocketbook during nighttime while sharing his room, where prosecuting witness had testified that he had not held defendant a prisoner until arrival of police, court's refusal to permit witness to testify during cross-examination whether he had made a statement inconsistent with such testimony was not reversible error, under Const. art. 6, § 4½, where evidence was amply sufficient to warrant conviction; a miscarriage of justice not having resulted.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

A. W. Williams was convicted of petit larceny, and from judgment of conviction, and from order denying motion for a new trial, and from order denying motion in arrest of judgment, he appeals. Judgment and order denying new trial affirmed.

Fred J. Rogers and F. M. Fulstone, both of Fresno, for appellant.

U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and R. L. Chamberlain, of Sacramento, for the People.

BARDIN, Judge pro tem. The defendant was informed against for the crime of grand larceny. Upon his trial he was convicted of petit larceny, and, having suffered a previous conviction of felony, which he confessed on arraignment, was sentenced to imprisonment in the state prison at San Quentin. He now appeals from the judgment of conviction and an order denying his motion for a new trial, and also from an order denying his motion in arrest of judgment.

[1] It will be unnecessary to comment further upon the attempted appeal from the order denying defendant's motion in arrest of judgment than to say that there is no authority for such appeal. People v. Matuszewski, 138 Cal. 533, 71 Pac. 701; People v. Mullen, 7 Cal. App. 547, 94 Pac. 867.

No claim is made by the defendant that the verdict of the jury is not supported by the evidence; the grounds urged for the reversal of the judgment and order denying a new trial being that the trial court erred in its rulings upon the admissibility of evidence upon three separate occasions, thereby committing error of such substantial weight as to entitle the defendant to a reversal of the judgment rendered against him, and to have this cause remanded for a new trial.

The information alleges that the crime was committed on or about January 2, 1919. The errors complained of arose during the cross-examination of the complaining witness, Walker, who testified substantially as follows: That he became acquainted with the defendant about the middle of December, 1918, while both were in the employ of Wells Fargo & Co. at Fresno, Cal. That about the 1st day of January, 1919, Walker stated to the defendant that he was making arrangements to go to Texas and intended going to the bank to withdraw some money. That shortly prior to the alleged theft defendant heard a third party state to Walker that he would pay him some money the following day, and that on January 2d, the day of the commission of the offense, the defendant inquired whether this money had been paid, to which inquiry, however, the prosecuting witness answered in the negative. Walker further testified that on the afternoon and evening of January 2d the prosecuting witness and the defendant drank intoxicating liquors together, but were not intoxicated, and that night went to Walker's room in the Clark Hotel to pass the night, although at that time the defendant had lodgings at another hotel.

The testimony of Walker further shows that shortly after reaching the latter's room they retired for the night, both occupying the same bed; that when Walker disrobed he felt in his trousers pocket and ascertained that his pocketbook was there, folded his trousers, and left them on a suitcase near the head of his bed. At 5 o'clock that afternoon his pocketbook contained a $50 Liberty Bond, a $20 bill and a $5 bill in currency of the United States, after which time its contents had not been disturbed.

Before retiring Walker locked the door of the bedroom, placed the key on the table, directing the defendant's attention to the fact, should he desire to go to the lavatory. Walker was awakened at 5 minutes to 2 o'clock a. m. of that night by the defendant unlocking the door from outside of the room. Williams stepped inside the room and stated that he had been to the toilet, which was but two or three doors away and in the same hall way. He was fully dressed at the time. Walker then noticed that his trousers had been disarranged and had been moved from the suitcase, and he thereupon discovered that his pocketbook and its contents were gone.

Walker further testified that he and the defendant remained in the room during the balance of the night, the defendant undressing and again retiring, while he (Walker) did not again retire. Shortly before 7 o'clock of the morning of January 3d, one Keith, a fellow roomer at the Clark Hotel, came to Walker's room, and was informed of the larceny of Walker's property. Keith stated to Williams that he had seen him down on H Street a little after 12 o'clock, which Williams then admitted was true.

[2] It was testified by Walker, on direct examination, that when the defendant returned to the room about 2 o'clock a. m., under the circumstances already related, he was asked by Walker to switch on the light. On cross-examination the question was asked if it was not the fact that, when the defendant entered the room at the time referred to, he switched on the light without being asked by the witness so to do, to which question the witness answered in the negative. This question then followed:

> "Did you state at the preliminary that you asked him to turn on the light?"

The district attorney objected to the question as immaterial. The question was a proper one and the objection should have been overruled. People v. Hart, 153 Cal. 261, 94 Pac. 1042; People v. Webber, 26 Cal. App. 413, 147 Pac. 102. And it must be assumed that such ruling would have immediately followed had not counsel for the defendant been apparently diverted from his purpose of making the above inquiry, for, instead of taking the ruling of the court upon the objection, he asked another and different question of the witness before the court had ruled upon the objection, thus in effect withdrawing the previous question.

During the direct examination of the prosecuting witness this testimony was given:

> "Q. Was there anything said about where he would stay all night that night? (referring to the night in question). A. Oh, I told him that —he had stayed there the night before—I told him, I says, 'I can't keep you over to-night,' I says, 'I'm going to have company.'"

[3] Referring to this testimony counsel for the defendant on cross-examination propounded the question which follows, which question was objected to as immaterial and the objection properly sustained:

> "Now just tell us who that party was and give us an opportunity to subpœna them right now."

The truth or falsity of that statement would shed no light upon the issues before the court. In fact, if the statement was a pure fabrication, then it would seem to militate more against the defendant than be of benefit to him, for, it would, to some extent, demonstrate the desire in the prosecuting witness' mind to rid himself of the company of the defendant.

We pass now to the consideration of the last objection complained of. This objection is predicated upon the court's refusal to permit the prosecuting witness to answer another of the questions directed to the prosecuting witness on cross-examination. That witness had testified that he had made no effort to make the defendant a prisoner in his room prior to the arrival of the peace officers. These proceedings then took place:

> "Q. Is it not a fact that you told Mr. Beebe, the proprietor of the Mayer Hotel, where Mr. Williams stopped, a few days after the 2d, that you found this man in your room, and that you held him at the end of a gun in the corner of the room until the police came?
>
> "Mr. Beaumont: Well, we object to that as irrelevant, incompetent, and immaterial, and not proper cross-examination, and an attempt to impeach the witness on a collateral and immaterial matter, and that the question is not properly founded for impeachment.
>
> "The Court: The objection is sustained. I think it is immaterial.
>
> "Mr. Rogers: If we call Mr. Beebe, will we be prevented from asking whether or not Mr. Walker made this statement to him—that he found him in the room and held him at the end of a gun until the police came?
>
> "The Court: The chances are you will, if it is objected to."

Mr. Beebe was subsequently called as a witness for the defendant, and testified that the statement above referred to was in fact made by the prosecuting witness; but his testimony was, upon motion of the district attorney, stricken from the record, although the jury was not admonished to disregard it.

[4] The record discloses that during the direct examination of the prosecuting witness he went into a detailed account of what happened in his room from the time the defendant returned there until morning, and during which time the defendant and the prosecuting witness were together alone. It was proper to make full inquiry upon cross-examination as to any facts which had been referred to in the direct examination. Section 2048, Code Civ. Proc. And, having testified on cross-examination that he made no effort to hold the defendant a prisoner under the circumstances referred to, it was proper to ascertain whether or not the witness had made previous inconsistent statements, not only upon that subject, but also relative to the events that occurred in the room and partially detailed upon his direct examination. And it was proper to endeavor to discover that fact from the witness himself, and without the necessity of first laying the predicate referred to in section 2052 of the Code of Civil Procedure. People v. Jones, 160 Cal. 358, 117 Pac. 176; People v. Ho Kim You, 24 Cal. App. 451, 141 Pac. 950; People v. Webber, 26 Cal. App. 413, 147 Pac. 102; Wigmore on Evidence, § 1023.

[5, 6] The court did not commit error in striking out the testimony of Mr. Beebe, the witness called for impeachment. It was received over the objection of the district attorney, and was not properly founded for impeachment, as required by section 2052 of the Code of Civil Procedure. But the trial court was in error in sustaining the objection of the district attorney to the question directed to the complaining witness relative to the alleged contradictory statement made to Mr. Beebe. The utmost latitude compatible with our rules of evidence should have been permitted in the cross-examination of that witness. The record shows other instances where the cross-examination was held, within boundaries more restricted than is usual under circumstances where the guilt of the defendant depends to a considerable extent, not only upon indirect evidence, but also upon the credibility of a single witness.

[7, 8] A survey of the whole record of the case, however, which discloses ample testimony to warrant the conviction of the defendant, compels the conclusion that the error complained of has not resulted in a miscarriage of justice. The case seems to be one for the application of section 4½ of article 6 of the Constitution of the state. It appears from the record that the defendant had been unduly inquisitive about the receipt of money by the complaining witness shortly before

the commission of the offense. On the night of January 2d he had pressed himself into companionship with Walker for the night, although he had lodgings at another hotel. Without arousing Walker from his slumber, the defendant stealthily arose at about midnight, fully dressed himself, and went down upon the streets of Fresno, and was observed by two witnesses in front of the hotel where he had permanent lodgings. He returned to the room of the prosecuting witness, unlocked the door from the outside, entered, locked the door again, and stated to Walker that he had been to the toilet. Subsequently, and in the presence of the officers, he admitted having made this false statement to Walker. Confronted with a witness who had seen him down on the street, he offered in explanation of such act that he had gone from Walker's room down upon the street to get a drink. He denied having any money in his possession, other than $15 in currency and a few dollars in silver. It was only after a very careful search that a $20 bill in currency was found concealed on the inside of his hatband. The Liberty Bond was not found.

The defendant did not take the stand, but sought to prove by other witnesses that Walker had been imbibing intoxicating liquors quite freely on the afternoon and evening in question, and that he had been consorting with a woman of questionable morals, and that he might have lost his money through her handiwork, rather than by any act of the defendant. The testimony intended to sustain such a theory, while redolent of days before the advent of the redlight abatement act, and of war-time prohibition, is weak and unconvincing, and in our estimate is entitled to no more weight than that given it by the jury and trial court.

The defendant's conduct, his admissions, his highly incriminatory deceptions, coupled with the testimony of the witnesses for the prosecution, justify the conclusion reached by the jury, and make this a proper place to apply the section of the Constitution referred to.

The judgment and order denying a new trial are affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

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43 Cal. App. 113

JOHNSON v. NELSON et al. (Civ. 3004.)

(District Court of Appeal, First District, Division 1, California. Sept. 2, 1919.)

1. Motions ⚿64—Dissimilar motion not res judicata of subsequent motion.

A premature motion to set aside sheriff's return is not res judicata of a motion to set aside, made after return had been made.

2. Motions ⚿64—Doctrine of res judicata not applicable.

The doctrine of res judicata does not apply to motions, but their renewal is in the discretion of the court.

3. Appeal and error ⚿1032(1) — Objections that other defendants had no notice of motion not available to appellants.

Defendants in mortgage foreclosure may not complain of granting of motion to set aside sheriff's return of sale, over their objection that other defendants had not had notice of the motion; it not being made to appear what interest the other defendants had in the case, or how objectors were injured by the others not being served.

4. Mortgages ⚿502—Setting aside return to order of sale.

The trial court, having control of its process, on knowledge that the sheriff, as its officer, had made an equivocal and unsatisfactory return on the order of sale, and that it was unsatisfied, could, ex parte, set aside the return and direct a new order of sale to be issued and executed.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Peter Johnson against Hedvig Nelson and others. From an order after judgment, certain defendants appeal. Affirmed.

John F. Poole and Wm. Lewis, both of Los Angeles, for appellants.

Chas. J. Kelly and D. A. Stuart, both of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from an order made after final judgment setting aside a sheriff's return of sale for the foreclosure of a mortgage and directing a new order of sale to be issued. The facts are undisputed and are as follows:

The mortgage was duly foreclosed, and a decree of sale of the mortgaged premises made and entered, and an order of sale duly issued thereon and placed in the hands of the sheriff for execution. On the day on which the sale was advertised to take place the plaintiff and also one of his attorneys were present at the time and place of sale; the plaintiff personally made a bid of an amount somewhat less than the total sum then due. His attorney also on his behalf made a bid of the total sum due. There were no other bidders. A misunderstanding arose between the sheriff and the plaintiff as to the sum actually bid; the sheriff insisting that he had struck off the property for the amount of the plaintiff's personal bid. Thereupon, and before the sheriff had made any return of sale, the plaintiff moved the court for an order vacating and setting aside the sale. When this motion came on for hearing, the sheriff not yet having made his return of sale, the court denied the motion. Thereafter the sheriff made his return of sale, which, while reciting the fact that the property was sold, returned the order of sale as wholly unsatisfied. Thereupon the plaintiff moved the court to set aside this return of sale and direct a new order of sale to be issued. Upon the hearing of this motion the court granted the same, and from its order to that effect this appeal has been taken.

[1, 2] The first point urged by the appellants is that the trial court had no jurisdiction to make the order appealed from, for the reason that the first order of said court denying the plaintiff's motion to vacate the sheriff's return of sale rendered the matter res adjudicata, and hence the court had no power to grant the plaintiff's second motion to set aside the return of sale. The point is utterly without merit for two reasons: First, that the two motions are dissimilar in the important respect that at the time the plaintiff's first motion was made no return of sale had yet been made by the sheriff, and the motion was therefore premature and doubtless was denied for that reason, while said return of sale was on file when the second motion was made, presenting an entirely different situation to the trial court; and the second reason why the point is without merit is that under the settled practice in this state the doctrine of res adjudicata does not apply to motions, the matter of their renewal being in the discretion of the trial court. Ford v. Doyle, 44 Cal. 635; Bowers v. Cherokee Bob, 46 Cal. 279; Johnston v. Brown, 115 Cal. 694, 47 Pac. 686; Gay v. Gay, 146 Cal. 237, 79 Pac. 885.

[3] The next contention of the appellants is that the court was in error in granting the motion in question because all of the proper parties to the action had not been served with notice of the motion. This appeal has been taken by a number of persons other than the original mortgagor and main defendant in the action. The record before us does not contain any of the pleadings or proceedings in the case prior to the making and entry of the decree of foreclosure, and we have therefore no means of knowing, except from the terms of said decree, who the defendants in the action were, or what issues were presented by them, or in what way any of them may have been interested in the proceedings in the case subsequent to the entry of the decree of foreclosure and issuance of the order of sale. The record before us, however, discloses that a number of these appealing defendants appeared upon the hearing of said motion to set aside the sheriff's return of sale, and at that time made no objection that they themselves had not been duly served with notice of said motion, and only objected because some other unnamed and unidentified defendants had not been served with such notice. The only evidence offered in support of said objection was the original notice of trial of the cause, which showed that there were quite a number of defendants who had at that time been served with such notice; but as to what interest they may have had in the case, particularly after the final decree of foreclosure, we are left entirely in the dark. In a word, it is nowhere made to appear how these defendants have been injuriously affected by the fact that some defendants other than themselves, and whose interest is not disclosed, were not served with notice of the motion to set aside the sheriff's return of sale.

[4] In addition to the foregoing considerations the fact that trial courts have control of their process, and that the trial court in this particular case, upon having brought to its attention the fact that the sheriff, as its officer, had made an equivocal and unsatisfactory return upon the order of sale which had been issued to him, and that the same was unsatisfied, would have had full power ex parte to set aside such return and direct a new order of sale to be issued and executed, brings this case perilously near the point of being a frivolous appeal.

No error appearing upon the face of the record before us, the order is affirmed.

We concur: WASTE, P. J.; BARDIN, Judge pro tem.

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43 Cal. App. 53

DRAKE v. TUCKER et ux. (Civ. 2891.)

(District Court of Appeal, First District, Division 2, California. Aug. 27, 1919. Rehearing Denied by Supreme Court Oct. 23, 1919.)

1. WATERS AND WATER COURSES ⟹156(4) — RESERVATION IN DEED CONSTRUED TO INCLUDE ONLY WATER ACTUALLY USED BY GRANTOR.

Deed reserving to grantors the amount of water of stream formerly "held, used, or claimed" by former owner *held* to reserve only portion of the water actually taken and used by former owner.

2. PARTITION ⟹8 — EXECUTION OF TWO DEEDS BY TENANTS IN COMMON TO EACH OTHER PART OF SAME TRANSACTION.

Where children, to whom father had deeded property as tenants in common, partitioned land between themselves by two deeds, executed as part of same transaction, one of the deeds, in being construed, will be taken in connection with the other.

3. WATERS AND WATER COURSES ⟹44—USE FOR IRRIGATION NOT TO INTERFERE WITH RIGHTS OF LOWER OWNER.

Upper owner has no right, by use of water for irrigation purposes, to deprive lower owner of sufficient water for his domestic purposes.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

4. Waters and water courses 🔑42—Reasonable use of water by upper owner.

What is a reasonable use of water by upper proprietor depends upon all the facts and circumstances in the case.

5. Waters and water courses 🔑78 — Rights of lower riparian owner to divert water from upper owner.

Riparian proprietor is entitled only to the water after it reaches his land in its natural flow, and if in the natural flow of the stream there is insufficient water conducted to lower owner's land for his uses, he has not, as a riparian owner merely, the right to go on the land of an upper owner and divert the water from there.

6. Waters and water courses 🔑152(11)—Adjudication of water rights between two owners not affecting rights of lower owner.

Adjudication of water rights between upper and lower riparian owners does not affect rights of other lower owners not parties to the action.

7. Waters and water courses 🔑152(11)—Adjudication of water rights under deed from upper to lower owner.

Where upper owner's deed to lower owner gave lower owner right to divert water at point on upper owner's land after upper owner had used the amount of water "held, used, or claimed" by a former owner of both lands, court, after awarding upper owner's successor in interest water used by former owner, and after allowing lower owner water for domestic uses, properly divided the water for irrigation purposes in proportion to acreage held by each.

8. Appeal and error 🔑1073(1)—Error in holding certain land of upper owner not riparian harmless.

In action involving water rights of upper and lower owners, holding that certain land of upper owner was nonriparian, if error, was not prejudicial to upper owner, where a greater quantity of similar land of lower owner was likewise held to be nonriparian, and where the water was divided in proportion to acreage of riparian land.

9. Evidence 🔑448—Parol testimony inadmissible to vary written instrument.

Written instruments, which are not ambiguous, may not be varied by parol testimony.

Appeal from Superior Court, Napa County; A. B. McKenzie, Judge.

Action by Harry Clyde Drake against Charles L. Tucker and wife. From the judgment rendered, plaintiff appeals. Affirmed.

Clarence N. Riggins, of Napa, for appellant.

John T. York and Percy S. King, both of Napa, for respondents.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment of the superior court in and for Napa county, dividing the waters of Ritchie creek between the plaintiff and the defendants. The principal question presented to this court is as to the construction of certain deeds in the record. The facts surrounding the execution of said deeds are briefly as follows. From 1867 to 1905 George W. Tucker, the father of the defendant Charles L. Tucker, owned 146 acres of land situated along Ritchie creek, a map of which land is in evidence in this action. During a part of this time he sold about 3,000 gallons per day of the water of said creek to the county, and in addition used what he required thereof for domestic purposes in and about his house and barn. In 1905 he deeded his property to his children, who held it as tenants in common. One of the children died shortly thereafter, and the remaining children partitioned the land among themselves by two deeds, which it is conceded were executed as a part of the same transaction, and which deeds are the key to the solution of the controversy here. In the first deed from Charles L. Tucker, one of the respondents here, and George H. Tucker, to their sisters, Lila J. Eachus and Martha A. Culver, a portion of the land was conveyed, which has since by mesne conveyances become the property of the plaintiff. This land is higher on the stream than the defendants' land. The deed conveying it contains a clause granting to plaintiff's predecessors the right to the amount of water diverted by George W. Tucker at a point in Ritchie creek specified therein. At the same time another deed was executed by Eachus, Culver, and George H. Tucker to Charles L. Tucker, respondent, conveying an undivided three-quarter interest in the portion of the land now owned by defendant and containing a clause granting to said Charles L. Tucker the right to divert water from a point specified and situated upon the land now held by the plaintiff, after the amount formerly diverted by George W. Tucker had been reserved. Defendant has maintained this point of diversion up to the time of the action. Plaintiff has resided on his land for about four years and has diverted water from a point below defendant's said point of diversion until May, 1917, when plaintiff placed a 5-inch pipe in the stream above defendant's point of diversion and diverted substantially all the water of the stream, so that the defendant was deprived of water necessary for domestic and irrigation purposes. Defendant removed the pipe line of plaintiff so placed, and plaintiff sought an injunction.

The clauses in the deeds upon which plaintiff and appellant bases his claim were construed by the trial court in a manner which is in accordance with our own conclusions Defendant contends that as a riparian owner he is entitled to his proportion of the water except as that right is modified by the deeds. The first deed, in which Charles L. and George H. Tucker are the grantors, and Lila J. Eachus and Martha A. Culver, plaintiff's predecessors in title, are the grantees, conveys:

> "All of the water right acquired, or the right to divert the waters of Ritchie creek acquired by George Tucker, the grantor of all the parties to this instrument, at any time in connection with the above-described tract, or in connection with any other tract of which the foregoing tract was a part, and which said water is now diverted at a point in Ritchie creek southwest of the most southerly point of the above-described land."

The second deed, in which Lila J. Eachus, Martha C. Culver and George H. Tucker are grantors, and Charles L. Tucker, the defendant, is the grantee, contains the following language:

> "Granting to the said Charles L. Tucker the right to divert water from Ritchie creek at a point about 450 feet southwest of the main county road, and below the point where F. Salmina & Co. now divert water from said creek; it being understood and agreed that Charles L. Tucker shall only have the right and privilege of using and diverting the overflow from Ritchie creek after Lila J. Eachus and Martha A. Culver, or either of them, have used all of the water formerly held, used, or claimed by George Tucker, the former owner of the 146-acre tract this day divided among the parties hereto, they may desire for any and all purposes, upon the land this day deeded to them, and after said F. Salmina & Co. has used its share of said water; and it is understood and agreed that no right, title, or interest in any water right of said George Tucker, or any water right acquired since said property was granted to the parties hereto is hereby granted."

This deed reserves to the grantors only the amount of water formerly "held, used, or claimed" by George Tucker. The court admitted evidence of the amount of water used by George Tucker, and found that the amount was about 3,000 gallons per day sold to the county, and sufficient water for his domestic uses about his home and barn, and the court therefore allowed the plaintiff such amounts before allowing the defendant any water at all, and after such amounts were taken by the plaintiff, if any water remained, the court allowed the defendant sufficient water for his domestic uses and divided the balance, if any, between the plaintiff and defendant for irrigation in the proportion that the acreage of each bore to the entire acreage of the riparian land. The decisions are to the effect that in running water there can be no absolute ownership; that riparian rights do not mean ownership in any special portion of the water of a stream until such water is actually taken and used. Kidd v. Laird, 15 Cal. 161, 179, 76 Am. Dec. 472; Eddy v. Simpson, 3 Cal. 249, 252, 58 Am. Dec. 408; Palmer v. R. R. Com., 167 Cal. 163, 168, 138 Pac. 997; Farnham on Waters and Water Rights, vol. 2, pp. 1565, 1566.

[1, 2] In view of these decisions, the language of the deed is clear. George W. Tucker "held, used, and claimed" only the portion of the water actually taken and used by him, which amount was found by the court upon substantial evidence. The deed from Charles L. Tucker by which appellant claims the grantor deeded away his riparian rights must be construed in connection with the deed to him, as both are admittedly a part of the same transaction. We think the language of that deed bears out the construction placed upon it by the court. The deed contains a specification of the exact water conveyed by it in the words:

> "And which said water is now diverted at a point in Ritchie creek southwest of the most southerly point of the above described land."

The evidence regarding the amount of water diverted at that point at the time the deeds were executed is in harmony with the judgment. As the deeds merely reserved to the plaintiff's predecessors such amounts of water as the court found were used by George Tucker—the rights in the remainder of the water of the creek, as between the plaintiff and the defendant, are governed by the law applicable to riparian owners.

[3] In answer to appellant's contention that he is entitled to use the water for irrigation on his land before the defendant is entitled to any water at all for domestic or other uses, we quote the language found in the decision in the case of Alta Land & Water Co. v. Hancock, 85 Cal. 219 at page 230, 24 Pac. 645 at page 647, 20 Am. St. Rep. 217, at page 224:

> "So far, the right of a riparian proprietor to the use of water for purposes of irrigation at all has been assumed, rather than determined, and has been properly regarded as among the last, though perhaps not the least important, of his riparian rights; one that must be always held in subordination to the rights of all other riparian proprietors to the use of water for the supply of the natural wants of man and beast, extended to the occupants of each and every tract held as an entirety, bordering upon the stream, whatever its extent. These natural wants supplied and protected the right to a reasonable use of the surplus water by the riparian proprietor, in common with others in like situation, for purposes of irrigation, has been acknowledged and recognized, but it cannot be extended even by implication."

See, also, Smith v. Corbit, 116 Cal. 587, 48 Pac. 725; Learned v. Tangeman et al., 65 Cal. 334, 4 Pac. 191.

[4] What is a reasonable use depends upon all the facts and circumstances of the case. Ferrea v. Knipe, 28 Cal. 341, 87 Am. Dec. 128; Union Mills, etc., Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371; Dilling v. Murray, 6 Ind. 324, 63 Am. Dec. 385; Elliot v. Fitch-

burg R. R. Co., 10 Cush. (Mass.) 191, at pages 193, 194, 57 Am. Dec. 85; Timm v. Bear, 29 Wis. 254, 265. The court here heard evidence upon the needs of the parties, the nature of the land, the volume of the stream, and its variation in this respect at different seasons, and we think properly decided that it would be an unreasonable use of the water under all the facts and circumstances for the plaintiff to use it for irrigation before the domestic uses of the defendant had been satisfied. The court, therefore, after reserving to the plaintiff the amount reserved to him by the deeds, allowed him water for his domestic uses, and then allowed to the defendant water for his domestic uses before allowing the plaintiff any water for irrigation. After the domestic uses of the defendant were satisfied, then the water was divided between the plaintiff and defendant for irrigation, having regard to the number of acres of riparian land owned by each. The case seems to fall within the rule announced in the case of Evans v. Merriweather, 3 Scam. (Ill.) 492, 38 Am. Dec. 106, where it is said that a riparian owner may use the whole of the stream, if it is necessary to satisfy his natural wants. He may consume all the water for his domestic purposes, including water for his stock, but if he desires to use it for irrigation or manufactures, and there be a lower proprietor to whom its use is essential to supply his natural wants, or for his stock, he must use the water so as to leave enough for such lower proprietor. Where the stream is small, and does not furnish more than sufficient to answer the natural wants of the different proprietors living on it, none of the proprietors can use the water for either irrigation or manufacture.

[5] It is not contended that the land of the defendant is nonriparian land. As a riparian proprietor, he is entitled, it is true, only to the water after it reaches his land in its natural flow, and if in the natural flow of the stream there is insufficient water conducted to defendant's land for his uses, he has not, as a riparian owner merely, the right to go on the land of an upper proprietor and divert the water from there. Anaheim Union Water Co. v. Fuller, 150 Cal. at page 332, 88 Pac. 978, 11 L. R. A. (N. S.) 1062. A riparian proprietor's title to the water begins only when it reaches his land. Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390. But, in the present case, defendant does not rely upon his riparian right for the privilege of going upon plaintiff's land and diverting the water. The deed to him from plaintiff's predecessor in interest has facilitated the enjoyment of his riparian rights, and by virtue of the contract between the parties, as contained in said deed, defendant is given the right to divert water from Ritchie creek at a certain point on plaintiff's land, after plaintiff has used for any purpose he may desire the amount of water "held, used, or claimed by George Tucker," the former owner, which amount has been found by the court and saved to the plaintiff.

[6, 7] With respect to the fractional division of the water for purposes of irrigation, there is no evidence before the court as to whether or not there are yet other lower riparian owners; but, if there are, of course, the rights of such owners are not affected by this judgment. As between the parties hereto, the division seems to us proper and reasonable, and if there are other parties who have yet independent rights, in a proper proceeding the rights of the riparian proprietors now before the court may be declared to be subject to such rights of such third parties, but such adjudication would not change the relative rights of the parties hereto as between each other

[8] Appellant objects to the holding of the trial court that certain land which was owned by the plaintiff, but was divided from his main tract and from Ritchie creek by a strip of land used for the operation of an electric railroad was nonriparian land. The fee to the strip of land occupied by the railroad had been granted to said company by plaintiff's predecessor in title. It becomes unnecessary for us to pass upon this question of law, because, as pointed out by the respondent, this ruling was not injurious to the plaintiff, for the reason that the court held that the land of both the plaintiff and defendant lying north of said railroad was nonriparian, and, as shown by the map, more of the defendant's land was thus held to be nonriparian than of the plaintiff. As the water was divided in proportion to the acreage of riparian land held by each, after reserving certain amounts to the plaintiff, the plaintiff would have received less water had the court held this strip of land to be riparian.

[9] Appellant objects that he was not allowed to introduce evidence of the negotiations and understandings of the parties to the deeds at the time they were executed. The rule is, of course, beyond dispute that when written instruments are not ambiguous, they may not be varied by parol testimony. The plaintiff himself admits that he does not consider these instruments ambiguous, but relies upon certain language used by the court in the course of the trial which he contends shows that the court considered these instruments ambiguous. The answer to this contention is that, in arriving at its judgment, the court did not treat the instruments as ambiguous, but construed them without the aid of parol evidence, and this court finds that construction to be correct. It cannot be held, therefore, that these instruments are ambiguous, requiring the aid of parol testimony for their interpretation.

The judgment is affirmed.

We concur: HAVEN, J.; BRITTAIN, J.

43 Cal. App. 91

GREENE v. MOORE. (Civ. 2983.)

(District Court of Appeal, First District, Division 1, California. Sept. 2, 1919.)

1. Bankruptcy ⚷277—Action for benefit of estate in discretion of trustee.

The trustee in bankruptcy, and not a creditor or any number of creditors, is the sole judge of when or whether to bring actions in the interest and for the benefit of the estate, and, in the absence of an alleged abuse of discretion with which he is invested, he is not subject to the dictation or control of the creditors of the estate.

2. Bankruptcy ⚷20(1) — Jurisdiction of federal court exclusive.

The jurisdiction of the federal court over the assets of a bankrupt and over the actions of the trustee in bankruptcy is exclusive, and the state courts have no jurisdiction over either during the pendency of the proceedings; the remedy of a creditor in such a case being by application to the federal court.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by A. W. Greene, as a creditor of R. B. Tolmie, etc., against William H. Moore, Jr., as trustee in bankruptcy of R. B. Tolmie, a bankrupt. From judgment for defendant, plaintiff appeals. Affirmed.

John A. Wallis, of Los Angeles, for appellant.

Bowen & Bailie, Norman A. Bailie, and Frederick W. Lake, all of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the defendant after an order sustaining his demurrer to the plaintiff's complaint without leave to amend.

The action is one brought by the plaintiff as one of the creditors of one R. B. Tolmie, a bankrupt, the plaintiff purporting to bring said action on behalf of himself and many other creditors of said bankrupt, though who or how many of these creditors there are, or by what authority the plaintiff assumes to represent them, is not made to appear. The complaint alleges that the proceedings in bankruptcy of said Tolmie are pending in the United States District Court of the Southern District of California, wherein the said Tolmie has been duly adjudicated a bankrupt, and wherein the defendant herein has been and still is the duly appointed, qualified, and acting trustee of the estate of said bankrupt. The complaint further alleges that the plaintiff herein has demanded of such trustee that he commence a certain action against certain parties who are alleged to have seized and sold certain property of said bankrupt, and for the value of which said parties are alleged to be liable to said estate; that the defendant as such trustee has refused to commence said action, by which refusal the plaintiff and the other parties whom he assumes to represent have been damaged in the sum of $862.27, for which sum he prays judgment against said trustee.

The defendant demurred to this complaint upon two main grounds: First, that said complaint did not state facts sufficient to constitute a cause of action; second, that the court had no jurisdiction of the subject of the action. The court sustained this demurrer generally without leave to amend.

[1] We are of the opinion that the judgment of the trial court rendered after making said order was proper for both of the reasons urged in said demurrer. The complaint failed utterly to show any abuse of the discretion with which the trustees of bankrupts are invested with respect to the bringing of actions in the interest and for the benefit of the estate. He and not a creditor or any number of creditors is the sole judge of the matter of when or whether to bring such actions; and, in the absence of an alleged abuse of the discretion with which he is invested, he is not subject to the dictation or control of the creditors of the estate. In re Baird (D. C.) 112 Fed. 960; In re Columbia Iron Works (D. C.) 142 Fed. 234; Remington on Bankruptcy, § 900. There being no averment in the complaint herein showing any abuse of this discretion, it failed to state a cause of action.

[2] But the order of the court in sustaining said demurrer without leave to amend is sustainable for another and stronger reason. The proceedings in bankruptcy were pending in the federal court at the time this action was commenced, and the defendant herein was then and still is the duly appointed officer of that court. The jurisdiction of the federal court over the assets of said bankrupt and over the actions of said trustee is exclusive, and the state courts have no jurisdiction over either during the pendency there of said proceedings. In re Watts, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933; In re Anderson (D. C.) 23 Fed. 482; White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183. None of the cases cited by the appellant hold to the contrary. The remedy of a creditor in such a case as this is complete; he may apply to the federal court for relief from any neglect or refusal of the trustee to perform his duty, and the court upon a proper showing will compel him to proceed or remove him for his disobedience or neglect of duty. The exclusive jurisdiction to thus control its officer rests with said court. It follows that the order of the trial court sustaining the defendant's demurrer without leave to amend was proper.

The judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

43 Cal. App. 94

SIMPSON et ux. v. SMITH. (Civ. 2156.)

(District Court of Appeal, First District, Division 1, California. Sept. 2, 1919.)

1. HUSBAND AND WIFE 🔑156—EXTINGUISHMENT OF PRIOR NOTE OF HUSBAND AS CONSIDERATION FOR WIFE'S NOTE.

Where husband executed a note and handed it to defendant wife for her signature and she several days after maturity of note affixed her signature thereto and returned the note to her husband, who thereafter delivered it to plaintiffs with the understanding that it replace a prior note made by the husband before his marriage to defendant, there was a sufficient consideration to support defendant's promise to pay.

2. APPEAL AND ERROR 🔑931(1), 1010(1)—FINDINGS BASED ON SUBSTANTIAL EVIDENCE NOT DISTURBED.

Every intendment should be indulged in favor of the findings of a trial court, and the findings not overthrown on appeal unless it clearly appears that the conclusions reached are without the support of substantial evidence.

Appeal from Superior Court, Alameda County; James G. Estep, Judge.

Action by M. L. Simpson and wife against Elsie Smith. Judgment for defendant, and plaintiffs appeal. Judgment reversed, and new trial ordered.

Fitzgerald, Abbott & Beardsley, of Oakland, for appellants.

Weinmann, Wood & Cunha, of Alameda, for respondent.

BARDIN, Judge pro tem. Plaintiffs, who are husband and wife, brought this action to recover a judgment for the balance due of the principal and interest of a promissory note made by the defendant and her husband, E. S. Smith, since deceased, dated April 20. 1912, and payable one day after date "to M. L. Simpson or S. E. Simpson." The defendant, who had judgment below, denies liability upon two grounds: (1) That there was no consideration for the promise of the defendant; and (2) that the signature of defendant to said note was procured under duress and through the undue influence of plaintiffs and the husband of the defendant.

The court found, in effect, among other facts, that the defendant did not, for value received, execute to the plaintiffs the promissory note sued upon; that the defendant had never received any consideration of any nature whatsoever for signing said promissory note; that there was no consideration for defendant signing said note; and "that no detriment of any kind or nature was suffered by the plaintiffs * * * or either of them by reason of said instrument."

The affirmative allegations contained in defendant's answer relative to the charge that plaintiffs procured the defendant's signature to the note in question through duress and undue influence were adopted by the trial court in its findings as true, yet there is no evidence whatever in the record which sustains such findings. They are so clearly unsupported by the evidence that they were probably made through inadvertence.

From a review of the evidence adduced at the trial, and which was believed by the trial court to warrant the finding that there was no consideration for the promise of defendant contained in the promissory note sued upon, we discover the following germane and uncontradicted facts:

[1] The note in suit was the outgrowth of the demands of plaintiff M. L. Simpson for the payment of a prior promissory note, then due and unpaid, made by the husband of defendant and presumably payable, as stated in respondent's brief, to both plaintiffs. The prior note was made previous to defendant's marriage, and the consideration therefor had passed solely to the said husband of defendant and she was not obligated in any manner under it. Under pressure of plaintiff M. L. Simpson for payment of the first note, or that its payment be secured, the note in suit was drawn, dated, and signed by the husband of defendant, and he thereupon handed the note to defendant for her signature. Several days later, and after its maturity, she affixed her signature to the face of the note and returned it to her husband, who thereafter delivered it to the plaintiffs with the understanding that it replace the first note.

It does not appear from the evidence that the defendant participated directly in the arrangement whereby the antecedent debt was discharged by the execution of the new note, other than by signing the note in suit and delivering it to her husband. Some two years thereafter the present action was begun to enforce the payment of the balance due and unpaid on the note last executed.

It is contended by the defendant that, since the note in suit was not delivered until after its maturity, it became, in legal effect, a demand note which the parties might sue upon as soon as delivered; and that therefore no detriment or prejudice was suffered by the plaintiffs, for there could be no enforceable forbearance to sue under the circumstances; and that, since the element of forbearance to sue was not present, there was no consideration for the promise of the defendant.

But this theory eliminates the real consideration for the execution of the note in suit. The consideration for the signature of the defendant to such note is not grounded upon the forbearance of either of plaintiffs to sue upon an antecedent debt, but, instead, upon the extinguishment of the prior note of the husband of defendant. The relinquishment of all rights under that note constituted such a detriment and prejudice to the rights of the plaintiffs as to provide a sufficient consideration to support the promise of the defendant to pay the note sued upon. Stroud v. Thomas, 139 Cal. 274, 72 Pac. 1008, 96 Am. St. Rep. 111; Lyon v. Robertson, 6 Cal. Unrep. 390, 59 Pac. 990; Hobson v. Hassett, 76 Cal. 203, 18 Pac. 320, 9 Am. St. Rep. 193; Miller & Lux v. Dunlap, 28 Cal. App. 313, 152 Pac. 309; section 1605, Civ. Code.

In Stroud v. Thomas, supra, the court used the following language:

> "The contention of the appellant that a preexisting debt is not a sufficient consideration for the execution of a note, so far as the sureties thereon are concerned, where the obligation for the pre-existing debt is canceled upon the delivery of the new note, does not merit discussion. It is well settled that such a consideration is sufficient as a foundation for the promise of the sureties, as well as that of the principals."

Counsel for the respondent places undue reliance upon the cases of Westphal v. Nevills, 92 Cal. 545, 28 Pac. 678, and Whelan v. Swain, 132 Cal. 389, 64 Pac. 560. We perceive nothing in those cases contained which is in disagreement with the views herein expressed. In Westphal v. Nevills, supra, it was held that the detriment to the plaintiff by reason of time given to make payment of an antecedent debt was sufficient consideration to support the promise of the appellant. The effect of the relinquishment of rights under an antecedent note or debt was not involved. And, in the case of Whelan v. Swain, supra, the consideration supporting a promissory note was based not only upon a forbearance to sue, but also because "the old note was surrendered."

[2] While we are aware that every intendment should be indulged in favor of the findings of a trial court, and that they should not be overthrown on appeal unless it clearly appears that the conclusions reached are without the support of substantial evidence, yet in this particular case it clearly appears, from the uncontradicted testimony adduced at the trial, that the consideration for the signature of the defendant to the note sued upon was the relinquishment by plaintiffs of rights under the prior note referred to.

The findings of the trial court to the effect that there was no consideration for the execution of the note in suit by the defendant is without sufficient support in the evidence. The resulting judgment cannot, therefore, be upheld.

Judgment reversed, and a new trial ordered.

We concur: WASTE, P. J.; RICHARDS, J.

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43 Cal. App. 126

AMERICAN TRUST & BANKING CO. v. UNION SECURITY CO.

LOWE v. AMERICAN TRUST & BANKING CO. et al.

(Civ. 3002.)

(District Court of Appeal, First District, Division 1, California. Sept. 3, 1919. Rehearing Denied by Supreme Court Oct. 28, 1919.)

1. CORPORATIONS 🔑122 — BONA FIDE PURCHASER ON EXECUTION SALE OF STOCK PROTECTED AGAINST PRIOR PLEDGEE.

A bona fide purchaser at an execution sale of stock standing in the name of a judgment debtor on the books of the corporation is protected in the purchase against a prior pledgee holding a certificate evidencing said stock as security for an antecedent indebtedness, in view of Civ. Code, § 324, as to transfers not entered on books affecting parties only.

2. CORPORATIONS 🔑123(4) — PLEDGEE OF STOCK MAY CAUSE BOOKS TO SHOW TRANSACTION.

Pledgee of corporate stock had right to compel company to cause nature of transaction to be so entered on its books as to show names of pledgor and pledgee, number or designation of shares, and date of transfer.

3. CORPORATIONS 🔑122 — BONA FIDE PURCHASER FOR VALUE OF STOCK.

One who purchases corporate stock at a sale under his own judgment, without actual or constructive notice of alleged defects in title thereof, is a bona fide purchaser for value; the rule as to a bona fide purchaser applying to sales of corporate stock.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by the American Trust & Banking Company against the Union Security Company, in which L. P. Lowe intervened. Judgment for the intervener, and the plaintiff appeals. Affirmed.

Gray, Barker & Bowen and Donald Barker, all of Los Angeles, for appellant.

Swanwick & Donnelly, of Los Angeles, for respondent.

WASTE, P. J. Plaintiff brought this action against the Union Security Company, seeking to compel defendant to enter a transfer of certain shares of its own stock upon its books, showing ownership therein in plaintiff, and to issue to plaintiff a certificate therefor. From the chronological statement of the facts it appears that one Brown, the owner of 70 shares of the capital stock of defendant, Union Security Company, indorsed a certificate of this stock, and delivered it to the plaintiff as a pledge and security for an obligation held by plaintiff against the corporation, of which Brown was president. Plaintiff took no steps to have the records of the Union Security Company show the transfer, or its interest in the said stock as pledgee, until long after the rights of intervener and cross-complainant Lowe had attached to said stock as hereinafter stated.

After the delivery of the stock certificate and pledge, one Randall commenced an action in the superior court of Los Angeles county against Brown, and caused an attachment to be regularly issued and levied upon the said 70 shares of stock, then standing in the name of Brown on the books of the Union Security Company. Judgment was entered in this action in favor of Randall against Brown, and execution upon the said judgment was issued and levied upon the said 70 shares of stock still standing in Brown's name on the books of the company. The sheriff of Los Angeles county duly sold said stock to Randall in satisfaction of his judgment, and delivered a certificate of sale thereof in regular form. Randall had no notice or knowledge of plaintiff's equities in the stock until long after his purchase at the execution sale in satisfaction of the judgment against Brown and receipt of the certificate of sale from the sheriff. He promptly presented this certificate to the Union Security Company, and demanded transfer of the said 70 shares in his name on the books of the company. As the company had no knowledge of any adverse interest in or claim to the stock, it issued to Randall a certificate for 70 shares of its capital stock, in lieu of said certificate, standing on its books in the name of Brown. Randall thereafter indorsed and delivered said certificate of stock to Lowe, the intervener, who also took the same without notice.

Some time thereafter the certificate of stock which Brown had delivered as a pledge to plaintiff was sold and assigned to plaintiff in satisfaction of the debt for which it was held as security. Plaintiff presented the certificate, with the assignment thereof to the Union Security Company, and demanded the transfer of such shares be made to defendant upon the books of said company. The Union Security Company refused to comply with the demand, and plaintiff commenced this action to compel it to do so. L. P. Lowe intervened in the action, and by cross-complaint against plaintiff and defendant alleged, in substance, the foregoing facts, which at the trial were stipulated as the facts of the case. Judgment was entered in favor of Lowe, adjudging him to be the owner of the stock. Plaintiff moved for a new trial, which was denied, and now appeals from the judgment.

[1] Succinctly stated, the question for the court on this appeal is whether or not a bona fide purchaser at an execution sale of stock standing in the name of a judgment debtor on the books of the corporation is protected in the purchase against a prior pledgee holding a certificate evidencing said stock as security for an antecedent indebtedness of the judgment creditor. The lower court answered this question, we believe correctly, in the affirmative.

[2] When plaintiff acquired the stock in question in pledge from Brown, it had a right to compel the Union Security Company to cause the nature of the transaction to be so entered upon its books as to show the names of the pledgor and the pledgee, the number or designation of the shares, and the date of the transfer. Spreckels v. Nevada Bank, 113 Cal. 272, 277, 45 Pac. 329, 331 (33 L. R. A. 459, 54 Am. St. Rep. 348). As was said in that case:

> "All this may be done to the full protection of the pledgee's rights without the surrender of the certificates, their cancellation, and the issuance to him of new ones, and, when done, the pledgee would be fully protected against a subsequent purchaser, who would be charged with the constructive notice which the entries upon the books of the corporation import; and, upon the other hand, there would be preserved to the pledgor all the rights incident to his ownership under the pledge."

Section 324 of the Civil Code provides that shares of stock may be transferred by indorsement and delivery of the certificate, but that such transfer is not valid, except between the parties thereto, until same is so entered upon the books of the corporation as to show the names of the parties, by and to whom transferred, the number or designation of the shares, and the date of the transfer. It has been determined by the decisions of the Supreme Court of this state, interpreting these provisions, that even without entry upon the books of the corporation such a transfer is valid as against all but innocent purchasers and transferees in good faith, for value, and without notice. Actual notice to such an intending purchaser by one having a prior claim upon the stock, even though his claim be not noted in the books of the corporation, is sufficient. Spreckels v. Nevada Bank, supra, and cases cited. In the case at bar the subsequent purchaser at the execution sale had no actual notice, nor constructive notice, which the entries on the books of the corporation, referred to in the decision just quoted, would have imported. We are of the opinion, therefore, that plaintiff omitted to take an ordinary business precaution as well as to perform its duty when it failed to cause a proper entry of the transaction between itself and defendant's pledgor, Brown, to be entered upon the books of the Union Security Company for its protection, as the section of the Code referred to contemplated.

Lowe, as the purchaser at the execution sale under his judgment, without notice of the previous assignment of the 70 shares of stock to the plaintiff, took the stock discharged of the plaintiff's lien (Farmers' National Gold Bank v. Wilson, 58 Cal. 600), and was entitled to have the certificate of such shares reissued to him as such purchaser (West Coast Safety Faucet Co. v. Wulff, 133 Cal. 315, 316, 65 Pac. 622, 85 Am. St. Rep. 171).

[3] Lowe, purchasing the stock at a sale under his own judgment, without actual or constructive notice of alleged defects in the title thereof, was a bona fide purchaser for value. Cady v. Purser, 131 Cal. 552, 559, 63 Pac. 844, 82 Am. St. Rep. 391; Foorman v. Wallace, 75 Cal. 552, 17 Pac. 680; Hunter v. Watson, 12 Cal. 377, 73 Am. Dec. 543. The rule as to a bona fide purchaser, applies to sales of corporate stock. Anglo-California Bank v. Grangers' Bank, 63 Cal. 359; Winter v. Belmont Mining Co., 53 Cal. 428. Within the rule announced intervener Lowe was a bona fide purchaser in good faith, for value, without notice.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

43 Cal. App. 97

CURTIS v. ARNOLD. (Civ. 2957.)

(District Court of Appeal, First District, Division 1, California. Sept. 2, 1919. Rehearing Denied Oct. 2, 1919; Denied by Supreme Court Oct. 28, 1919.)

1. Landlord and tenant ⚷184(2)—Right of lessee to deposit with landlord on termination of lease.

Where money was deposited by a lessee as security for payment of rent, the lessee is entitled, on termination of the lease, to a return of the sum deposited less the amount of rent due and unpaid at the time of termination; but, if the sum was paid by the lessee as a bonus to induce the lessor to make the lease, the lessee is not entitled to recover back any part of the bonus on cancellation of the lease by the lessor for justifiable cause.

2. Landlord and tenant ⚷184(2)—Recovery by lessee of deposit made with landlord.

Assignee of the lessee *held* not entitled to recover a payment of $300 made by the lessee on execution of the lease, it appearing that the lease was terminated because of the breach of covenant as to payment of rent; the provision as to repayment excepting termination of the lease for lessee's breach of contract.

3. Landlord and tenant ⚷188(1)—Right of tenant to make repairs and charge to landlord.

Where a lease provided that the landlord should repair defects in the premises which should appear in the first year after completion and that the lessee waived all rights to make repairs at the expense of the lessor, as provided in Civ. Code, § 1942, *held*, that the lessee could not justify refusal to pay rent because the lessor refused during the third year after completion of the premises to make repairs, which repairs were then made by the lessee.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Fannie Slater Curtis against Ella H. Arnold. From a judgment for defendant and an order denying new trial, plaintiff appeals. Affirmed.

R. H. Countryman, of San Francisco, for appellant.

Burrell G. White and John Ralph Wilson, both of San Francisco, for respondent.

WASTE, P. J. The plaintiff appeals from a judgment, and asks for a review of the order denying a motion for a new trial. The controversy involves the sum of $3,000, on deposit under the terms of a written lease dated March 7, 1910, between defendant, as lessor, and Charles Loeffler, as lessee. The interests and rights of the lessee have been transferred to plaintiff.

The first paragraph of the lease reads as follows:

> "For and in consideration of the sum of three thousand dollars ($3,000) gold coin of the United States of America, the receipt of which is hereby acknowledged, Ella H. Arnold, of the city and county of San Francisco, state of California, agrees to make and enter into, and does hereby make and enter into, to and with Charles Loeffler of the same place the following lease, upon the terms and conditions herein specified, to wit."

Then follows an ordinary lease made and entered into between the parties, under the terms of which the lessor agrees to erect a certain five-story, class C, building in accordance with plans and specifications therein particularly referred to, for a period of 10 years, from and after the date of completion of the building, at the total rental, or sum, of $102,500, in monthly payments (the first month's rent being free) of $875 per month, for the first five years of the lease, and $925 for the next four years and seven months of the term. Nothing is said in the lease as to the amount of rent to be paid by the lessor for the last five months of the term.

It was expressly covenanted in the lease that the lessor should, at her own cost and expense, keep the roof and exterior of the premises in good order, condition, and repair during the term of the lease, and should likewise, at her own cost and expense, repair or cause to be repaired any defects in the premises which should appear during the first 12 months after the completion and acceptance of said building, if the defects resulted from the settling of the walls, shrinkage of timbers, defective plumbing, or other defects due to construction.

It was further stipulated in the lease that, otherwise than as above stated, the lessor, after taking possession of the premises, should keep and maintain the interior of the same in good order, condition, and repair during his occupancy; the injury thereto or destruction thereof by the act of God or the elements or other cause beyond the control of the lessee being excepted. The lessee expressly waived all rights to make repairs of said premises at the expense of the lessor, as provided in section 1942 of the Civil Code of the State of California.

A further stipulation in the lease is:

> "That in the event of the determination of this lease prior to the expiration of the ten year term hereby demised, for any reason or cause, except a breach of covenant by the lessee, the lessor will pay to the lessee the sum of three thousand ($3,000) dollars in gold coin of the United States of America, together with interest thereon from the date of the completion of said building, at the rate of four (4%) per cent. per annum, compounded annually, provided however, that if such termination shall occur during the last five months of said term, the amount so payable shall be reduced at the rate of nine hundred and twenty-five ($925) dollars per month for each of said months as shall have expired prior to said termination. It is understood and agreed that this lease shall not be assigned without the written consent of the lessor. It is understood that if the lessee shall in all respects fully comply with the terms, conditions and covenants of this lease, he shall have the use of the above described premises, herein leased for the last five months of the term herein named and provided, free of rent, and said free rent is conditioned upon the full compliance with the performance of all conditions and covenants of this lease by said lessee both before and during the said last five months hereof."

The building was completed, and possession taken by the lessee, on or about the 31st day of December, 1910. The rent for the month of September, 1914, was not paid. Defendant served on plaintiff a notice, requiring him to pay the rent within three days or deliver possession of the premises. Plaintiff moved out of the premises within the period given, and defendant, in writing, accepted the keys and possession of the leased property.

[1] During plaintiff's occupancy of the house, certain structural defects in the building developed, and plaintiff, after calling the attention of the defendant to these matters, expended certain sums of money in making repairs. Plaintiff brought this action for the recovery of the $3,000, and interest, paid by her assignor to defendant, under the provision of the lease that has been referred to. Defendant filed an answer and cross-complaint for the amount of the rent for the month of September, 1914. Plaintiff, in answer to the cross-complaint, asserted the right to offset the claim for the rent for that month by the sum of money she expended in making the repairs to the premises hereinbefore and hereinafter referred to. At the trial defendant dismissed her cross-complaint, leaving as the only issue to be tried by the court the question of the right of plaintiff to recover the $3,000. The court eventually held that by the failure of plaintiff to pay the rent in cash for September, 1914, she had so violated the covenants of the lease that, under its terms, she was not entitled to recover that amount, and gave judgment for defendant. The decision of the main issue of the case, to wit, the right of the plaintiff to recover the sum of $3,000, turns upon the determination of the status of that fund now in the hands of defendant. Appellant steadfastly maintains that the amount was deposited with the lessor as security for the performance of the covenants of the lease; that, therefore it was not forfeited to the lessor by reason of the failure on the part of the lessee to pay the rent accrued for September, 1914. She relies upon Green v. Frahm, 176 Cal. 259, 168 Pac. 114, and Rez v. Summers, 34 Cal. App. 527, 168 Pac. 156. Defendant claims that it was paid to defendant by the original lessee as an additional consideration, or bonus, as an inducement to defendant to make the lease. If either of these claims finds support in the pleadings or evidence, the decision of the case presents but little difficulty. If the money was deposited as security for the payment by the lessee of the rent, it is clear that upon the termination of the lease the plaintiff would be entitled to a return of the sum deposited, less the amount of rent due and unpaid at the time of the termination. Green v. Frahm, supra; Rez v. Summers, supra; Caesar v. Rubinson, 174 N. Y. 492, 67 N. E. 58; Michaels v. Fishel, 169 N. Y. 381, 62 N. E. 425; Galbraith v. Wood, 124 Minn. 210, 213, 144 N. W. 945, 50 L. R. A. (N. S.) 1034, Ann. Cas. 1915B, 609. If the $3,000 was paid by the lessee as a bonus, as an independent consideration, to induce defendant to make the lease, it is equally clear that a cancellation of the lease by the landlord for any cause which justifies the act would not entitle plaintiff to receive back any part of the sum so paid, in the absence of some stipulation in the lease requiring her to do so. Galbraith v. Wood, 124 Minn. 210, 214, 144 N. W. 945, 50 L. R. A. (N. S.) 1034, Ann. Cas. 1915B, 609; Dutton v. Christie, 63 Wash. 372, 115 Pac. 856.

[2] In the first of the cases relied upon by appellant, Green v. Frahm, the language of the lease is that—

> "Cohn hereby deposits with Frahm the sum of three thousand dollars, receipt of which is hereby acknowledged, said sum of three thousand dollars to be retained by Frahm as a guaranty that Cohn will pay the rent as herein provided, and in the manner herein specified, and will keep and perform each and every covenant

> herein contained to be performed by Cohn, and in the event of the failure of Cohn to pay the rent or to keep or perform any of the covenants herein contained to be performed by Cohn, then and in that event, the said sum of three thousand dollars shall become forfeited unto Frahm. On the other hand, should Cohn pay the rent herein reserved, then and in that event the said sum of three thousand dollars shall be returned to Cohn at the end of the term hereinbefore created, or at any sooner determination thereof. Frahm agrees to pay Cohn four per cent. interest on the sum of three thousand dollars, to be paid annually."

Another clause provided that, in case of any termination of the lease through any fraud or neglect of Cohn, then the $3,000 reserved should be repaid to him with interest. Cohn defaulted in payment of rent. Frahm instituted proceedings in unlawful detainer against him, and, upon obtaining judgment, was put into possession of the property. Cohn, by his assignee, began an action against Frahm to recover the $3,000, which, in pursuance of the terms of the lease, had been deposited by Cohn with Frahm at the time of the execution thereof. The judgment was for plaintiff, and Frahm appealed. The Supreme Court held that the above-quoted provision of the lease naturally divided itself into two parts: One, a provision that the $3,000 deposited with Frahm was to be a guaranty for performance by Cohn of the covenants of the lease, including the payments of rent; the other that, in the event of the failure of Cohn to perform any of said covenants, the said money should become forfeited to Frahm, that the provision for a forfeiture upon the failure of Cohn to pay the rent was either a penalty, or a provision that the $3,000 was to be liquidated damages for the breach of the covenants, and in either aspect the provision was void. Green v. Frahm, supra. The other part of the clause, providing for the deposit of the $3,000 as a security for the payment of rent, was held by the Supreme Court to be for a legal purpose, and in all respects valid and enforceable, and that Frahm had a legal right, in case of the failure of Cohn to pay rent, to retain the $3,000 and apply it on the rent until the same was exhausted; that he did not choose to do this, however, but immediately began proceedings for the restitution of the premises, and the recovery of the rent due, and had succeeded in obtaining judgment for both, also for cancellation of the lease; that, under these circumstances, he must be admitted to have repudiated the security, and to have waived the right to retain the $3,000 as security for the payment of rent subsequently accruing; that the sum as deposited was to be considered as money held by Frahm as bailee, for the use of Cohn, and due demand having been made for its return, the plaintiff was entitled to recover. In Rez v. Summers, also relied upon by appellant, the court found:

> "That the sum of $800 was received by the lessor as being in full payment for the rent for the last two months of the term. But the payment was not absolute and unconditional, since it was also agreed that in certain contingencies this money would be returned to the lessee, and in that part of the contract the $800 was referred to as 'security.'"

In neither of the foregoing cases were the facts similar to those of the case at bar. In the instant case, for and in consideration of the sum of $3,000, the receipt of which was acknowledged by the lessor, she agreed to make and enter into the lease to plaintiff's assignor.

This, to our mind, brings the case squarely within the ruling of Ramish v. Workman, 33 Cal. App. 19, 164 Pac. 26, and Dutton v. Christie, supra. In the first of these cases the provision of the lease was that the lessees would pay to the lessor, as a further consideration for the lease, in addition to the rent therein reserved, the sum of $7,200, receipt of which was acknowledged by the lessor. There was a further proviso that if the lessees should pay the rent reserved, when same became due under the lease, and should well and truly perform and observe all the covenants and agreements contained in the lease on their part to be performed during the first nine years, seven months, and twelve days, and the lease should not be terminated by the re-entry of the lessor as in the lease provided, within that period, the lessor should credit said sum of $7,200 so paid by the lessees upon the last four months and eighteen days' rent due under the lease. After taking possession under the lease, the lessees made default and were evicted. The lessor also commenced an action to recover rent for the period during which the premises were held and occupied by the lessees. The defendants, by answer and cross-complaint, set up the deposit of $7,200, made as hereinbefore indicated, and prayed for its return. Judgment went for the plaintiff, and the defendants appealed, insisting, as does the appellant here, that, notwithstanding the plain language in which the provision of the lease is couched, "the meaning of which, to our minds," said the appellate court, "admits of no controversy," the payment of $7,200 should be construed as security for the payment of the rent reserved during the time ending with their eviction, and any damages sustained by plaintiff; that, when the landlord elected to evict defendants from the premises for nonpayment of rent, he waived all claims to the fund except in so far as it was necessary to apply it in payment of rent then due and accrued. In its decision the court said:

> "As stated in Dutton v. Christie, 63 Wash. 373, 115 Pac. 857, where a similar question was involved: 'We cannot agree with this contention without in effect writing a new contract for the parties.' Clearly, the $7,200 was paid

for a ten-year lease of the premises, upon the conditions and terms specified therein. Defendants parted with the money, not as a penalty or as security, but as a payment the consideration for which was the execution of the lease on the part of plaintiff. The title thereto passed absolutely to the lessor, unaffected by the fact that he agreed, upon the performance of certain conditions by defendants, to give them credit therefor. The conditions were never performed by defendants, and hence they could have no claim to the fund. The authorities which appellants cite in support of their contention all appear to have been cases where the deposit was made with the lessor upon the execution of the lease as security for the payment of the rent, and in such cases, upon the lessor evicting the tenants, it is uniformly held that he cannot assert claim to the amount so deposited, over and above rent due, with damages sustained. The cases cited by appellants involve deposits made as 'a guaranty,' 'as indemnity,' as 'a penalty,' 'for security,' etc., and hence are readily distinguished from the case at bar. This view finds full support in the case of Dutton v. Christie, 63 Wash. 373, 115 Pac. 857.

"The provisions of the lease in question hereinbefore quoted should be interpreted in accordance with the plain import of the language used, and thus construed it is clear that the parties intended the $7,200 to be in the nature of a bonus or additional consideration paid the lessor as an inducement to make the lease upon the terms and conditions therein contained; and, as stated, the fact that upon the performance of all the covenants and agreements contained in the lease to be performed by the lessees during the first nine years, seven months, and twelve days of the term thereof, he promised in effect to release them from the payment of rent at the rate of $1,500 per month for the last four months and eighteen days of the term so demised, furnishes no reason for appellants' contention."

A rehearing of this case was denied by the Supreme Court.

The facts in Dutton v. Christie, supra, are very similar to those under consideration here. The respondent in that case let to the appellants certain premises in the city of Seattle, for the period of five years, under a written lease by which it is provided that the rental of the premises should be $750 every month in advance. It was stated in the first paragraph of the lease that it was made "in consideration of the covenants of the second parties (appellants) hereinafter set forth, and of the sum of fifteen hundred dollars ($1,500) now paid to the first party by the second parties, the receipt of which is hereby acknowledged." In a subsequent paragraph of the lease it was stated that the "above payment of fifteen hundred dollars ($1,500) now made snall, in the event of the full and faithful performance of this contract by the second parties, be credited in payment of rent for the last two months of said term; but otherwise said payment this day made shall belong to first party as a part of the consideration to them for the execution of this lease." The lessees defaulting, the lessor brought an action to recover the unpaid rent. Judgment was rendered against the lessees who appealed claiming that the judgment should have been in their favor for the difference between the advance payment of $1,500 and the amount of the unpaid rent, earnestly insisting that the $1,500 so paid in advance was merely intended as a deposit in the nature of a penalty for any failure on their part to carry out the terms of the lease.

"We cannot agree with this contention," said the Supreme Court of Washington, "without in effect writing a new contract for the parties. In the beginning of the lease the parties have declared that the lease is given in consideration of the covenants of the second parties and of the payment of $1,500. The lease was certainly a legally sufficient consideration for the payment. If there had been no further mention of this money, there could be no question of the respondent's ownership of it. Does the added stipulation that this payment shall, in the event of full performance of the contract by the second parties, 'be credited in payment of the rent for the last two months of said term; but otherwise said payment this day shall belong to the first parties as a part of the consideration to them for the execution of this lease,' change the nature of this payment from consideration to penalty? We think not. It is declared to be a part of the consideration in the beginning, and this clause reiterates the same thing. In both instances the ownership of the respondent therein is affirmed. This is not changed by his agreement to apply this sum in payment of the rent for the last two months of the terms in the event of the appellants fully performing their contract. It was only by that performance that they could assert any claim upon this money. They must earn it."

"Provision is sometimes made in a lease for the payment in advance of the rents of the last or later periods of the lease, and such a provision has been held not to be a security merely for the lessee's performance of his agreements in the lease, but purely a payment of rent in advance, and therefore may be retained by the lessor though he terminates the lease for the default of the lessee as provided for in the lease." 16 R. C. L. 931.

A case bearing directly on this phase of the question which we are now considering is Galbraith v. Wood, supra, where the Supreme Court of Minnesota was called upon to determine the status of a payment made upon the execution of a lease under circumstances not far dissimilar from the facts in the case at bar. At the time of the execution of the lease there considered, the lessee agreed to pay the lessor the sum of $20,000 "as an advance payment on the rent," which advance he agreed to keep good during the first five years of the lease, with the privilege of reducing the rent at the rate of $6,666.66 per year for the third, fourth, and fifth years of the term. On motion of defendants the lower court dismissed the action brought by the assignee in bankruptcy of the lessee, after default of the latter, to recover the money so deposited, and in which it was contended that the fund was but a guaranty for the payment of rent to be made by the lessees during the terms of the lease. On appeal the higher court held that the claim of plaintiff that the money was deposited as security was not sustained by the pleadings or evidence, and also found a lack of anything in the pleadings or evidence to support its claim that the money was paid as a bonus or independent consideration to induce the making of the lease. It was decided that it was no more than an advance payment of rent, and affirmed the ruling of the lower court.

It requires but a short mathematical calculation to demonstrate that it would be improper to hold that the $3,000 fund under consideration here may be regarded as an advance payment for the rent of the leased premises for the last five months of the term, which was for the full period of ten years, at the agreed monthly rental of $875 per month for the first five years (no rent being charged for the first month), and $925 for four years and seven months. The credited rent is the exact amount specified in the lease, to wit, $102,500. At the rate of $925 per month, the rent for the last five months of the term, for which no rent is otherwise provided, would aggregate $4,625. The sum of $3,000 at four per cent. per annum, compounded annually for ten years, the term of the lease, would approximate just about that amount. Furthermore, the stipulation in the lease that the lessor will repay to the lessee the sum of $3,000, with interest, on the date of the completion of the building, is effective only in the event of the termination of the lease prior to the expiration of the ten-year term thereby demised, for any reason or cause, *except a breach of covenant by the lessee* (the italics are ours), and the stipulation further provides that if such termination shall occur during the last five months of said term the amount so repayable shall be reduced at the rate of $925 per month, for each of said months as shall have expired prior to said termination.

From the facts of the present case, and our review of the foregoing authorities, we reach the conclusion that plaintiff in this action is not entitled to recover any portion of the fund of $3,000 paid at the time of the execution of the lease. If the money be regarded as given in consideration of the covenants of the lease when paid, the title thereto passed to the lessor (Ramish v. Workman, supra; Dutton v. Christie, supra); if it is to be regarded merely as an advance payment of rent, the lessor is entitled to retain it (Galbraith v. Wood, supra—see, also, citations under this case found in 50 L. R. A. [N. S.] 1034, Ann. Cas. 1915B, 609, 613).

An examination of the authorities cited by appellant bearing on this point of the case, and its allied questions, discloses that they were dealing with instances in which the money sought to be recovered was deposited as security for the payment of rent, and the performance of the conditions and covenants of the lease, and, in our view, they are not in point as applied to the lease we are called upon to construe in this case.

[3] Appellant also asks for a reversal of the judgment in the case at bar upon the contention that defendant, upon the terms of the lease, had agreed to make repairs which we have before referred to, and had failed and refused to do so; and that, as they were made by plaintiff, she had a right to recoup her losses of money in making such repairs from the rent of the premises as it became due. The stipulation of the lease, however, is that the lessor, at her own cost and expense, shall repair, or cause to be repaired, any defects in said premises due to construction which shall appear during the first 12 months after the completion and acceptance of said building. The building was completed and accepted on or about the 31st day of December, 1910, and no notice of any defects was given until January, 1913. By the terms of the lease, therefore, the lessor was not obligated to make such repairs. As to other work claimed by plaintiff to have been done by her in repairing the building, it appears not to have been performed until nearly one year and five months after the completion of the building. Plaintiff contends that she was called upon to make certain necessary repairs during her occupancy of the building, which it was the duty of the defendant to make.

> "If it be assumed that under ordinary circumstances the defendants should be credited with such an expenditure as a payment on account of the rent, provided such expenditure was not greater than one month's rent of the premises, in view of the provisions of section 1942 of the Civil Code, the complete answer to any such claim in this case is to be found in the provisions of the lease, whereby the lessee 'hereby waives all rights to make repairs of said premises at the expense of the lessor as provided in section 1942 of the Civil Code of the State of California.'" Arnold v. Krigbaum, 169 Cal. 147, 146 Pac. 424, Ann. Cas. 1916D, 370.

It follows, therefore, that the action of the trial court in striking out much of plaintiff's evidence, and in refusing to admit other evidence relative to these repairs, was proper. The court was correct in its action in denying the motion for a new trial.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

43 Cal. App. 110

ROGERS BROS. CO. et al. v. BECK et al.
(Civ. 2997.)

(District Court of Appeal, First District, Division 1, California. Sept. 2, 1919.)

1. EVIDENCE 🔑366(1) — IDENTIFICATION OF OFFICIAL RECORDS SUFFICIENT.

In action to foreclose street assessment lien, testimony of employé of city clerk, who identified records containing assessment, warrant, and diagram of street superintendent, and who testified that such records were official records kept in city clerk's office, was sufficient foundation for introduction of such records in evidence without identification thereof by city clerk himself.

2. PLEADING 🔑122—DENIAL OF CORPORATE EXISTENCE ON INFORMATION AND BELIEF INSUFFICIENT.

Denial of allegation of corporate existence of a domestic corporation on information and belief *held* an insufficient denial amounting to an admission of the alleged fact.

3. PLEADING 🔑258(4)—REFUSAL OF AMENDMENT OF ANSWER AT CLOSE OF PLAINTIFFS' TESTIMONY PROPER.

Refusal to permit amendment to answer after plaintiffs had fully presented their case was proper, where no sufficient reason for delay was given.

4. APPEAL AND ERROR 🔑681 — RECORD NOT SHOWING PROPOSED AMENDMENT, REFUSAL NOT REVIEWABLE.

Court's refusal to permit amendment of answer after introduction of plaintiffs' testimony will not be considered on appeal, where the record does not embrace copy of proposed amended answer; the court on appeal having no means of determining whether amendment should have been permitted.

5. MUNICIPAL CORPORATIONS 🔑562(1) — FRAUD NO DEFENSE TO ACTION TO FORECLOSE STREET ASSESSMENT.

In action to foreclose street assessment lien, unfairness or fraud relating solely to the progress of the work is no defense; such matters being subject to correction by appeal to city council, whose decision is conclusive on parties entitled to take such appeal.

6. APPEAL AND ERROR 🔑690(1)—RECORD NOT CONTAINING PROPOSED AMENDMENT TO ANSWER.

Question whether court erred in rejection of certain evidence which appellants claimed would have been admissible under amended answer which trial court rejected will not be considered on appeal, where proposed amended answer was not in the record; the court being unable to determine whether rejected testimony was within issues presented by such amended answer.

Appeal from Superior Court, Imperial County; W. H. Thomas, Judge.

Action by the Rogers Bros. Company and others against John H. Beck and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Jas. E. O'Keefe and C. H. Van Winkle, both of San Diego, for appellants.

Crouch & Crouch, of San Diego, for respondents.

RICHARDS, J. This appeal is from a judgment based upon a verdict in the plaintiffs' favor in an action to establish and foreclose the lien of a street assessment.

[1] The appellants make several points upon appeal. The first of these consists in their contention that the trial court erred in overruling their objection to the introduction in evidence of the assessment, diagram, and warrant of the street superintendent upon the ground that no proper foundation had been laid for their introduction. The plaintiffs have produced a witness who testified that he was one of the employés of the city clerk of the city of Imperial, in which said street improvement work had been done, and who in that capacity produced and fully identified the records containing the assessment, warrant, and diagram of the street superintendent of the city, and who further testified that these were to his knowledge part of the official records of said street superintendent's office, and that the said records were kept in the city clerk's office. This testimony was entirely sufficient to furnish the requisite foundation for the introduction in evidence of these records. It is not necessary for the legal custodian of a public record in every case to be present in court to identify it. This may be done by any witness who can speak from his own knowledge in identifying the documents as the official records of the office from which they are produced, as such, and hence the ruling of the court was proper in admitting the assessment, diagram, and warrant in question in evidence.

[2] The next contention of appellants requiring attention is that the offered proof of the fact that the plaintiffs, Rogers Bros. Company and O. & C. Construction Company, were corporations was insufficient, but this objection is without merit, for the reason that the corporate existence and character of these two plaintiffs were alleged to be that of corporations organized and existing under and by virtue of the laws of the state of California. The defendants' denial of these averments was based on the want of information and belief upon the subject. This was an insufficient denial, and amounted to an admission of the alleged fact; hence no evidence was required to prove these averments of the plaintiffs' complaint. Bartlett Estate Co. v. Fraser, 11 Cal. App. 373, 105 Pac. 130; Mulcahy v. Buckley, 100 Cal. 487, 35 Pac. 144; Mullally v. Townsend, 119 Cal. 47, 50 Pac. 1066.

[3, 4] The next contention of the appellants

is that the trial court committed an abuse of discretion in refusing the defendants leave to file an amended answer during the progress of the trial of the case. This action was commenced on January 3, 1915; the answer of the defendants was filed on March 5, 1915; the cause came on for trial on January 17, 1916. The amended answer was not proffered for filing until the trial of the cause had proceeded up to the point where the plaintiffs had fully put in their case. No sufficient reason was given for the defendants' delay in seeking to amend their answer, and this of itself would have been a sufficient ground for the court's refusal to permit the same to be filed. But aside from this the record herein does not embrace a copy of the proposed amended answer, and this court has no means of knowing its contents, and hence cannot determine whether or not the trial court should in any event have permitted it to be filed, nor whether its refusal to do so was error.

[5] The next contention of the appellants is that the trial court was in error in sustaining the objection of the plaintiffs to questions asked or proofs offered by the defendants in an endeavor to show fraud in the doing of the public work upon which the assessment in question is predicated. In so far as these questions asked or proof offered were based upon the averments of the original answer of the defendants herein we are satisfied that no foundation is therein laid for the introduction of such evidence, since the only unfairness or fraud therein alleged relates solely to the progress of the work, and has reference to matters which are properly the subject of correction by appeal to the city council, whose decision, in the absence of fraud on the part of said council or its members in the hearing of said appeal or the rendition of such decision, is final and conclusive upon the parties entitled to take said appeal. Girvin v. Simon, 116 Cal. 604, 48 Pac. 720; McLaughlin v. Knobloch, 161 Cal. 676, 120 Pac. 27; Lambert v. Bates, 137 Cal. 676, 70 Pac. 777.

[6] In so far as the appellants' contention as to the existence of fraud on the part of the city council or its members in the hearing or determination of said appeal is concerned, it may be stated that possibly such an issue was presented by the amended answer which the defendants vainly sought to file; but since the said amended answer has not been embraced in the record before us we are unable to say whether such an issue was so tendered, and hence cannot determine whether the court was in error in its refusal to admit such offered proofs.

No question being presented, the judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

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43 Cal. App. 799

ROGERS BROS. CO. et al. v. BECK et al.

(Civ. 2998.)

(District Court of Appeal, First District, Division 1, California. Sept. 2, 1919.)

Appeal from Superior Court, Imperial County; W. H. Thomas, Judge.

Action by the Rogers Bros. Company and others against John H. Beck and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Jas. E. O'Keefe and C. H. Van Winkle, both of San Diego, for appellants.

Crouch & Crouch, of San Diego, for respondents.

PER CURIAM. On the authority of Rogers Bros. Co. et al. v. Beck et al., No. 2997, 184 Pac. 515, this day decided, the judgment is affirmed.

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43 Cal. App. 799

ROGERS BROS. CO. et al. v. BECK et al.

(Civ. 2999.)

(District Court of Appeal, First District, Division 1, California. Sept. 2, 1919.)

Appeal from Superior Court, Imperial County; W. H. Thomas, Judge.

Action by the Rogers Bros. Company and others against John H. Beck and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Jas. E. O'Keefe and C. H. Van Winkle, both of San Diego, for appellants.

Crouch & Crouch, of San Diego, for respondents.

PER CURIAM. On the authority of Rogers Bros. Co. et al. v. Beck et al., No. 2997, 184 Pac. 515, this day decided, the judgment is affirmed.

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43 Cal. App. 800

ROGERS BROS. CO. et al. v. HOLSAPPLE.

(Civ. 3000.)

(District Court of Appeal, First District, Division 1, California. Sept. 2, 1919.)

Appeal from Superior Court, Imperial County; W. H. Thomas, Judge.

Action by the Rogers Bros. Company and others against F. W. Holsapple. Judgment for plaintiffs, and defendant appeals. Affirmed.

Jas. E. O'Keefe and C. H. Van Winkle, both of San Diego, for appellant.

Crouch & Crouch, of San Diego, for respondents.

PER CURIAM. On the authority of Rogers Bros. Co. et al. v. Beck et al., No. 2997, 184 Pac. 515, this day decided, the judgment is affirmed.

43 Cal. App. 801

ROGER BROS. CO. et al. v. HOLSAPPLE et al. (Civ. 3001.)

(District Court of Appeal, First District, Division 1, California. Sept. 2, 1919.)

Appeal from Superior Court, Imperial County; W. H. Thomas, Judge.

Action by the Rogers Bros. Company and others against F. W. Holsapple and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Jas. E. O'Keefe and C. H. Van Winkle, both of San Diego, for appellants.

Crouch & Crouch, of San Diego, for respondents.

PER CURIAM. On the authority of Rogers Bros. Co. et al. v. Beck et al., No. 2997, 184 Pac. 515, this day decided, the judgment is affirmed.

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43 Cal. App. 21

MOTT v. WRIGHT et al. KING v. SAME. MacSWAIN et al. v. SAME. (Civ. 2007.)

(District Court of Appeal, Third District, California. Aug. 26, 1919. On Petition for Rehearing, Sept. 25, 1919; Rehearing Denied by Supreme Court, Oct. 23, 1919.)

1. MECHANICS' LIENS 🔑281(2)—SUFFICIENCY OF EVIDENCE TO SHOW DATE OF COMPLETION OF BUILDING.

In an action to foreclose mechanics' liens, evidence of owner that work or labor ceased on building on a certain day, and that last work necessary to be done on the building to complete the contract was performed on that date, and that the building was then completed, and nothing more was to be done thereon, was sufficient evidence on which to base a finding that the building was completed on that date.

2. MECHANICS' LIENS 🔑132(9) — CONSTRUCTIVE COMPLETION OF BUILDING BY CESSATION OF LABOR.

Cessation from labor by reason of actual completion of a building contract is not the cessation of labor, which, under Code Civ. Proc. § 1187, relating to filing of claim, itself constitutes a constructive completion of the building or contract.

3. APPEAL AND ERROR 🔑1011(1)—FINDINGS OF FACT ON CONFLICTING EVIDENCE CONCLUSIVE.

The District Court of Appeal is concluded by the findings of the trial court on conflicting evidence.

4. MECHANICS' LIENS 🔑132(7)—COMPLETION OF BUILDING—"TRIVIAL IMPERFECTION."

Where the papering of a building had been completed, and the owner later informed the paper hanger that there was a defect in the papering in a hallway, and requested him to repaper the defective part, and the work of repapering required only about two hours, such defect amounted to only a "trivial imperfection" in the work, within the meaning of Code Civ. Proc. § 1187, relating to the time from which right of lien claimants to file their liens begins to run.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trivial Imperfection.]

5. MECHANICS' LIENS 🔑132(7) — TIME FOR FILING LIEN FIXED BY SUBSTANTIAL COMPLETION.

All that Code Civ. Proc. § 1187, requires to fix the time from which the right of lien claimants to file their liens begins to run, is that there be, so far as actual completion is concerned, a substantial completion.

6. MECHANICS' LIENS 🔑132(4, 9)—TIME FOR FILING LIEN AS GOVERNED BY ACTUAL AND CONSTRUCTIVE COMPLETION.

The rule under Code Civ. Proc. § 1187, as to the 120-day period after cessation of labor within which a lien claimant may file a lien does not apply where there is an actual completion, and the 90-day provision applies, not only to cases of actual completion, but also to those of constructive completion, including completion, by cessation from labor, for in such case there is no completion until there has been a cessation of labor for the period of 30 days, after which the lien claimant has 90 days within which to file his lien by virtue of estoppel because of owner's failure to file notice of cessation from labor.

7. MECHANICS' LIENS 🔑279—OCCUPATION OF BUILDING INSUFFICIENT TO SHOW ITS COMPLETION.

Where the owner of a building never ceased occupying the building at any time pending the reconstruction or alteration thereof, except during the brief time when building was in course of removal from one parcel of land to another, there was not such an occupation or use, within the meaning of Code Civ. Proc. § 1187, as raised a conclusive presumption of completion.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Occupation.]

8. CONTRACTS 🔑186(2)—NO PRIVITY OF CONTRACT BETWEEN OWNER AND EMPLOYÉS OF BUILDING CONTRACTOR.

Where a person contracts to construct a building for a certain price, and employs labor and purchases material for such work, there is no privity of contract between the owner and the employés and the materialmen.

9. CONTRACTS 🔑186(2) — OWNER OF BUILDING NOT PERSONALLY LIABLE TO EMPLOYÉS OF CONTRACTOR AND MATERIALMEN.

Where a contract is let for the construction of a building for a certain amount, and the contractor employs labor and purchases material, the owner of the building is not personally liable to the employés of the contractor and the materialmen, unless it is shown that there exists a contract, express or implied, as a contractual privity, between the owner and such persons, notwithstanding Code Civ. Proc. § 1192.

10. WORK AND LABOR 🔑22—IN ACTION TO FORECLOSE MECHANIC'S LIEN, COMPLAINT INSUFFICIENT AS ON QUANTUM MERUIT.

In an action to foreclose mechanics' liens, complaint alleging that materials and labor were "of the reasonable value of" certain amounts *held* not to state cause of action against the owner in the form of a quantum meruit; it being alleged that the labor and materials were furnished in pursuance of the contract between the contractor and the owner, and were furnished at the instance of the contractor.

On Petition for Rehearing.

11. APPEAL AND ERROR 🔑835(2)—NEW POINT RAISED ON REHEARING NOT REVIEWABLE.

A new point raised in a petition for rehearing need not be considered.

12. MECHANICS' LIENS 🔑280(6) — CONTRACT TO REMOVE BUILDING TO OTHER LOT AND RECONSTRUCT SEVERABLE.

Where a contract was entered into whereby a contractor was to remove a building from one parcel of land to another, and certain work was to be done on the parcel from which the building was removed, owner to pay the absolute cost of such work, and no more, and the building was to be altered and reconstructed on the lot where removed to, the contract was severable, and those furnishing labor and material on the land where the building was reconstructed were not entitled to show the date of the last work done on the land from which the building had been removed, in order to show when the contract was completed, as to the work to be done on the land where the building was moved to; purpose being to show that a lien was filed in time.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Consolidated actions by Philip F. Mott, and by Chester E. King, and by A. R. MacSwain and E. W. MacSwain, copartners doing business under the style of Sacramento Builders' Supply Company, against Frank E. Wright and Frank P. Williams. From a judgment for plaintiffs for part of the relief demanded, they appeal. Affirmed.

W. A. Gett and Johnson & Lemmon, all of Sacramento, for appellants.

Devlin & Devlin, of Sacramento, for respondents.

HART, J. The actions were brought to enforce mechanics' liens and were consolidated for trial. Judgment was rendered in favor of plaintiffs against Frank P. Williams, the contractor, and in favor of Frank E. Wright, the owner, for his costs, and that the plaintiffs were not entitled to liens upon the premises described in the complaints. The appeal is by plaintiffs from the judgment.

The owner, defendant Wright, entered into a contract with the contractor, defendant Williams, for the removal of a cottage from Eleventh and O streets, in the city of Sacramento, to Twenty-Fourth and L streets, in said city, and for the raising of said cottage and constructing flats underneath the same. The liens in question are sought to be enforced against the lot on Twenty-Fourth and L streets. Work started on the flats about the middle of February, 1915, and continued without cessation until the 12th day of May, 1915. From about March the owner occupied the upper portion of the building, and later on tenants occupied the flats.

It was found by the court that defendant Wright entered into a contract with defendant Williams, "which said contract was never recorded in the office of the county recorder of Sacramento county," under which said contractor agreed to construct said building; that no notice of completion of said building or contract and no notice of cessation of labor were recorded; "that the said building and said contract were completed on the 12th day of May, 1915; that subsequent to said 12th day of May, 1915, the plaintiff Chester E. King repapered a portion of the hallway of the building located on said premises; that the papering of said hallway had been completed by said plaintiff Chester E. King prior to the 12th day of May, 1915, but said papering was defectively done by said plaintiff Chester E. King, whereby it became necessary for him to repaper a portion of said hallway; that the cost of repapering said hallway subsequent to the said 12th day of May, 1915, was the sum of $2.40; that the condition of said hallway subsequent to the 12th day of May, 1915, was a trivial imperfection in said work, and was not such as would prevent filing of liens; that the cost of said repapering said hallway was trivial in comparison with the cost of the work and improvements that were done under said contract."

The liens which are sought to be enforced were filed, respectively, August 12, 15, and 18, 1915. The complaints alleged the completion of the work on June 1st.

It is strenuously argued by appellants that the finding that the building was actually completed on May 12, 1915, is unsupported by the evidence. The contractor testified that the last work he did was about May 28th or June 1st; Mott, the plumber, said that he went to the building on June 2d to fix a water pipe; and King, the painter and paper hanger, testified that he worked personally on the building about the 14th or 15th of May, and that in the week ending May 29th one man worked there. King produced his "labor book," showing the following entries:

"May 15. Bert Renner. $2.50. May 29. Pape. $2.00."

The last item was explained to have been for repairing in the hall where the plaster had burned through the paper. It was also explained that the men working for Mr. King turned in their time cards every Saturday, showing the time they had worked during the week; that the time cards were destroyed, and the total paid each man entered in the labor book at the week end. Consequently the item of May 15th covered work that may have been performed on any day between the 10th and 15th, both inclusive, and the work shown by the item of May 29th may have been done on any day between the 17th and 29th, both inclusive.

The testimony on behalf of respondent on this point was as follows: M. F. Trebilcox testified that the two lower flats were rented to tenants who took possession on April 1st. Mr. Dunn, one of the tenants, testified that he took possession on April 7th of the east lower flat; that at the time it was finished and ready for occupancy and there were no mechanics working in the building after that except, he believed, some painters were working on the garage, and he did not think they had finished upstairs; he thought the west flat was also finished; that some carpenters were working "for maybe a week or more." Defendant Wright testified that he moved into the building the 1st of March; that labor ceased on May 12th, and at that time there was no further work to be done on the property, either the upper part or the lower flats. Mr. Wright's wife corroborated his testimony.

The discussion to follow will be the better understood by first reproducing herein the provisions of section 1187 of the Code of Civil Procedure pertinent to the points advanced here by the appellants. Said section provides that every person save the original contractor—

> "claiming the benefit of this chapter [on the enforcement of liens of mechanics, laborers and materialmen], within thirty days after he has ceased to labor or has ceased to furnish materials, or both, or at his option, within thirty days after the completion of the original contract, if any, under which he was employed, must file for record * * * a claim of lien. * * *"

The said section further provides:

> "Any trivial imperfection in the said work, or in the completion of any contract by any lien claimant, or in the construction of any buildings," etc., "shall not be deemed such a lack of completion as to prevent the filing of any lien; and, in all cases, any of the following shall be deemed equivalent to a completion for all the purposes of this chapter: The occupation or use of a building, improvement, or structure, by the owner, or his representative; or the acceptance by said owner or said agent, of said building, improvement, or structure, or cessation from labor for thirty days upon any contract or upon any building, improvement or structure or the alteration, addition to, or repair thereof; the filing of the notice hereinafter provided for. The owner may within ten days after completion of any contract, or within forty days after cessation from labor thereon, file for record in the office of the county recorder of the county where the property is situated, a notice setting forth the date when the same was completed, or on which cessation from labor occurred, together with his name and the nature of his title, and a description of the property sufficient for identification, which notice shall be verified by himself or some other person on his behalf. * * * In case such notice be not so filed, then the said owner and all persons deraigning title from or claiming any interest through him shall be estopped in any proceedings for the foreclosure of any lien provided for in this chapter from maintaining any defense therein based on the ground that said lien was not filed within the time provided in this chapter: Provided, that all claims of lien must be filed within ninety days after the completion of any building, improvement or structure, or the alteration, addition or repair thereto."

[1, 2] The appellants insist that the evidence without conflict shows that there was not an actual completion of the building under the contract on the 12th day of May, 1915, but that there was only a constructive completion by cessation of labor on said day. But in this they are mistaken. Wright, the owner, testified, it is true, that work or labor ceased on the building on the 12th day of May, 1915. He also testified, as seen, and Mrs. Wright corroborated him, that the last work necessary to be done on the building to complete the contract was performed on the 12th day of May, and that the building was then completed, and nothing more was to be done thereon. Of course, that testimony was the equivalent of testimony that the contract was completed, and from it the trial court was justified in so finding, if it believed the testimony, as obviously it did. Manifestly there must have been a cessation of labor when the building was completed according to the terms of the contract, but the cessation from labor by reason of the actual completion of the contract is not the cessation of labor which, under section 1187, itself constitutes a constructive completion of the building or contract.

[3] There is, it is true, some testimony slightly tending to show that the actual completion occurred at a later date, which would render the liens effective; but this merely raised a conflict in the evidence upon that issue, which the trial court resolved, as it was within its constitutional province to do, in favor of the defendants. This court is, as is well understood, concluded by the findings so made, and must accept as the fact that the building was actually completed according to the terms and requirements of the contract on the 12th day of May, 1915. It follows, therefore, that the appellants filed their claims too late to render them effective or of any force.

[4, 5] As to the work of repapering a por-

tion of the hallway on May 29, 1915, by King, who had the contract for papering the house, the uncontradicted testimony upon that point shows that said work of repapering occurred after King had finished his contract. Wright, the owner of the house, called on King after the building had been in all respects completed, and, informing him that there was a defect in the papering in the hallway, requested him (King) to repaper the defective part, and, as seen, on the 29th day of May King did so. This work of repapering required, according to the testimony, approximately two hours' time. If the testimony of King as to this matter is to be accepted, the defect in the papering was not due to any remissness or lack of proper skill or care on his part in doing the work originally, but to some circumstance or fact subsequently occurring and over which he had no control; and, if this be true, the work of repapering was as far removed from any consideration of the original contract as though the papering had naturally become defective from long use. But, however that may be, it is clear that if the original papering was defectively done, and the repapering was for that reason required to be done, it amounted to a trivial imperfection only in the work, within the meaning of that language in section 1187. All that the statute requires, to fix the time from which the right of lien claimants to file their liens begins to run, is that there be, so far as actual completion is concerned, a substantial completion, and, in this case, the testimony shows that there was such a completion, if, indeed, not more than that. Willamette, etc., Co. v. College Co., 94 Cal. 229, 237, 29 Pac. 629; Harlan v. Stufflebeem, 87 Cal. 508, 25 Pac. 686; Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 379, 51 Pac. 555; Schindler v. Green, 149 Cal. 752, 754, 87 Pac. 626; Bianchi v. Hughes, 124 Cal. 24, 27, 56 Pac. 610; Joost v. Sullivan, 111 Cal. 286, 292, 43 Pac. 896.

The foregoing, of course, disposes of the proposition earnestly urged by the appellants that the completion was not actual, but by cessation from labor, and that, therefore, they were entitled to file their liens at any time within 120 days from the date of the cessation from labor, and that in that view their liens were seasonably filed under the law. But there is some intimation by appellants in their briefs that the 120 days' limitation applies in all cases of completion, whether actual or statutory, and they cite as supporting that view the cases of Buell v. Brown, 131 Cal. 158, 63 Pac. 167, and Farnham v. Cal., etc., Trust Co., 8 Cal. App. 266, 96 Pac. 788.

[6] In each of these cases the lien claimants relied upon a constructive completion of the contract by cessation from labor, and it was held that where a contract has not been actually completed, but there was a constructive completion by cessation from labor for the period of 30 days, and no notice of such cessation had been filed by the owner with the office of the county recorder, lien claimants have 90 days from and after the expiration of the 30 days of cessation from labor within which to file their liens. In other words, in such case lien claimants relying on completion by cessation from labor are, like those relying on actual completion, limited, as to the time within which they may file their liens, where the owner has failed or neglected within the prescribed period to file with the county recorder a notice of the cessation from labor, to 90 days from the time that there has been a completion by cessation from labor (30 days from and after the time of such cessation) within which to file their liens, or 120 days from the date of the cessation from labor. But, in this case, there was an actual completion, and the rule as to the 120 days' period can have no application where there is an actual completion. The statute plainly provides that all claims of lien must be filed within 90 days after the completion of any building, improvement, etc., and, as a matter of fact, that provision, as above suggested, applies, not only to cases of actual completion but also to those of constructive completion, including completion by cessation from labor, for in the latter case, as is obvious, there is no completion until there has been a cessation from labor for the period of 30 days, from and after which time the lien claimant has, by virtue of the estoppel arising against the owner upon his failure to file with the county recorder notice of the cessation from labor 90 days within which to file his lien.

[7] Counsel for the respondents state in their brief that the appellants claim, for the first time on this appeal, that there was a constructive completion of the contract through occupation and use of the building by the owner. But counsel for appellants make no such contention here. Indeed, in their closing brief they positively declare that there is no ground afforded by the record for any such claim, and in this they are clearly right. The owner never ceased occupying the building at any time pending the reconstruction or alteration thereof, except during the brief time the building was in the course of removal from Eleventh and O streets to Twenty-Fourth and L streets in Sacramento. The lien claimants here involved did all their work after the occupation or use by the owner took place, or while the owner was occupying and using the building. This, quite clearly, is not such an occupation or use as raises a conclusive presumption of completion under the statute. Orlandi v. Gray, 125 Cal. 372, 374, 58 Pac. 15; Boscus v. Waldmann, 31 Cal. App. 245, 255, 160 Pac. 180.

[8-10] It is lastly contended that, because the materials and the labor were furnished

with the knowledge and consent of Wright, an implied contract arose between the claimants and Wright, and that, having received the benefit of the labor performed and the materials furnished, Wright ought in equity and good conscience to be held to be personally liable and compelled to pay the appellants their claims. There are two answers to this proposition, viz.:

(1) As the court found, upon sufficient evidence, to be true, the materials and labor were furnished to Williams, the contractor, and, as is necessarily implied from that finding, the materials and the labor were not furnished to Wright. In other words, there was no contract, either express or implied, between the materialmen and the laborers and the owner. There was, therefore, no privity of contract between the defendant Wright and the several lien claimants. Obviously, to sustain an action against Wright, it must be upon the theory that he is personally liable, and to render him personally liable, there must be shown to exist a contract, express or implied, or a contractual privity, between him and those claiming lien.

(2) The complaints, in neither counts thereof, submit any issue as to the reasonable value of the labor and the materials in the form of a common count. It is true that the complaints are in two counts, but in both it is alleged that the labor bestowed upon and the materials furnished for the building were so bestowed and furnished in pursuance of the contract between the contractor and the owner and were bestowed and furnished at the instance of the contractor. There is no allegation in either count of the complaints that the materials were furnished for and the labor done on the building at the direct instance of Frank E. Wright, the owner, or at his instance at all. There is, in short, no attempt to rely upon a common count in the form of a quantum meruit. While the second count in each of the complaints alleges that the materials and the labor were "of the reasonable value of" the respective amounts of the several claims, the right to the enforcement of the payment of said claims is expressly and primarily based upon the contract between Williams and Wright and upon the theory that said materials and labor were furnished and bestowed at the instance of Williams, the contractor.

The case of S. C. L. Co. v. Schmitt, 74 Cal. 625, 626, 16 Pac. 516, was decided when section 1183 of the Code of Civil Procedure provided that all contracts for work on buildings or other improvements, where the amount agreed to be paid thereunder exceeded $1,000, should be in writing and filed by the owner in the office of the county recorder, in default of which the contract became wholly void, and no recovery could be had thereon, and that in that case the work done and the materials furnished thereunder were to be deemed to have been done and furnished at the personal instance of the owner, and that laborers, mechanics, and materialmen doing work thereon and furnishing materials therefor should have a lien for the value thereof. Answering the argument made in that case that, notwithstanding that no liens were filed for the enforcement of the plaintiff's claim for furnishing materials for a building constructed for the owner by a contractor, a personal judgment for the value of the materials should be entered and enforced against the owner, the Supreme Court said:

> "It is claimed, although no lien exists on the building as to the contractor, and those who may claim under him, and none as to the materialman, that nevertheless, according to section 1183, Code of Civil Procedure, the plaintiff ought to have had a personal judgment against Schmitt, with whom he never had any contract to furnish the building materials. * * * We cannot agree with the appellant in a case where neither the contractor nor the materialman has filed any lien, such as is given them by statute, that under the section, supra, a personal judgment for the value of the materials furnished may be had against the owner of the building, who did not purchase them, and who was under no contract with the materialmen, either express or implied, to pay for them."

See, also, Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 647, 22 Pac. 860; First National Bank v. Perris, 107 Cal. 55, 64, 40 Pac. 45; Marchant v. Hayes, 120 Cal. 137, 139, 52 Pac. 154.

The cases relied upon by appellants as supporting their position that they are entitled to a personal judgment against the owner of the building are Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127, Acme Lumber Co. v. Wessling, 19 Cal. App. 406, 126 Pac. 167, and Gentle v. Britton, 158 Cal. 328, 111 Pac. 9. But the decisions in those cases proceed upon a very much different state of facts from that with which we are confronted in this case.

In Castagnino v. Balletta the action was by the contractor against the owner, between whom and the former a contract had been entered into for the construction of certain buildings. The complaint declared upon two counts, one being for the foreclosure of a mechanic's lien, and the other in indebitatus assumpsit, or a common count, founded upon the proposition that the original contract had been departed from in material respects in the construction of the buildings. That is not this case.

In Acme Lumber Co. v. Wessling the action was for the foreclosure of a lien for work done under an oral, and consequently an unrecorded, contract between the contractor and a tenant in possession of the real property upon which the improvement was made. It was made to appear that the owner had knowledge of the improvement being made on his premises, but that he failed to file the notice of nonresponsibility prescribed by section 1192 of the Code of Civil Procedure, and it was therefore held that, by virtue of the terms of said section, it was to be presumed that the improvement was constructed or made at the instance of the owner of the premises, and said premises were subject to the lien filed for the materials and labor used in the work of improvement. But it is claimed or intimated that in that case the complaint proceeded upon a quantum meruit against the owner of the premises and that the appellate court held that it was proper to do so. But, even so, that case is not in point here, for the reason that between the plaintiff therein, who was the assignor of the contractor, and the owner, there existed a privity of contract, created by the terms of section 1192.

Gentle v. Britton is another case where section 1192 was applied, the improvement having been made under a contract between the contractor and a party not the real owner of the premises upon which the improvement was made. The conditions pointed out by said section 1192 to render the premises subject to a lien for the labor and materials used in the improvement were found to exist in that case; hence an equitable lien was created on the premises to secure the payment of the value of the labor and materials. It is obvious that section 1192 has no application to the facts of this case.

We have been shown no reason for disturbing the judgment, and it will therefore stand affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Petition for Rehearing.

HART, J. Appellants have filed a petition for rehearing, in which several points are raised. The first one is that the contract in question was an entire and not a divisible one. The contract was made by Wright, the owner, with Williams, the contractor, and provided for the erection of a six-flat building upon a lot at Eleventh and O streets, in the city of Sacramento, for the consideration of $9,500. Said contract also contained the following provision:

> "It is hereby agreed that in consideration of receiving the above contract, the party of second part will furnish plans, and superintend the moving and erection of flats under present house, the location to be Twenty-Third and L streets, without commission or consideration; it being understood that this work is to be done at absolute cost to the owner. The cost of remodeling not to exceed $1,800, and moving not to exceed $125. He will also agree to superintend erection of garages and other work on lot which owner may desire under above conditions."

The specific point made is that the work on the O street property was not completed until June 4 or June 12, 1915, which is "the true date from which the tolling of the limitation of time within which liens may be filed is to be computed," and not May 12, 1915, the date of the completion of the work on the L street property.

[11, 12] In neither appellant's opening brief nor in his reply brief is there one word concerning the Eleventh and O streets property. Indeed there seems from the record not to be any occasion for referring to that property, because there is nothing in the pleadings, nothing in the findings, nothing in the evidence, and nothing in the judgment having any reference to the O street property, except incidentally it is mentioned by one of the witnesses. The liens were all filed against the Twenty-Third and L streets property, and there was no issue in the case regarding the O street property. If questions can be raised for the first time in the petition for rehearing, there would never be an end to litigation. It has in many cases been held that, where a case has been decided, a new point raised in appellant's reply brief, or in the petition for rehearing, will not be considered. Buena Vista Oil Co. v. Park Bank of Los Angeles, 180 Pac. 12; Camp v. Boyd, 182 Pac. 60; Hibernia Sav. & Loan Soc. v. Farnham, 153 Cal. 578, 96 Pac. 9, 126 Am. St. Rep. 129; Flores v. Stone, 21 Cal. App. 105, 131 Pac. 348, 351, 352. However, in this case, we will consider the point raised.

In 13 C. J. p. 563, it is said:

> "If the consideration is single, the contract is entire, but if the consideration is either expressly or by necessary implication apportioned, the contract will be regarded as severable. * * * Where the portion of the contract to be performed by one party consists of several and distinct items, and the price to be paid is apportioned to each item according to the value thereof and not as one unit in a whole or in a part of a round sum, the contract will ordinarily be regarded as severable."

In Elliott on Contracts (volume 4, § 3667) it is said:

> "A building, construction, or working contract is entire, and not divisible, where it is for an entire structure for a stated compensation. * * * If the price is apportioned among the several items, or to the different parts of one item, the contract will generally be construed as severable."

In the case at bar "the price was apportioned to each item according to the value thereof, and not as one unit," and we hold that the contract was not an entire one, but was severable.

As to the remaining points raised in the petition, that "provisions as to trivial imperfections were designed merely to prevent premature filing of liens," and that "slight work after substantial completion, done at request or with consent of owner or subcontractor, extends time for filing liens," we are satisfied with what is said in the main opinion.

The petition for a rehearing will be denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

43 Cal. App. 130

NEZIK v. COLE et al. (Civ. 3018.)

(District Court of Appeal, First District, Division 1, California. Sept. 3, 1919.)

1. APPEAL AND ERROR 🔑373(1)—NECESSITY OF BOND ON APPEAL BY ALTERNATIVE METHOD.

The new and alternative method of taking appeals, provided by Code Civ. Proc. § 941a, 941b, and 941c, enacted in 1907, dispenses with the necessity of an undertaking on appeal, and the fact that a bill of exceptions is prepared in place of the reporter's transcript authorized by section 953a has no bearing on the question; the latter section having to do with the preparation of the record on appeal.

2. APPEAL AND ERROR 🔑607(1)—MAKING UP OF RECORD.

An appeal having been properly taken in compliance with either the old or the alternative method, the record may be made up in any way permitted by the Code.

3. CORPORATIONS 🔑594—DISSOLUTION AT EXPIRATION OF TERM OF EXISTENCE.

A corporation is dissolved at the expiration of the term of its corporate existence.

4. CORPORATIONS 🔑594—POWER TO SHORTEN TERM OF EXISTENCE.

A company had power to shorten the term of its corporate existence by an amendment to its articles of incorporation even if the result of such abbreviation amounted to an almost immediate dissolution.

5. ABATEMENT AND REVIVAL 🔑39—CONTINUANCE OF ACTION AGAINST REPRESENTATIVE OF DISSOLVED CORPORATION.

If Code Civ. Proc. § 385, providing that an action does not abate at the death or disability of a party if the cause of action survives, is applicable to the case of a corporation on dissolution, it does not authorize the continuance of the action against the corporation itself, but allows the action to be continued only against the representative or successor in interest, brought in on motion.

6. ABATEMENT AND REVIVAL 🔑39—CONTINUANCE OF ACTION AGAINST CORPORATION IN NAME OF REPRESENTATIVES AFTER DISSOLUTION.

Despite Civ. Code, § 400, where a corporation was dissolved, during action against it by expiration of the term of its existence, it was necessary, for the action to continue at all, that the company's successors or representatives under section 400 be properly brought in on motion as defendants, as provided in Code Civ. Proc. § 385.

7. CORPORATIONS 🔑630(½)—VOID PROCEEDINGS IN ACTION AGAINST AFTER DISSOLUTION.

After a corporation was dissolved by expiration of the term of its existence, filing of demurrers and answer in its name and on its behalf in an action pending against it were nullities, as the company could no longer be served with process, could not appear, and could not itself admit anything, or authorize any one else to do so for it.

8. CORPORATIONS 🔑630(3) — PROCESS INEFFECTIVE AS TO COMPANY AFTER ITS DISSOLUTION PENDING ACTION AGAINST IT.

After a corporation was dissolved by expiration of the term of its existence, any service, on counsel previously authorized to represent it in a pending action, of plaintiff's notice of motion to file an amended and supplemental complaint, and the notice that such pleading had been filed, and of the time granted the company's directors, substituted as its trustees, within which to plead thereto, were not effectual so far as any interest of defendant company was concerned.

9. ABATEMENT AND REVIVAL 🔑39—SUBSTITUTION OF DIRECTORS AS TRUSTEES ON DISSOLUTION OF CORPORATION BY EXPIRATION OF TERM.

After a corporation, pending action against it, had become dissolved by expiration of the term of its existence, if plaintiff intended to secure any judgment enforceable against the company's directors as its trustees, he should have had them substituted as parties in place of the company, under Code Civ. Proc. § 385.

10. PARTIES 🔑61—SUBSTITUTION OF PARTY BY ORDER OF COURT NOT AMENDMENT.

The substitution of one party for another by order of court is not such an amendment of a pleading as is required to be made on notice or to be engrossed, otherwise than to be entered in the minutes of the court.

11. PARTIES 🔑61 — AMENDMENT OF COMPLAINT SUBSTITUTING DIRECTORS AS DEFENDANTS AFTER DISSOLUTION.

In action against corporation pending which company was dissolved by expiration of term of existence, notice of motion for permission to file an amended and supplemental complaint substituting the company's directors, as trustees, and the order directing that the proposed amended complaint be filed and made of record, further directing that the new defendants named in the amended complaint have 20 days in which to plead, *held* a substantial compliance with Code Civ. Proc. § 385, operating to bring about the substitution as defendants of the directors as trustees for the defunct company.

12. PARTIES 🔑63—NOTICE TO SUBSTITUTED PARTY.

One substituted in a cause must be duly notified of the fact of his having been made a party before he can be affected by notices or proceedings in the action.

13. JUDGMENT ⚷17(1)—JUDGMENT BY DEFAULT VOID AGAINST SUBSTITUTED DEFENDANTS NOT SERVED.

Default judgment against the individual defendants in an action against a corporation which was dissolved pending action by expiration of the term of its existence, the action being continued by amendment against the company's directors as its trustees, in the absence of service upon or authorized appearance by or on behalf of the individual defendants, was unauthorized and void.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by John Nezik against Walter D. Cole and others. Judgment for plaintiff, and defendants appeal. Reversed, and cause remanded, with directions.

Thomas, Beedy & Lanagan, of San Francisco, for appellants.

Edmon G. Bennett, of Los Angeles, Chas. E. Barrett, of Las Vegas, Nev., and Platt & Sanford, of Carson City, Nev., for respondent.

WASTE, P. J. Appeal from a judgment, entered after default, awarding damages in the sum of $17,688 for personal injuries.

Within the time when an appeal may be taken appellants filed with the clerk of the court in which the judgment was entered a notice stating the appeal from the same and served a similar notice on the attorneys for the adverse party. They did not, however, within five days after service of the notice of appeal, file the undertaking, or, in lieu thereof, make the deposit of money with the clerk as required by sections 940 and 941 of the Code of Civil Procedure, and no waiver of the same was ever made or filed. Neither did appellants, in lieu of preparing and settling a bill of exceptions, pursuant to the provisions of section 650 of the same Code, file with the clerk the notice required by section 953a thereof, requesting that a transcript of the proceedings be made up and prepared.

On the contrary appellants caused to be duly prepared and settled a bill of exceptions, containing the usual statement of the matters occurring at the trial. Respondent moves to dismiss the appeal upon the ground that no undertaking on appeal having been given or deposit in lieu thereof made, this court has no jurisdiction of the cause, for the reason that no appeal has been perfected in the manner or form prescribed by law.

[1, 2] The motion is without merit. The new and alternative method of taking appeals provided by sections 941a, 941b, and 941c of the Code of Civil Procedure, enacted in 1907, dispenses with the necessity of an undertaking. Estate of McPhee, 154 Cal. 385, 97 Pac. 878; Mitchell v. California S. S. Co., 154 Cal. 731, 99 Pac. 202; Union Collection Co. v. Oliver, 162 Cal. 755, 124 Pac. 435; Title Ins., etc., Co. v. Cal. Dev. Co., 168 Cal. 397, 402, 143 Pac. 723. Section 941b provides that the notice of appeal when filed "shall without further action on the part of the appellant transfer the cause for decision and determination to the higher court." "That this appeal was perfected under the new method there can be no question. Appellant filed his notice, and that was all that was required to perfect it." Mitchell v. California, etc., S. S. Co., supra. The fact that a bill of exceptions was prepared in place of the reporter's transcript authorized by section 953a has no bearing upon the question. The latter section has to do with the preparation of the record on appeal. An appeal having been properly taken in compliance with either the old or the alternative method, the record may be made up in any way permitted by the Code. Lang v. Lilley & Thurston, 161 Cal. 295, 119 Pac. 100; Union Collection Co. v. Oliver, supra.

The motion to dismiss the appeal is denied.

The original complaint in this action was filed July 8, 1914, against the Pacific Coast Borax Company, then a corporation, incorporated for a period of 50 years from and after July 5, 1912. It was alleged that plaintiff had suffered severe personal injuries by reason of the negligence of defendant in failing on two separate occasions to furnish him a safe place in which to work. After obtaining time by stipulation within which to plead, on September 18, 1914, counsel, who later specially appeared in the action for appellants, filed a general and specific demurrer, purporting to be interposed on behalf of the borax company. At the hearing on demurrer the same counsel orally suggested to the trial court that the corporation defendant had ceased to exist, and moved for a dismissal of the action, which was denied. The demurrer was overruled and an answer was filed on April 26, 1915.

From the answer it appeared that on September 8, 1914, which date was prior to the appearance of the company in the action by proceedings duly taken to that end, the corporation had amended its articles by changing the term for which it was to exist from 50 years to 2 years, 2 months and 7 days from and after the date of its incorporation. In other words, the life of the company had expired on September 12, 1914, 6 days before the demurrer purporting to be on its behalf was filed in this action.

After the service of notice thereof by plaintiff on the attorneys who first made the purported appearance in the action on behalf of the borax company, the court granted permission to plaintiff to file an amended and supplemental complaint, naming as defendants the appellants, who were alleged to be the directors of the Pacific Coast Borax Company prior to and at the time it ceased to exist as a corporation. The amended and supplemental complaint set forth the original causes of action, the facts relating to the termination of the life of the corporation, and that the directors thereof (appellants) had thereby become its trustees, with full power and authority to settle its affairs. The prayer of the amended and supplemental complaint was for recovery "of and from the said defendants" of the amount claimed as damages by reason of the personal injuries. The court ordered that the defendants named therein be given 20 days from the date of service of a copy of the order so fixing the time in which to plead.

No summons or any notice that the appellants so alleged to be directors of the Pacific Coast Borax Company prior to and at the time it ceased to exist had been made defendants in the action was served on the defendants, or either of them, or upon any attorney of record other than upon the attorneys who first appeared and filed the demurrer and thereafter the answer before referred to. Except in the same manner, no service was made of the court's order fixing the time within which defendants might plead to the amended and supplemental complaint.

The defendants not appearing, judgment by default was entered against them in the amount prayed for. Thereupon the defendants, specially appearing by counsel for the purpose, made a motion, supported by affidavits of merit and as to the facts, for an order setting aside the default judgment and all subsequent proceedings. The motion was based on the facts, substantially set forth herein, and the further fact that no one of the defendants was a director of the borax company at the time it ceased to exist. No counter showing was made by the plaintiff. The court denied the motion, and appellants have appealed from the judgment.

[3-5] A corporation is dissolved at the expiration of the term of its corporate existence. Kohl v. Lilienthal, 81 Cal. 378, 386, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520. The Pacific Coast Borax Company had power to shorten the term of its corporate existence by an amendment to its articles of incorporation, even if the practical result of such abbreviation amounted to almost an immediate dissolution. Tognazzini v. Jordan, 165 Cal. 19, 130 Pac. 879, Ann. Cas. 1914C, 655. "It is settled beyond question that, except as otherwise provided by statute, the effect of the dissolution of a corporation is to terminate its existence as a legal entity, and render it incapable of suing or being sued as a corporate body, or in its corporate name. It is dead, and can no more be proceeded against as an existing corporation than could a natural person after his death. There is no one who can appear or act for it, and all actions pending against it are abated, and any judgment attempted to be given against it is void." Crossman v. Vivienda Water Co., 150 Cal. 575, 580, 89 Pac. 335, 337. Where there is no statute providing for the continuance of the corporation itself after dissolution, for the purpose of settling its affairs, provision is generally made for the doing of this by others. We have such a provision in this state. Section 400 of the Civil Code provides:

> "Unless other persons are appointed by the court, the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation."

Before the Supreme Court was called upon to construe the provision of the act of the Legislature relating to the forfeiture of charters by corporations for failure to pay license taxes, to which we will shortly refer, section 400 was held to be applicable in all cases of dissolution, whether voluntary or involuntary. Havemeyer v. Superior Court, 84 Cal. 327, 365, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; Crossman v. Vivienda Water Co., supra. Construing that section in the last-mentioned case, the court said:

> "There is no statute of this state that authorizes the commencement or continuance of an action against the corporation after its legal death. We have no statute similar to that of several states, providing that in the event of the dissolution of a corporation its existence shall be continued either indefinitely or for a specified time for the settlement of its affairs. Statutes similar to our section 400 of the Civil Code above quoted do not have the effect of continuing the existence of the corporation as cestui que trust, or otherwise, so as to render it capable of defending actions in its corporate name. Thompson on Corporations, § 6739; Clark & Marshall on Private Corporations, § 333; Sturgis v. Vanderbilt, 73 N. Y. 384. If section 385 of the Code of Civil Procedure, providing that an action does not abate by the death or any disability of a party, if the cause of action survives, is applicable to the case of a corporation, it does not authorize the continuance of the action against the corporation itself, but allows the action to be continued only against the 'representative or successor in interest,' brought in on motion." McCulloch v. Norwood, 58 N. Y. 562, 568.

See, also, Judson v. Love, 35 Cal. 463.

[6] Respondent, nevertheless, contends that the lower court, having acquired jurisdiction over the defendant and the subject-matter of the action by reason of the service of summons, continued to entertain and hold such jurisdiction, regardless of the fact that subsequent to such jurisdiction attaching the corporation voluntarily ceased to exist, and that, while the directors might properly be substituted as parties defendant, such substitution was not essential to a continuance of the action. He cites three cases as sup-

porting this proposition: Lowe et al. v. Superior Court of Los Angeles County, 165 Cal. 708, 134 Pac. 190, 192; Brandon v. Umpqua Lumber & Timber Co., 166 Cal. 322, 136 Pac. 62; Turney v. Morrissey, 22 Cal. App. 271, 134 Pac. 335. An important distinction must be made in the consideration of these decisions. Each deals with facts arising under the provisions of the special act of the Legislature relating to the payment of the license tax by corporations and cases of forfeiture under its provisions. By reference to the above statute, and acts amendatory thereof, we find that the provision of section 10a, Act Extra Sess. 1906, p. 25, as amended by section 2, Act 1907 (Stats. 1907, pp. 746, 747), so strongly relied on by respondent, is restricted by the title of the act to "making provision for settling the affairs of corporations where said tax has not been paid," and by the language of the provision itself to "cases of forfeiture under the provisions of this act."

As we read the cases relied on by respondent, they merely determine that, since the amendment of 1907 to the act in question, an action pending against a corporation which has forfeited its charter by reason of failure to pay its license tax shall not abate by reason of the forfeiture, but may be continued and prosecuted or defended in the corporate name, the control and management of the action, so far as the corporate interests are concerned, being in the directors or managers in office at the time of the forfeiture, they being the trustees of the corporation, its stockholders or members. Brandon v. Umpqua Lumber Co., supra. We find nothing in any of said decisions, read in connection with the statute under which the cases arose, which may properly be said to remove this case, and cases like it, from the operation of the well-established general principles so succinctly stated in the authorities from which we have quoted. As was so well pointed out by the Chief Justice in the Crossman Case, supra, section 400 of the Civil Code, already quoted, does not have the effect of continuing the existence of a corporation after dissolution so as to render it capable of defending actions in its corporate name. It was therefore necessary that if the action could continue at all its successors or representatives, under section 400, be properly brought in on motion, as provided in section 385 of the Code of Civil Procedure.

[7, 8] Assuming the correctness of the recital in the judgment in this case, that the Pacific Coast Borax Company was regularly served with process, the filing of the demurrers and answer in its name, and purporting to be in its behalf, was a nullity. So far as the dead corporation itself was concerned there could be no admission or estoppel. It could no longer be served with process, could not appear, could not itself admit anything nor authorize any one else to do so for it. It was legally dead. Crossman v. Vivienda Water Co., supra. The action of counsel, who may have had authority to represent the defendant company prior to the termination of the period of its legal existence, could not, so far as that party was concerned, vitalize any proceedings taken in the abated action after the corporation ceased to exist. Any subsequent service on them by the plaintiff of the notice of motion to file the amended and supplemental complaint, the notice that such pleading had been filed, and of the time granted the substituted defendants within which to plead thereto, was not effectual, so far as any interest of the defunct corporation was concerned. Deiter v. Kiser, 158 Cal. 259, 262, 110 Pac. 921; Bell v. San Francisco Savings Union, 153 Cal. 64, 69, 94 Pac. 225; Pedlar v. Stroud, 116 Cal. 462, 48 Pac. 371.

[9] Unless, therefore, it can be shown that some other course was followed, the result of which was to properly bring the appellants into the action, after which, by due service or voluntary appearance, they were subjected to the jurisdiction of the court, the respondent will have failed to maintain his position here. From the very nature of things the dissolution or death of the defendant, like the death of any other party to a pending action, could only be brought to the attention of the court on proper suggestion made by some one other than the defunct corporation itself. Combes v. Keyes, 89 Wis. 297, 62 N. W. 89, 27 L. R. A. 369, 46 Am. St. Rep. 839. If the plaintiff intended to secure any judgment in this case, enforceable against these appellants, he should have had them substituted under section 385 of the Code of Civil Procedure as parties in place of the corporation, after the latter had become functus officio. Ex parte Tinkum, 54 Cal. 201, 203.

The notice of motion given by the plaintiff for permission to file the amended and supplemental complaint was based upon the notice itself and upon all the records, pleadings, and files in said action. The verified proposed amended and supplemental complaint was attached to, and by apt reference made a part of, the notice and motion. There was on file in the action the purported answer of the borax company, which was duly verified by one purporting to have been the secretary of the corporation prior to and at the time it ceased to legally exist. It fully appeared in both of these verified pleadings that the defendant corporation was legally dead. It was alleged in the verified proposed amended and supplemental complaint that "immediately prior and at the time of said dissolution" appellants, naming them, "were the duly elected, qualified, and acting board of directors of said corporation, and that they, as such directors are now the legally constituted and authorized trustees, representatives, and successors in interest of said corporation, and trustees of the creditors, stockholders, and members of said corporation, with full power and authority to settle the affairs of said dissolved corporation, and to appear in and defend this action, and as such are true and proper defendants herein."

[10] This notice of motion was not served on any of the appellants personally. It was addressed to the defendant borax company and to the attorneys who had purported to represent it in the earlier proceedings in the action. It was served on these attorneys and on no one else. It seems to be the well-settled rule that the substitution of one party for another by order of court is not such an amendment of a pleading as is required to be made on notice or to be engrossed otherwise than to be entered in the minutes of the court. Kittle v. Bellegarde, 86 Cal. 556, 562, 25 Pac. 55; Taylor v. Western Pacific R. R. Co., 45 Cal. 323, 337.

[11] No record appears in the transcript from which we may gather that a formal order was made and entered in the minutes of the court, either in substance or in hæc verba, substituting the appellants as parties defendant in the place and stead of the borax company. We are of the opinion, however, that the notice of motion and the order of the court directing that the proposed amended and supplemental complaint be filed and made of record in the case, and further directing that the defendants named in said amended and supplemental complaint have and were given 20 days from date of a service of a copy of this order in which to plead thereto, constituted a substantial compliance with section 385, Code of Civil Procedure, and operated to bring about such substitution. Taylor v. Western Pacific, supra; Campbell v. West, 93 Cal. 653, 29 Pac. 219, 645; Ford v. Bushard, 116 Cal. 273, 276, 48 Pac. 119. Furthermore, there is a recital in the judgment regarding the substitution of the defendants which, liberally construed, would show, whether with formality or not, the suggestion of the dissolution of the original defendant and a continuance of the action, or a revival of it, against the appellants. Gregory v. Haynes, 13 Cal. 592.

[12] One substituted in a cause must be duly notified of the fact of his being made a party before he can be affected by notices or proceedings in the action. Judson v. Love, 35 Cal. 463, 469. "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." Section 1014, Code Civ. Proc. None of these things was done in the instant case. The attorneys for the dissolved corporation defendant were never authorized to and never appeared as attorneys of record in the cause for appellants so as to waive service of the amended and supplemental complaint or notice of its filing and of their time to answer. Service on them alone, as we have pointed out, was a nullity after the borax company ceased to exist. Prior to their appearance to move to set aside the default and judgment, which was special for that particular purpose, and in no sense a general appearance in the cause (Powers v. Braly, 75 Cal. 237, 239, 17 Pac. 197), they never appeared in the action for the appellants at all. Proper service of the notice that appellants had been substituted as parties defendant in the action, and of the amended and supplemental complaint, not having been made on the appellants, their rights were not affected by the subsequent proceedings.

[13] It follows, therefore, that as there was no service upon, or authorized appearance by or in behalf of the defendants, the default entered in the action against the appellants was unauthorized, the judgment entered thereon was void, and must be reversed. Linott v. Rowland, 119 Cal. 453, 51 Pac. 687; Hill v. City Cab, etc., Co., 79 Cal. 188, 191, 21 Pac. 728; Altpeter v. Postal Tel. & Cable Co., 26 Cal. App. 705-713, 148 Pac. 241.

The judgment is reversed, and the cause remanded, with directions to the trial court to vacate and set aside the default of the defendants, with permission granted to them to plead to the amended and supplemental complaint, as in the original order therefor provided.

We concur: RICHARDS, J.; KERRIGAN, J.

181 Cal. 342

JOHNSON v. RAZEY et al. (L. A. 5251.)

(Supreme Court of California. Oct. 8, 1919.)

1. MORTGAGES ⚷137, 241—A LIEN AND NOT AN INTEREST IN PROPERTY.

Under Civ. Code, § 2888, a mortgage lien is not an interest in the property, but a mere lien; so that transfer of the mortgage does not transfer title to the mortgaged land.

2. MORTGAGES ⚷235 — SECURITY FOR DEBT AND NOT TRANSFERABLE WITHOUT TRANSFER OF DEBT.

A mortgage being a mere security for debt, is not transferable without transfer of the debt.

3. MORTGAGES ⚷268—KEPT ALIVE TO PROTECT INTEREST OF CREDITOR.

Where mortgage was assigned to a married woman and the mortgaged land deeded to her husband, and they then deeded the land, expressly subject to the mortgage, it will be held not to have merged in the fee; equity keeping it alive where necessary to protect rights of the one to whom the debt is due.

Department 1.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action begun by Arnold Vetter, Anna M. Johnson being substituted as plaintiff, against H. B. Razey and another. From an adverse judgment, defendant C. S. James appeals. Affirmed.

Hammack & Hammack, of Los Angeles, for appellant.

Charles J. Kelly and D. A. Stuart, both of Los Angeles, for respondent.

SHAW, J. The defendant James appeals on the judgment roll from a judgment foreclosing a mortgage. The action was begun by one Arnold Vetter. Before the trial the mortgage was assigned to Anna M. Johnson and she was substituted as plaintiff.

The facts presented by the record are as follows: The defendant Razey, being at the time the owner of the land involved, executed a mortgage thereon to said Vetter to secure a note for $1,500. Default having been made in payment of the note, Vetter began this action to foreclose the mortgage. The defendant James was made a party upon the allegation that he had some interest in the property. After the suit was begun, Razey conveyed the land, subject to the mortgage, to Peter Johnson, who was the husband of said Anna M. Johnson. Thereafter Vetter assigned the mortgage to said Anna M. Johnson. The consideration for this assignment was paid from her separate funds, and the mortgage thereupon became her separate property. The land held by Peter Johnson under his conveyance from Razey must be presumed to have been community property, although the record is silent on the subject. Before the trial Peter Johnson and his said wife, Anna M. Johnson, joined in a deed conveying the land to the defendant James. This deed expressly stated that the land was conveyed to James subject to the said mortgage, suit to foreclose which was then pending. By a supplemental answer James set up these transactions, and he now claims that by reason of the deed from Peter Johnson and wife to James the mortgage became satisfied and he became vested with the entire interest in the property free from all liens and claims thereon of either of the parties to said deed. His theory is that, since the deed purported to convey the fee, it carried with it all lesser interests which she held in the land and liens which she held thereon including this mortgage lien, and that the provision in the deed itself that the grantee took the property subject to the mortgage was of no effect.

[1-3] We cannot agree with this contention. The mortgage belonged to the wife as her separate property. The land belonged to the husband as community property. It does not appear that the wife received any consideration for the conveyance of the land by her husband to James going to her separate estate. As all presumptions must be indulged in support of the judgment and facts which are justly inferable from the facts found must be presumed to exist, we must assume that she joined in the deed because it was a conveyance of community property to which her signature would, under some contingencies, be necessary to give title satisfactory to the purchaser. A mortgage lien is not an interest in the property, but a mere lien thereon. A transfer of the mortgage does not transfer title to the land mortgaged. Civ. Code, § 2888. A mortgage is a mere security for the debt, and it cannot pass without a transfer of the debt. The conveyance of the land and the assignment of the mortgage are distinct transactions, different in character; the intention of one being to convey the title to the land, and of the other to transfer a debt with its securities. Civ. Code, § 2936; Peters v. Jamestown Bridge Co., 5 Cal. 336, 63 Am. Dec. 134. In view of the express reservation in the deed that it was conveyed subject to the mortgage, it is obvious that there was no

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

transfer to James of the debt due to the wife or of the security therefor. Under these circumstances, equity will regard the title to the land and the lien thereon as separate and keep the lien alive for the purpose of protecting the owner of the debt. The principle that equity will keep alive a mortgage lien under circumstances similar to this where it is necessary to do so in order to accomplish justice and protect the rights of the party to whom the debt is due is fully established by our decisions. Davis v. Randall, 117 Cal. 12, 48 Pac. 906; Anglo California Bank v. Field, 146 Cal. 653, 80 Pac. 1080; Rumpp v. Gerkens, 59 Cal. 502; Tolman v. Smith, 85 Cal. 280, 24 Pac. 743. The court did not err in applying these principles and holding that the mortgage still remained effective notwithstanding the conveyance to said defendant.

The judgment is affirmed.

We concur: **LAWLOR, J.**; **OLNEY, J.**

181 Cal. 389

CONTINENTAL CASUALTY CO. v. PILLSBURY et al., State Industrial Accident Commission. (Sac. 2952.)

(Supreme Court of California. Oct. 8, 1919.)

MASTER AND SERVANT 388—WIFE RECEIVING SEPARATE MAINTENANCE CAN RECOVER UNDER WORKMEN'S COMPENSATION ACT.

A wife who is not living with her husband, but who is receiving from him money paid pursuant to a decree awarding her separate maintenance, is, within Workmen's Compensation Act, § 14, declaring that a wife shall be conclusively presumed dependent for support upon a husband with whom she was living or for whose support such husband was legally liable, and an award in her favor for his death cannot be defeated on the ground that the legal liability in the act meant the common-law liability defined by Civ. Code, §§ 174, 175, for the decree merely reduced to a definite form the common-law liability of the husband to support her.

In Bank.

Application for writ, by the Continental Casualty Company, directed to A. J. Pillsbury and others, members of and constituting the Industrial Accident Commission, to review an order of the commission awarding compensation to the surviving widow of a deceased workman. Award affirmed.

Devlin & Devlin, of Sacramento, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

OLNEY, J. One Cox was killed while in the employ of the Sacramento Northern Railroad. No question is made but that the accident resulting in his death occurred under such circumstances that his dependents, if he had any, are entitled to compensation under the Workmen's Compensation Act (St. 1917, p. 831). He left a wife, and she petitioned the commission for such compensation, and it was awarded her as wholly dependent upon him. The insurance carrier for the employer thereupon petitioned for and secured an alternative writ from this court to review the award. The sole question is as to whether the decedent's wife was wholly dependent upon him within the meaning of the Workmen's Compensation Act.

The material provisions of the act are the following portions of section 14:

> "(a) The following shall be conclusively presumed to be wholly dependent for support upon a deceased employé: (1) A wife upon a husband with whom she was living at the time of his death, or for whose support such husband was legally liable at the time of his death. * * * (b) In all other cases, questions of entire or partial dependency and questions as to who constitute dependents and the extent of their dependency shall be determined in accordance with the fact, as the fact may be at the time of the injury of the employé."

The wife was not living with the decedent at the time of his death. In order to support the award of the commission, it must therefore appear either that the decedent was legally liable for her support or that she was in fact wholly dependent upon him. The commission found in favor of the wife on both these issues. As we are of the opinion that the award must be sustained upon the first ground—that is, that her husband at the time of his death was legally liable for her support—there is no necessity for considering the second.

The facts upon the first issue are that the decedent deserted his wife in 1911, and never lived with her afterwards. No proceedings for a divorce were ever brought, but in 1912 his wife filed in Iowa a suit for separate maintenance and secured a decree awarding her such maintenance in the sum of $50 a month. This decree remained in effect until the decedent's death. Pursuant to the decree the decedent sent his wife money from time to time, the amounts averaging about $20 or $25 a month. The position of the insurance carrier is that, by reason of the existence of this maintenance decree, the husband was not legally liable for his wife's support. The mere statement of this position is well-nigh enough of an answer to it. It is rather difficult to see what the maintenance decree means if it does not mean that the husband is legally liable for his wife's support.

The contention of the insurance company is that, when the act speaks of the husband being legally liable for the wife's support,

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For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes "the liability therein referred to must necessarily mean the common-law liability defined by sections 174 and 175 of the Civil Code, and *cannot mean liability to the wife.*" (The italics are ours).

Section 175 has nothing to do with the case. It provides that when a wife abandons her husband, or lives apart from him by agreement, he is not liable for her support. Here the wife had not abandoned her husband, nor was she living apart from him by agreement.

Section 174 provides that, if the husband neglects to make adequate provision for the support of his wife, any other person may furnish her with necessaries and recover the reasonable value thereof from the husband. The point is made that by the maintenance decree the husband was relieved from liability to third persons under this section. It is immaterial whether he was or not. The compensation provided by the act is for the benefit of the wife, not for that of her creditors, or of those who may supply her with necessities. It is true that the liability of the husband to persons supplying the wife with necessities where he neglects to provide for her is an incident of the obligation which rests upon him to support her. But it is only an incident, not the main obligation. The incident may be removed, and the main obligation remain wholly unaffected.

There are cited in petitioner's behalf authorities to the effect that, when there has been a divorce a mensa et thoro with a decree of maintenance to the wife, the common-law obligation of the husband is supplanted by the obligation of the decree and the husband's responsibility is measured by the decree. This is true in the sense that the husband's obligation, previously indefinite as to the amount of support or the manner in which it should be provided, is by such a decree made certain by requiring that the obligation be met by paying a certain amount of money, and paying it to the wife. Thereafter the husband's obligation is measured by the decree, but the fundamental obligation continues. The decree is, in fact, a judicial determination of the fact that the obligation exists, although the parties are separated. That an action for maintenance is but an action to enforce the husband's duty to support his wife was decided in Galland v. Galland, 38 Cal. 265.

It follows that at the time of the decedent's death he was legally liable for the support of his wife, and the action of the commission in making its award upon that basis was correct.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; MELVIN, J.; LENNON, J.; LAWLOR, J.

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181 Cal. 385

NEWELL v. E. B. & A. L. STONE CO.

(S. F. 8482.)

(Supreme Court of California. Oct. 8, 1919.)

1. VENDOR AND PURCHASER ⚷85—NOTICE AND CONDUCT NOT AMOUNTING TO RESCISSION BY CONSENT.

Giving of notice of tender of deed to the vendee by the vendor of land, after the vendee was in default in making installment payments, notice being intended as basis to declare a forfeiture, together with the conduct of the parties thereafter, *held* not to have amounted to a rescission by their mutual consent, to entitle the vendee to demand return of moneys paid.

2. VENDOR AND PURCHASER ⚷187—ACCEPTANCE OF OVERDUE PAYMENTS WAIVER OF PROVISION AS TO TIME BEING OF ESSENCE.

The vendor of land, by accepting installment payments after the time specified, waived the provision of the contract with reference to time being of the essence as to such payments, and could not thereafter effectually declare forfeiture of the vendee's right to purchase and of the payments already made, without notice that in the future a strict performance would be required.

3. VENDOR AND PURCHASER ⚷107—RIGHT OF PURCHASER, AFTER HIS OWN DEFAULT IN PAYMENTS, TO CLAIM RESCISSION.

The vendee of land, who contracted to pay in installments could not take advantage of his own default in making payments, and claim rescission, when the vendor tendered deed conditionally on payment in full, and in the alternative declared a forfeiture.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by E. W. Newell against the E. B. & A. L. Stone Company. From a judgment for plaintiff, defendant appeals. Reversed.

W. F. Williamson, of San Francisco (Ernest L. Brune and Sloss, Ackerman & Bradley, all of San Francisco, of counsel), for appellant.

Harding & Monroe, of San Francisco, for respondent.

MELVIN, J. The plaintiff, E. W. Newell, and the defendant corporation, entered into a written contract on April 7, 1913, whereby the former agreed to purchase and the latter to sell certain real property for $9,200. Of this amount the sum of $500 was paid at the date of the agreement. The sum of $1,500 was due August 1, 1913, and the balance was to be paid in monthly installments of at least $200. There was a provision for the monthly payment of interest, time was expressly made of the essence of the agreement, and it was further provided that upon default in the payment of any

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

of the installments the vendor, E. B. & A. L. Stone Company, might at its option, without notice to the vendee, declare the entire principal and interest immediately due.

The vendee failed to pay the first installment of $1,500, due August 1, 1913, but on December 13, 1913, a payment, on account, of something more than $500 was accepted, and thereafter other sums were paid, at various times not specified in the contract, until $2,694.83 had been received by the vendor. On April 28, 1915, the vendor (defendant in this action) served upon plaintiff a notice reciting the terms of the agreement. The notice contains the following statement by way of recital:

> "At all times the undersigned [E. B. & A. L. Stone Company] has stood ready, willing, and able to comply with the terms of said contract, and that it is not the intention of the undersigned in any manner to rescind or abandon said contract, and nothing herein shall be construed to be a consent in any way to a rescission or abandonment of said contract."

Then follow recitals that time is of the essence of the contract, and that default has been made by the vendee, in consequence of which he has abandoned the contract, and the vendor notifies the vendee that, in order to determine that it is the latter's "express intention as purchaser to abandon said contract," a deed to the land is ready and is thereby tendered to the vendee upon payment of the balance of the purchase price, with interest as specified in the agreement, provided the entire balance should be paid immediately upon receipt of the notice. The closing words of the notice are as follows:

> "Unless said entire balance shall be paid immediately as aforesaid, the undersigned, in accordance with the terms of said contract, hereby declares that it shall be relieved from all obligations in law or equity to convey the property hereinbefore described, or any part thereof, and that you shall forfeit all right thereto under this contract, and all rights to any and all moneys paid thereon, which shall be deemed payments for the right to have the option to purchase said property, and none of the same shall be returned, and the undersigned hereby further notifies you that it will thereupon, in accordance with its rights, immediately, or at its convenience thereafter, enter upon said lands and premises, and take possession thereof, together with the improvements constructed thereon, and the appurtenances thereunto belonging."

On August 4, 1916 (more than a year after the service of notice), the vendee demanded return of the moneys paid under the contract, and this demand being refused, instituted the present action.

The court found that defendant, although it had accepted payments from plaintiff while he was in default, by the writing of April 28, 1915,

> "notified plaintiff * * * that it exercised its option under said contract to cancel the same, and notified plaintiff that all his rights under said contract had terminated; that the moneys paid to defendant were forfeited and that defendant would retake possession of said real property, and defendant did re-enter and take possession of said real property in said contract described; that no notice was ever given to plaintiff of any intention on the part of defendant to insist upon its right to forfeit said contract, and no notice whatever was served upon plaintiff, except the notice of cancellation and claim of forfeiture above referred to."

This finding is attacked by appellant as being without justification, and appellant also insists that the further finding that "plaintiff accepted said notice of forfeiture as a rescission on the part of defendant of said contract" is not sustainable.

[1] The question to be determined by this court is whether or not the giving of the notice and the conduct thereafter of the parties to the contract amounted to a rescission by their mutual consent. We are of the opinion that it did not. In the first place, there was an express declaration by the vendor that it was not seeking to rescind. This, of course, would amount to nothing if the other parts of the notice were in contradiction of the vendor's declared intention. But we do not so interpret them.

[2, 3] Under the authorities the vendor, by accepting payments after the times specified in the agreement, waived the provision with reference to time being of the essence of the contract as to those payments, and could not thereafter effectually declare a forfeiture of vendee's right to purchase, and of the payments already made, without notice that in the future a strict performance would be required. That is the doctrine of such cases as Boone v. Templeman, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126, Stevinson v. Joy, 164 Cal. 279, 128 Pac. 751, Butte Creek Consolidated Dredging Co. v. Olney, 173 Cal. 697, 161 Pac. 260, and Pearson v. Brown, 27 Cal. App. 125, 148 Pac. 956. The vendee was in default over 20 months at the time the notice was served; that is to say, more than $4,000 in monthly installments had not been paid when due. If, within a reasonable time after receipt of the notice, the purchaser had tendered payment of the amounts due under the terms of the contract, perhaps the seller would have been bound to accept such tender. But this is not a case in which a vendee having offered to perform seeks to compel performance of the contract by the vendor. By its notice the vendor was not seeking to rescind the contract, but to declare the vendee's rights forfeited and itself entitled to the moneys previously paid by Newell because of the latter's supposed breach of the agreement. The mere fact that the vendor may have been in error in supposing and declaring that, unless immediate payment were made of the entire balance

of the purchase price, it could consider the rights of the vendee foreclosed, does not convert the notice into a declaration that the vendor elected to rescind. On the contrary, defendant sought to stand upon the contract and to enforce its terms. The corporation had done no act of abandonment of the agreement. On the contrary, it had extended to Mr. Newell the favor of accepting payments long past due. The plaintiff could not take advantage of his own default. Glock v. Howard, 123 Cal. 1–19, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17. Plaintiff was in default when the notice was received by him. True, his prior defaults had been condoned, and he could have reinstated himself by making prompt payments of the balance due under the terms of the contract; but he could not, by merely saying nothing, gain the right to demand repayment of the installments of the purchase price previously made. He could not place defendant in default unless he at least tendered to defendant all that was due under the agreement up to the date of his offer. He made no such tender. Therefore he should not prevail in this suit.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; WILBUR, J.; OLNEY, J.; LAWLOR, J.

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181 Cal. 379

BLAHNIK et al. v. SMALL FARMS IMP. CO. (S. F. 8500.)

(Supreme Court of California. Oct. 8, 1919.)

1. VENDOR AND PURCHASER 🔑341(2)—COMPLAINT TO RECOVER PRICE ON SELLER'S FAILURE TO BUILD ROADS AS AGREED.

Complaint to recover on account of seller's breach so much of the price of land as had been paid, the contract showing that in consideration of the price plaintiffs were to have certain lots with roads constructed thereto, was not insufficient as not alleging that plaintiffs had suffered or would suffer damage by reason of defendant's failure to build the roads; it being apparent that they were a material part of the consideration, failure of which, under Civ. Code, § 1689, subd. 2, is ground for rescission.

2. PLEADING 🔑216(3)—ON UNCERTAINTY IN COMPLAINT, OBJECTION RAISED BY DEMURRER.

In an action by the buyers of land to recover, for the seller's failure to build roads as agreed, so much of the price as had been paid, the complaint, because not describing the character of the roads, nor the character of work to be done on them within the time fixed, was uncertain rather than insufficient, and objection should have been presented by demurrer for uncertainty, and not for failure to state a cause of action.

3. EVIDENCE 🔑442(6)—PAROL EVIDENCE OF COLLATERAL AGREEMENT NOT AFFECTING CONTRACT OF SALE ADMISSIBLE.

In an action by the buyers of land to recover from the seller so much of the price as had been paid on account of failure to build roads as agreed, the contract having been silent in regard to the character and kind of work to be done on the roads, evidence of conversations between defendant's agent and a buyer before and at the time of the execution of the contract held admissible as tending to show only an agreement collateral to the main contract.

4. VENDOR AND PURCHASER 🔑341(5)—RECOVERY BY BUYERS ON RESCISSION OF ACTUAL VALUE OF LAND GIVEN IN EXCHANGE.

Where the buyers of land, rescinding for the seller's breach, had not paid the price in money but in land exchanged, if the seller had retained title to the land received, the buyers on rescission could have demanded only a reconveyance, and the seller, having parted with title, must compensate the buyers only for loss actually sustained, the actual value of the property when accepted on the contract of sale, and not the price placed on it by the parties.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Joseph Blahnik and another against the Small Farms Improvement Company. From judgment for plaintiffs, defendant appeals. Reversed.

J. L. Smith, of San Francisco, for appellant.

John J. O'Toole, of San Francisco, for respondents.

SHAW, J. The defendant appeals from the judgment.

The object of the action was to recover $2,556.94, alleged to have been paid by the plaintiff Catherine C. Blahnik to the defendant as a part of the purchase price of certain lands which the defendant had contracted to sell to said plaintiff, which contract, it is alleged, was rescinded by the plaintiff because of the failure of the defendant to perform the covenants therein contained. The plaintiff Joseph is the husband of the plaintiff Catherine, and has no other interest in the case.

The contract of sale was executed on June 28, 1913. By its terms the defendant agreed to sell to said plaintiff four lots of land, containing about 25 acres, in a subdivision known as "Small Farms Improvement Tract, division R," for the sum of $3,750. It acknowledges the receipt of $2,300 of this price. The remainder was to be paid in installments of $100 each every six months, beginning on December 28, 1914, and continuing until the whole was paid. The unpaid portion was to bear 6 per cent. interest, payable semiannually from the date of the contract. It contained the following stipulation:

> "The seller agrees that it will have the roads in said division 'R' constructed during the fall of 1913 after the rains or when the ground is able to be worked. And construct the necessary bridges."

The complaint sets forth the contract in full and alleges that the defendant failed and refused to construct the said roads; that, because of said failure and refusal, the plaintiffs, before the commencement of the action, rescinded the contract and demanded repayment of the consideration theretofore paid thereon, amounting to $2,556.94. Judgment was asked for the recovery of said sum of money.

The court found that all the allegations of the complaint were true, and thereupon gave judgment for the plaintiff as prayed for. The answer denied the alleged failure and refusal to construct the roads referred to in the contract. Upon the trial the defendant claimed it had constructed the roads before the plaintiff attempted the alleged rescission. The subdivision map of the tract in which the lots were situated showed two roads 40 feet wide, beginning at the county road abutting upon the north side of the tract and leading south to and beyond the plaintiff's lots. These roads afforded the only means of ingress and egress to and from the lots. Between these lots and the county road there was a creek running through the tract from east to west. It was necessary to build bridges over this creek in order to make these roads passable. Two other bridges were necessary at other points on these roads.

[1, 2] The defendant demurred to the complaint on the general ground that it does not state a cause of action. The objection that plaintiffs show no right to rescind because the complaint does not allege that they have suffered or will suffer any damage by reason of the failure to build the roads is not well taken. The contract shows that in consideration of the price to be paid the plaintiffs were to have the lots described, with roads constructed leading thereto for access and egress. That the roads were a material part of the consideration which they were to receive is apparent. The complaint alleges that the defendant failed and refused to render this consideration within the time fixed in the contract. That part of the consideration had failed through the defendant's fault. Where the consideration fails in whole or in part through the fault of the party whose duty it is to render it, the other party may rescind. Civ. Code, § 1689, subd. 2. It is also urged that the complaint is defective because it does not describe the kind of roads nor the character of the work to be done upon them by the defendant within the time fixed in the contract. The complaint fails in this particular, but we are disposed to believe that it is a matter of uncertainty rather than insufficiency of the facts and should have been presented by demurrer for uncertainty. It is averred that the defendant failed and refused to construct the roads referred to in the contract and that the rescission was made because of said refusal. The contract itself is silent with respect to the kind of roads and the character of the work to be done thereon. Evidently that was the subject of some other agreement between the parties, either express or implied. As the case must be reversed for other reasons, we do not think it necessary to discuss this subject further or determine definitely how the objection should be raised, inasmuch as the plaintiffs may amend their complaint prior to the new trial by setting forth the agreement which they claim was made concerning the kind of roads and character of the work. This subject will be hereinafter further discussed in connection with an objection to the evidence.

[3] Upon the trial the defendant claimed that the only road work to be done, under the agreement actually made, was the building of bridges across the creek at its intersections with the roads and at the other two places where bridges were necessary, and the making of the fills or cuts required for convenient approaches to such bridges. The bridges and approaches thereto were constructed by the defendant prior to the time of the alleged rescission, and if they complied with the contract no cause of rescission was shown. For the purpose of showing the real agreement in that respect the defendant offered evidence of conversations between its agents and plaintiff Joseph, who made the deal for his wife, before and at the time of the execution of the contract. This evidence was excluded by the court on the ground that the subject was covered by the terms of the written contract and that the admission thereof would violate the rule that a written contract cannot be varied or contradicted by parol evidence of conversations between the parties prior to or at the time of its execution. This ruling was erroneous. The contract was altogether silent in regard to the character and kind of work that was to be done upon the roads. If there was any agreement on that subject, or any plan relating thereto adopted by defendant and acquiesced in by the plaintiffs, it was not set forth in the contract. So far as appears, it was in parol only. Such an agreement would be collateral and supplemental to the contract contained in the writing, and, as parol evidence thereof would not be inconsistent with the contract and would not alter it in any respect, evidence thereof would be admissible if material to the issues. Sivers v. Sivers, 97 Cal. 521, 32 Pac. 571; Daly v. Ruddell, 137 Cal. 676, 70 Pac. 784; 17 Cyc. 741. Afterwards, however, the court ad-

mitted testimony of these conversations, with the result that there was a sharp conflict in the evidence on the subject. Sufficient evidence was given on behalf of plaintiffs to sustain a finding that the bridges and necessary approaches thereto did not comprise all the work that the defendant had agreed to do in constructing the roads. The finding made by the court was in the general form that all of the allegations of the complaint were true. The complaint, as we have seen, merely alleged that the defendant had failed and refused to construct the roads referred to in the contract. It does not appear with certainty that the court adhered to its ruling that the evidence was immaterial and that the contract itself was sufficient, or whether it concluded that the evidence regarding the parol agreement sustained the contention of the plaintiffs rather than that of the defendants. Consequently, we cannot determine whether the rejection of the evidence when first offered was injurious to the defendant or not. We state our views concerning the matter for the guidance of the court below upon a new trial, if the parties proceed after the going down of the remittitur.

[4] By the recitals in the contract the defendant acknowledged the receipt of $2,300 upon the purchase price. Upon the trial it was shown that this sum was not paid in money, but that the real transaction was an exchange of certain real property conveyed by the plaintiffs to the defendant, which property was taken by the defendant at the sum of $2,300, and credited upon the contract price of the land sold by defendant to plaintiffs. Evidence was thereupon introduced concerning the value of the property so exchanged. At the highest value given to it by any witness, it would have been worth at the time the contract was executed at least $300 less than the amount for which it was credited on the contract of sale to the plaintiffs. The court apparently disregarded this evidence and allowed the plaintiffs the full sum of $2,300 as a payment made upon the contract and which they were entitled to recover. It also appeared at the trial that after the contract of sale was made, but before the offer to rescind, the defendant had conveyed the property received in exchange to other parties and was not able to restore that part of the consideration. The court, apparently, proceeded upon the theory that the plaintiffs were entitled to treat the amount for which said property was taken in exchange as a payment in money upon the price of the property sold to the plaintiffs by defendant and to recover said amount upon a rescission. In this the court erred. If the defendant had retained the title to the property, the most that the plaintiffs could have demanded upon the rescission would have been a reconveyance thereof to them. The defendant having parted with the title thereto, and being unable to restore the plaintiffs to the position in which they were at the time the contract was made, the rule in equity is that they must compensate the plaintiffs for the loss thereby sustained. This would not be the price at which the property had been accepted upon the contract of sale, but would be its value at that time, and it was therefore necessary for the court to determine such value. "Where the grantee has conveyed the property, or part of it, to another, or for other reason cannot restore it, the plaintiff is entitled to a money judgment for the value of the land, the restoration of which is thus impossible; such relief being given on the principle that the court having obtained jurisdiction will retain the case for the purpose of giving complete relief." 6 Cyc. 340. Equity does not measure the damage by the price at which the property may have been taken in the exchange between the parties, but allows only the value of the property at the time the exchange was made. 9 Cor. Jur. 1263, § 211; Forrest v. Wardman, 40 App. D. C. 531; Sedgwick on Damages (9th Ed.) § 655b. The plaintiffs were not entitled to more than the actual value of the property at the time of the exchange. The judgment giving them the full amount at which it was taken in the contract is erroneous to the extent of the difference between the actual value and the price so fixed in the exchange. For this reason a reversal is necessary. The complaint did not raise this question, but it was put in issue by the allegations of the answer. There should have been a finding of the actual value of the property at that time and the judgment should have covered that amount only.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; OLNEY, J.; MELVIN, J.; LAWLOR, J.

181 Cal. 420

HONORE v. LEMM et al. (S. F. 8398.)

(Supreme Court of California. Oct. 9, 1919.)

1. EVIDENCE 🔑425—PAROL, TO VARY TERMS OF CONTRACT.

In purchaser's action for specific performance involving issue of whether purchaser had paid certain amount, vendor's testimony that note given him for such amount was not received in payment thereof, but merely as security, was not inadmissible as varying terms of contract, notwithstanding contemporaneous execution of receipt for such note, where terms of contract were admitted, and there was no allegation that by terms of contract note was received in payment, or that money had been paid, and receipt was not offered or received in evidence as proof of terms of contract, but merely as evidence of payment.

2. ALTERATION OF INSTRUMENTS 🔑16—ALTERED RECEIPT AS ESTABLISHING CONTRACT OF SALE.

Where description was inserted in receipt after vendor had signed it and during vendor's absence, the receipt would be insufficient to establish a contract for the purchase and sale of the land described.

3. SPECIFIC PERFORMANCE 🔑121(11) — EVIDENCE OF PAYMENT OF PURCHASE PRICE.

In purchaser's action for specific performance involving issue of whether purchaser had paid vendor certain portion of the purchase price, evidence *held* to sustain finding that purchaser had not made such payment.

In Bank.

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by M. Honore against Hans Lemm and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Stafford & Stafford, H. I. Stafford, W. F. Stafford, and Wm. M. Stafford, all of San Francisco, for appellant.

Drown, Leicester & Drown, of San Francisco, for respondents.

WILBUR, J. This is an action for specific performance brought by the vendee against the vendor. The contract is admitted, and the only question is whether the vendee has paid $500 upon the purchase price in addition to the amount conceded by the vendor to have been paid. The trial court held that the payment had not been made, and gave judgment foreclosing the right of the vendee, unless within 30 days from the date of the decree he paid such $500 in addition to other amounts conceded to be due. Plaintiff appeals. The complaint stated and the answer admitted the terms of the contract between the parties. The finding of the court is in accordance with such admission, to wit, that on or about August 22, 1913, the parties entered into an agreement or contract whereby the defendant agreed to sell to the plaintiff the land described in the complaint for the sum of $900, that the sum of $100 was paid on said date, and that no time was agreed upon for the payment of the balance of the purchase price. Plaintiff alleged that on or about April 6, 1914, he paid the defendant the sum of $500 as part payment on the purchase price of the lot, leaving a balance of $300 due on account thereof. Upon the trial plaintiff offered two receipts, one dated August 22, 1913, as follows:

> "Received from M. Honore the sum of $100 in cash and a note for $500 payable February 1, 1914, as part payment on two lots, Nos. 35 and 36, in block 26, Third addition, San Bruno, San Mateo County, Cal., and for which he agrees to pay $900 and I agree to then furnish him with a clear title to said lots.
> "[Signed] Hans Lemm."

The other, dated January 6, 1914, read as follows:

> "Received from Mrs. Anna Honore the sum of $500.00 (five hundred dollars), as part payment on lots Nos. 35 and 36, Blk. 26, Mastick avenue, Third addition, San Bruno, Cal., leaving a balance of $300.00 yet to be paid on said lots. [Signed] Hans Lemm."

[1] With relation to the receipt of August 22, 1913, it appears from the evidence that on that date the vendee delivered to the vendor a note for $500, due February 1, 1914, signed by one Wolff. The vendor, however, testifies that this note was not received in payment of the said sum of $500, but merely as security. To a consideration of this testimony the vendee objects on the ground that the receipt was the contract of purchase, and that therein it was agreed that the note should be accepted as payment to the extent of $500, and that to receive evidence to the contrary is to vary the terms of the written contract between the parties. This objection is not well taken for the reason that the contract between the parties and the terms thereof were admitted in the pleadings, and there is no allegation that by the terms of the contract the note in question was given or received in payment, or that the amount of $500 was then thereby or otherwise paid. On the contrary, it is specifically alleged that the sum of $500 was paid in April, 1914. The receipt in question was not offered or received in evidence as proof of the terms of the contract between the parties, but was offered and received without objection as evidence of payment.

[2, 3] Moreover, plaintiff testified that at the time the defendant signed the receipt in question the above description of the property was not contained therein, but was subsequently inserted therein by the plaintiff in defendant's absence. In such case it would be insufficient, in any event, to estab-

lish a contract for the purchase and sale of the lot in question. It was proper, therefore, to receive defendant's evidence to overcome the claim that the $500 was paid by said note. The defendant testified that the note for $500 signed by Wolff, received as security, was retained by him until January 6, 1914, when he surrendered the note to plaintiff at plaintiff's request. Wolff and the plaintiff were partners, doing business under the name of the North Star Iron Works. The defendant Lemm was an employé of the firm. The business had been established by the plaintiff for many years, and Wolff had recently purchased a half interest therein, and in payment thereof had given plaintiff $450, a promissory note for $600, and the $500 note above referred to, as evidence of the indebtedness due from him to the plaintiff on account of said purchase price. The business was apparently regarded of the value of $3,000, and the interest of each partner as $1,500. Under these circumstances plaintiff and defendant and Wolff agreed that defendant for $1,000 should have a third interest in the copartnership. Defendant Hans Lemm was to pay $500 in cash, and Honore agreed to pay the other $500. Upon the faith of plaintiff's promise the defendant claims that he executed the receipt for $500 dated January 6, 1914, acknowledging the receipt of $500 on account of the purchase price of the lots in question. The defendant claims that the $500 was never paid, while the plaintiff claims that it was paid in the following manner, to wit: He arranged with Wolff to reduce Wolff's interest in the partnership from $1,500 to $1,000, and in consideration of such agreement returned to Wolff the note for $500, thus canceling the indebtedness due from Wolff to himself; that in pursuance of the agreement between plaintiff and defendant entries were made upon the books of the copartnership showing that each partner had paid in $1,000; that the defendant thus secured exactly what he bargained for, namely, a third interest in the copartnership, for which he gave plaintiff a $500 credit on account of the purchase price of the lots and paid $500 in cash into the copartnership. The evidence as to the agreement between the plaintiff and defendant concerning the partnership arrangement is, however, conflicting, for Wolff and Lemm, and indeed the plaintiff himself at one point, testified that the $1,000 was to be paid into the copartnership, $500 by Lemm and $500 by plaintiff, as a part of the capital, and the evidence is all to the effect that the $500 to be paid into the copartnership by the plaintiff, on behalf of the defendant, never was so paid, unless the surrender of the note in question was such payment. Wolff left the partnership on April 27, 1914, and the defendant May 28, 1914, apparently without any settlement of partnership affairs. It also appears that the Wolff note for $600 was returned to him before the Lemm copartnership arrangement because of his complaint that the copartnership was indebted for $1,600 above the amount communicated to him when he purchased, thus apparently leaving Wolff's investment in the copartnership $450. If the agreement was as contended by the defendant, that the $1,000 was to be paid into the business in cash, and that after such payment the defendant should have a third interest therein, the defendant thereby retained a third interest in the $1,000, whereas, if $500 was to be used to pay one of the partners off without augmenting the assets of the copartnership, the defendant retained no interest in such amount. There was, then, substantial evidence to the effect that the second $500 receipt was given in pursuance of a promise of the plaintiff which he did not fulfill. The finding of the trial court must therefore be affirmed.

The judgment is affirmed.

We concur: LENNON, J.; MELVIN, J.; LAWLOR, J.

OLNEY, J. I concur in the result, but I do not agree with what is said in the main opinion as to the writing of August 22, 1913, being a receipt merely, with the result that evidence was permissible to show that the Wolff note was taken by the defendant as security instead of in payment as specified in the writing. The writing was more than a receipt. It was intended by the parties as the written expression of their understanding. Its terms must therefore be taken as final as to what their understanding was. The question of whether the Wolff note was taken as security or in payment is one as to what was understood between the parties; and, inasmuch as the written expression of this understanding says it was taken in payment, that ends the matter.

This conclusion, however, does not change the result. The Wolff note was taken in payment either conditionally or absolutely. The presumption is it was taken in conditional payment (Griffith v. Grogan, 12 Cal. 317), and the subsequent conduct of the parties leaves no doubt as to this being the fact. The final and crucial question in the case is as to whether the note was paid as a result of the subsequent transaction whereby Lemm endeavored to buy into the partnership with the plaintiff and Wolff. It appears that Lemm was to pay not to the plaintiff, but into the capital of the firm, $1,000, of which $500 was to be paid by the payment of the Wolff note to the firm. On this understanding Lemm redelivered the note to the plaintiff. But the note was never paid, and the partnership came to nothing. There was therefore a complete failure of the consideration for which Lemm gave up the note, and he has not, in fact, received anything of value on account of the $500 which constituted the part of the purchase price represented by the note. This being the situation, the plaintiff must pay this $500 before he is entitled to a deed under his contract of purchase.

I concur: SHAW, J.

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181 Cal. 398

MUNDELL v. WELLS et al. (TAYLOR, Intervener). (S. F. 8390.)

(Supreme Court of California. Oct. 8, 1919. Rehearing Denied Nov. 6, 1919.)

1. Bail 🔑73—Liability of clerk depositing money on order of court.

Where cash bail for one charged with a misdemeanor triable in the superior court was furnished, the clerk could satisfy out of the money in his custody the part of the judgment imposing fine, and the person who put up the bail and defendant's judgment creditor seeking to go against the deposit have no possible recourse against the clerk for following the mandate of the court which could order disposition of the money.

2. Bail 🔑73—Application of cash bail in satisfaction of fine.

Under Pen. Code, §§ 1295, 1297, in contemplation of law, so far as a criminal action is concerned, money deposited as cash bail to insure defendant's appearance is his money, and the court is not required to protect the rights of any one who may have advanced it for him, though after conviction and on appearance for sentence defendant's counsel seeks to surrender him and asks an order remitting the bail to the parties who put it up; the duty of the court being to apply the money in satisfaction of judgment for a fine.

3. Bail 🔑73—Offer to surrender as prerequisite to return of cash bail.

It is a prerequisite to the return of bail money under Pen. Code, § 1302, that defendant offer to surrender himself to the officer to whom the commitment is directed.

4. Bail 🔑73—Constitutional law 🔑262—Application of bail money to payment of fine not wanting in due process.

Pen. Code, § 1297, requiring the application of bail money by the clerk under direction of the court in satisfaction of judgment for a fine, *held* not unconstitutional as depriving of his property without due process the person who advances the money by placing him in a different and less advantageous position than a surety on a bail bond.

5. Bail 🔑73—Determination of right to balance of cash bail after payment of fine.

After part of cash bail has been applied, under Pen. Code, § 1297, to payment of defendant's fine, if the true ownership of the remainder be litigated, or refund of the balance to defendant contemplated, the court will inquire who is entitled to the money, whether the person who put it up, or a judgment creditor of defendant's, and will award it accordingly.

6. Bail 🔑73—Ownership of residue of cash bail after payment of fine.

Where cash bail was put up for one charged with a misdemeanor, and after his conviction, under Pen. Code, § 1297, half of the bail was applied to payment of the fine, the surplus of the money remaining in the hands of the clerk was properly adjudged to be the money of the party who put it up, and not to belong to defendant's judgment creditor seeking to attach it.

In Bank.

Appeal from Superior Court, Contra Costa County; J. E. Barber, Judge.

Action by Esther A. Mundell against J. H. Wells and the Fidelity & Deposit Company of Maryland, wherein E. B. Taylor intervened. From judgment for plaintiff against defendant Wells, dismissing the action against the fidelity company, and adjudging that intervener take nothing, plaintiff and the intervener appeal. Affirmed.

Chas. S. Peery, of San Francisco, for appellant Mundell.

Appellant Taylor, in pro per.

T. D. Johnston, of Richmond, and A. B. Tinning, Alfred C. Skaife, and Guy Le Roy Stevick, all of San Francisco, for respondents.

MELVIN, J. Plaintiff sued as assignee of W. A. Mundell for $2,000 deposited with defendant Wells, who is ex officio clerk of the superior court of Contra Costa county, as bail in the case of the People, etc. v. R. B. Cradlebaugh. The corporation defendant is the surety on the official bond of Mr. Wells, and the intervener, Taylor, asserts an interest in the money by reason of an attachment and judgment against Cradlebaugh. The plaintiff and the intervener Taylor are the appellants.

Cradlebaugh was charged with a misdemeanor triable in the superior court. After his arrest he was released on cash bail of $2,000, deposited in that behalf by W. A. Mundell, who had borrowed the money for that purpose. He was preliminarily examined, was held to answer, and his bail was fixed at $2,000. At his request, the fund deposited at the time of his arrest was transmitted to the county clerk. Cradlebaugh was tried and convicted; was readmitted to bail pending sentence; and the money in the hands of Mr. Wells, as clerk of the court, was by order of court accepted as security for his due appearance for sentence.

Cradlebaugh appeared for sentence, as ordered, and his counsel in open court, not in his behalf but for those who had advanced the money in lieu of bail, sought to surrender him into custody, and asked for an order remitting the bail money "to the parties who put it up, and for the purpose of filing new bonds later on." The court did not act upon the suggestion of surrender, nor was there any ruling upon the motion to return the money. Cradlebaugh was arraigned and sentenced to imprisonment for one year in the county jail and to pay a fine of $1,000.

After notice of appeal, the court, on request, fixed bail on appeal; the amount being $2,000. Counsel for the prisoner then asked that the bail theretofore deposited be exonerated. The court instructed him to draw the order and present it to the district attorney. Later in the day the district attorney asked for an order directing the clerk to apply $1,000 of the fund in his hands to the satisfaction of the fine imposed upon Cradlebaugh. After argument upon this matter, the court directed the clerk to satisfy that part of the judgment imposing a fine out of the money in his custody. He obeyed this order and offered the $1,000 remaining, after satisfaction of the fine, to Cradlebaugh. This sum, however, was sought to be attached in the hands of the clerk by Mr. Taylor, in an action brought by him against Cradlebaugh to recover $500 as a fee for his services as counsel in the criminal action. Mr. Taylor recovered a judgment against Cradlebaugh, which was in force at the time of the trial of the case at bar.

Upon these facts the superior court gave judgment for plaintiff against Mr. Wells, as clerk, for the sum of $1,000 remaining in his hands after satisfying the fine imposed upon Cradlebaugh. The court dismissed the action against the sureties on the clerk's bond and adjudged that the intervener take nothing.

Appellants, Mrs. Mundell and Mr. Taylor, contend that the offer to surrender Cradlebaugh into custody was sufficient to exonerate the bail; that the fund on deposit was not the property of the defendant in the criminal action out of which a fine might be satisfied; and that such payment of the fine deprived the real owner of that amount without due process of law.

[1] Even if appellants could uphold their declaration that the money deposited as bail was not in the contemplation of law the property of Cradlebaugh, but of the person who furnished it for that use, they could not prevail in this action against Wells, who, as county clerk and ex officio clerk of the superior court, only performed his duty as a ministerial officer of the court, acting under the order of the judge of said court when he applied half of the fund to the satisfaction of the fine. Regarding that portion of the fund, they can have no possible recourse against defendant Wells. The court had jurisdiction of the subject-matter and could order the disposition of the money in custodia legis. If the clerk had disobeyed the order of the court in this case, he would have been guilty of contempt of court. A ministerial officer is protected and justified when acting under a process or order of a court possessing general jurisdiction over the subject-matter, in spite of any errors committed by the court issuing the process or giving the order. 22 R. C. L. 481.

[2] But the court acted correctly and fully within its powers in making the order of which appellants complain. Section 1295 of the Penal Code provides for the deposit of money for the release from custody of a person held to answer. Section 1297 is as follows:

> "When money has been deposited, if it remains on deposit at the time of a judgment for the payment of a fine, the county clerk must, under the direction of the court, apply the money in satisfaction thereof, and after satisfying the fine and costs, must refund the surplus, if any, to the defendant."

It will thus be seen that in contemplation of law, so far as the criminal action is concerned, the money deposited for the purpose of insuring a defendant's appearance is his money, and the court is not required to protect the supposed rights of any one who may have advanced it for him. There is no pretense that Cradlebaugh in the criminal action surrendered himself into custody. His counsel, in making the motion, was seeking to protect the rights of the person or persons who had advanced the money as if bondsmen had appeared upon a written obligation. But persons who advance money in lieu of bail are not in the same position as sureties on a bond and have no such rights.

[3] When the defendant in the criminal action appeared for sentence, the counsel for Cradlebaugh, addressing the court, said:

> "Now if the court please at this time at the request of the bondsmen I will ask for an order of court surrendering the defendant into custody and for an order of the clerk remitting the bail money back to the parties who put it up, and for the purpose of filing new bonds later on."

The court then proceeded to pronounce judgment. From the foregoing it will be seen that there was no offer of the defendant in the criminal action to surrender himself "to the officer to whom the commitment was directed"—a prerequisite to the return of the bail money. Section 1302, Penal Code. Therefore the court was not called upon to rule upon the motion to order Cradlebaugh into custody. Consequently, the money in the hands of the clerk was a fund remaining on deposit "at the time of a judgment for the payment of a fine." Under the statute (section 1297 of the Penal Code), there was but one correct method of disposing of half of it. The court adopted that method.

[4] Appellant Mundell contends that the statute (section 1297 of the Penal Code) is

unconstitutional, in that it deprives of property, without due process of law, the person who advances the money for bail, by placing him in a different and less advantageous position than the surety on a bail bond. There is no force in this contention. There is no constitutional reason why one who advances cash in lieu of bail money should occupy the identical position of a surety on a written contract. The latter is bound, and the court, clerk, and sheriff are bound, by the strict terms of the written promise, while the measure of the depositor's liability, as well as of the correlative duties of the court and its officers, are to be found in the statutes. The law does not provide for a written agreement between the state and one who advances cash in lieu of bail. It attributes the ownership of such a fund to the defendant, and one who furnishes money for the release of a person held under a criminal charge is presumed to know that fact. It is argued that the sheriff had no right to accept the money originally, and that the clerk therefore could not receive it in lieu of bail. But it is not contended that the money was not advanced for the purpose of obtaining Cradlebaugh's release. If it finally reached the proper judicial custody, and Cradlebaugh was in fact permitted to go at large, the plaintiff, Mrs. Mundell, cannot complain because the purpose of the payment by her assignor was accomplished, not by a direct deposit in court, but through the agency of the sheriff, who receipted for $2,000, "being bail money, case of R. B. Henry" (one of Cradlebaugh's aliases).

That the money deposited for bail in a criminal action is regarded as the defendant's property is a rule sustained by the weight of authority. In People v. Laidlaw, 102 N. Y. 588, 7 N. E. 910, the court, construing statutes very similar to sections 1295 et seq. of the Penal Code of California, used the following language:

> "All these sections treat the money deposited as belonging to the defendant, and in all cases where money is deposited in lieu of bail it may be applied in payment of any fine imposed, and the surplus, if any, after the fine has been satisfied, must be returned to the defendant. The relator when he deposited this money must be assumed to have known the provisions of these statutes, and the deposit must have been made in compliance with them. There is no authority for the county treasurer to take a deposit in lieu of bail except by virtue of these statutes, and the deposit must be made in strict compliance with the statutes. The statutes may have been framed as they are for the very purpose of avoiding a dispute like that which has arisen in this case. If the contention of the relator be upheld, then disputes may frequently arise as to whose money was deposited, and the county treasurer can never know with certainty to whom the money is to be returned, and the court cannot know in passing sentence, or in making its order, whether the money is properly applicable upon the fine imposed. It is therefore wiser that the provisions of the statute should have their obvious meaning, to wit: The money is deposited as the money of the defendant, and if a fine is inflicted upon him it may be used to pay the fine, and the surplus is to be returned to him."

Other authorities upon this subject announcing substantially the same rule are State v. Wisnewski, 134 Wis. 497, 114 N. W. 1113; State v. Ross, 100 Tenn. 303, 45 S. W. 673; People v. Gould, 38 Misc. Rep. 505, 77 N. Y. Supp. 1067, and State v. Owens, 112 Iowa, 403, 84 N. W. 529. But it is suggested very earnestly that in California an entirely different rule has been adopted, and Hudson v. Police Court of Oakland (App.) 178 Pac. 172, is cited to support this theory. That was a case in which a writ of review was issued against the police court of the city of Oakland, and, after hearing, the District Court of Appeal annulled a judgment forfeiting money deposited as bail and applying it to the payment of a fine. It appears from the opinion in that case that before trial Mr. Hudson, counsel for the defendant in a criminal action, offered to surrender said defendant. There seems to have been no question regarding the sufficiency of this offer, and the District Court of Appeal correctly decided that the court was bound to accept it and to return the money to the counselor who had deposited it for his client. In the case at bar the facts are very different. No request was made for the acceptance of defendant's surrender in the criminal action, but the court was asked for an order accepting his surrender by his bondsman. He had no bondsman, and the court was neither bound to act nor to regard the request for the order as a personal surrender by Cradlebaugh to the sheriff.

[5] But although, as between defendant and the state, the money deposited in lieu of bail is regarded as a defendant's property and will be applied, so far as necessary, to the satisfaction of a fine, nevertheless, in a contest like the one waged in the case at bar involving the residue in the hands of the clerk after the payment of the fine, the court will regard the claims of the person who advanced the fund in order to bring about the release of the individual held in custody. While it is true that the statute provides for the payment to the defendant of the surplus, if any, after satisfaction of the fine (section 1297, Penal Code), if the true ownership be litigated, as in the case at bar, before the refunding contemplated by the statute, the court will inquire who is, in equity and good conscience, entitled to the money, and will award it accordingly. In Way v. Day, 187 Mass. 476, 73 N. E. 543, the Supreme Judicial Court of Massachusetts was considering a judgment dismissing a bill in equity whereby a judgment was prayed to enforce an assignment by Day of $800 deposited as bail

and remaining in the hands of the clerk of the superior court after Day's conviction and sentence. It was found in the lower court that Greer, one of the defendants, had deposited the money and that it never was the property of Day, and that court ruled:

> "That, while Greer cannot claim against the commonwealth that this money belongs to him and not to Day, yet this rule does not protect the plaintiff or give to him any rights against the real owner of the fund and that for this sole reason the bill cannot be maintained."

In approving this ruling and the dismissal of the bill, the Supreme Court used the following language:

> "Even if it be assumed that a court of equity can interfere with the power and duty of the court in which the money is deposited and direct to whom it shall be paid—an assumption attended with great, if not insuperable difficulties—and even if it be further assumed that as between the commonwealth and Day the money must be regarded as belonging to Day and not to Greer, and, still further, that the court in which it is deposited has no power to order it to be paid to any other person than to Day or his order (see Edelsten v. Adams, 8 Taunt. 557; Douglass v. Stanbrough, 3 A. & E. 316; Salter v. Weiner, 6 Abb. Prac. [N. Y.] 191; People v. Laidlaw, 102 N. Y. 588 [7 N. E. 910]), still it is plain that the money being in fact Greer's and not Day's, and having been pledged only for a certain purpose, Day had no authority express or implied to divert it to a different purpose. In equity and good conscience the money should go to Greer, and as against him the assignment by Day to the plaintiff must be regarded as invalid to convey any interest in or right to the fund, and equity will not lend its aid to enable him to get possession of it."

In Wright & Taylor v. Dougherty, 138 Iowa, 195, 115 N. W. 908, the question presented to the Supreme Court was whether or not, when money is deposited with the clerk of a court by a friendly third person to secure the release from custody of one under indictment, such fund is subject to seizure in satisfaction of the claims of judgment creditors of the indicted person. After reviewing the authorities which hold that as between the state and the person under indictment the money deposited as bail may be used in satisfaction of a fine, the court said:

> "True, under the statute, the money is to be deposited in the name of the defendant, and perhaps in a sense the legal title thereto is to be regarded as in him. But the money in the hands of the clerk is no more than a deposit, and this is only in favor of the state, the other party to the transaction; and the interest of the state does not extend to the actual ownership of the money. It goes no farther than that the defendant shall appear when called for trial, and that the deposit shall be available out of which to pay any fine or costs that may be assessed against him. This the depositor must be held to have agreed to. The statute goes no farther, and the cases cited go no farther. As between the depositor and the defendant, or his creditors, the ordinary rules of property obtain."

[6] We are of the opinion that the true rule is clearly set forth in the passages quoted above, and therefore that the surplus remaining in the hands of the county clerk after satisfaction of the fine was properly adjudged to be the money of plaintiff. We also approve of that part of the judgment imposing costs upon plaintiff. Manifestly, it would have been unjust to charge costs against the officer who was the mere custodian of the fund.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; OLNEY, J.; WILBUR, J.; LAWLOR, J.

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181 Cal. 392

GREEN v. SOUTH SAN FRANCISCO R. & POWER CO. (S. F. 8298.)

(Supreme Court of California. Oct. 8, 1919. Rehearing Denied Nov. 6, 1919.)

1. RAILROADS ⚿359(1)—DUTY TO TRESPASSER ON RIGHT OF WAY.

Where a railroad company runs its track on its own land, and not on a public way, one who goes on the right of way without the consent, express or implied, of the company, is a trespasser, and the company owes him no duty, except to use ordinary care to avoid injuring him after seeing him in danger.

2. RAILROADS ⚿359(1)—DUTY TOWARD TRESPASSERS AT CROSSING WITH OTHER RAILROAD.

The duty of a railroad towards trespassers on its right of way is not changed with regard to either road, when two railroads cross each other at a place where there is no other public way.

3. RAILROADS ⚿274(3) — GROUNDS AT STATION NEAR CROSSING WITH OTHER ROAD MUST BE SAFE.

When one of two railroad companies, whose lines intersect at a place where there is no other public way, establishes a passenger station near the crossing, such company is charged with a duty to exercise reasonable care to have suitable station grounds and to keep them safe and convenient for persons there for any lawful purpose.

4. STREET RAILROADS ⚿86(1)—TRACKS CROSSING RAILROAD PROPERTY MUST BE CONSTRUCTED ACCORDING TO ITS PLAN.

Obligation of street railroad, under Civ. Code, § 465, subd. 5, to lay its tracks and maintain its roadbed at a crossing of another road, so as to afford security for life and property, runs not only to the railroad's own passengers, but to passengers on the other road, or about the other road's station for proper purposes, but is limited by the road's power to control the construction of tracks, which must be in accordance with method other road has first adopted.

5. STREET RAILROADS ⚷86(1) — NEGLIGENCE OF RAILROAD IN MAINTENANCE OF TRACKS AT STREET RAILROAD CROSSING.

If tracks were maintained by a steam railroad at its crossing with an electric road in a negligent manner, and without due regard to the safety of persons lawfully at the place on the steam road's invitation, the negligence was violation of a duty which the steam road owed to such persons, and not of any duty of the electric road.

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Kenneth M. Green against the South San Francisco Railroad & Power Company. From a judgment for plaintiff, defendant appeals. Reversed.

Wm. M. Abbott and Wm. M. Cannon, both of San Francisco (Kingsley Cannon, of San Francisco, of counsel), for appellant.

Green, Humphreys & Green, of San Francisco, Joseph J. Bullock, of Redwood City, and Vogelsang & Brown, of San Francisco (L. Seidenberg, of San Francisco, of counsel), for respondent.

SHAW, J. The defendant appeals from the judgment. The action was begun to recover damages from bodily injuries alleged to have been caused by the negligence of the defendant. The complaint alleged that the defendant was operating an electric street railway upon a public street in South San Francisco, which railway crossed the tracks of the Southern Pacific Company near the passenger station of said Southern Pacific Company. On the subject of negligence it alleged that where the defendant's track crosses the Southern Pacific tracks, and for more than 100 feet immediately west of the crossing, the defendant failed and neglected to pave, plank, macadamize, or fill in the ground between the tracks and on each side thereof, or to keep the track on said street flush with the street or flush with the surface of the ground, but, on the contrary, both rails of the defendant's track projected the full depth of the rail above the surface of the ground at said place, and that by reason thereof the said track was unsafe and dangerous; that at the time of the injury plaintiff approached the station of the Southern Pacific Company at South San Francisco to take passage on a train of that company which had stopped at said station for that purpose, and being unaware of the dangerous condition of the defendant's track, he tripped upon one of the rails of defendant's track so projecting above the level of the ground, and was thereby caused to fall to the ground in such a position that his left arm was thrown across one of the rails of the track of the Southern Pacific Company; that the wheels of the said train passed over his arm and so injured him that his arm had to be amputated at the shoulder.

We think there was no proof that the defendant violated any duty owing by it to the plaintiff to exercise care in his behalf at the place of injury, and that for this reason the judgment must be reversed. The allegation that the tracks of the defendant were laid in a public highway at that place was not true. Neither the tracks of the defendant nor those of the Southern Pacific Company at that point were upon any public way. Both companies were operating their cars upon tracks laid upon property acquired by them respectively for railway purposes only. The obligations of a railway company which lays its tracks in a public street to maintain the same flush with the street and to otherwise exercise care for the safety of persons lawfully traveling thereon have no bearing upon the case. The liability of the defendant depends upon the duties it owed under the law to exercise care at a place where its track is not laid upon a public street or highway. The evidence showed that the train had stopped at the station of the Southern Pacific Company as alleged, that it was about to start on its journey again, that plaintiff attempted to board said train, and was injured by stumbling over the defendant's rails as alleged. The defendant street railway did not cross the Southern Pacific tracks immediately upon the grounds prepared and maintained for station purposes by the Southern Pacific Company. The defendant maintained no station at that point, and its cars did not stop there. It had no interest in maintaining the station.

The authority of the defendant to lay its tracks across those of the Southern Pacific Company is found in the Civil Code. Section 500 provides that any street railway track is permitted to cross any railroad track already constructed and that the crossing must be made "as provided in chapter 2, title 3, of this part." The provisions referred to are in sections 465 and 469. Section 465 enumerates and describes the powers given to ordinary railroad companies. It authorizes such railroad company, if the route of its road intersects any existing railway, or other public way, to construct its road across the same "in such manner as to afford security for life and property; but the corporation shall restore the * * * railroad [or other public way] * * * thus intersected to its former state of usefulness as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise." Subdivision 5. Section 469 provides that, where the track of one railroad intersects another, "the rails of either or each road must be so cut and adjusted as to permit the passage of the cars on each road with as little obstruction as possible."

[1, 2] Where a railroad company runs its track upon its own land, and not along or across a street or other public way, any person who goes upon such right of way without the consent, express or implied, of such company is a trespasser. Toomey v. Southern P. Co., 86 Cal. 379, 24 Pac. 1074, 10 L. R. A. 139; Baltimore, etc., Co. v. State, 62 Md. 487, 50 Am. Rep. 233; Palmer v. Railroad Co., 112 Ind. 253, 14 N. E. 70. To such person the company owes no duty "to facilitate his trespass or render it safe," although bound to use ordinary care to avoid injuring him in the operation of its road after seeing him so trespassing and in a dangerous position. Id. This duty towards persons thus trespassing is not changed, with regard to either road, when two railroads cross each other at a place where there is no other public way.

[3-5] If one of such railroad companies establishes a passenger station near such crossing, that company immediately becomes charged with the duty of exercising reasonable care to prepare and maintain suitable station grounds, and make them safe and convenient for persons leaving its cars there, or who may be there for any lawful purpose. This duty rests upon that company alone. The other company at the nearby crossing stands in no relation to the passengers of the first company, nor to persons who may come to its station for purposes connected therewith. We are here concerned solely with the duty of the street railway company in regard to the manner of maintaining its tracks and roadbed at the crossing in question. Section 469 relates merely to the duty of the road making the crossing to cut and adjust its rails, so as to permit the passage of cars of the other road with as little obstruction as possible. It is not claimed that this duty was not fully performed. The provisions of section 465 above quoted require such street railway to lay its tracks and maintain its roadbed at such crossing so as to afford security for life and property. This obligation runs, not only to its own passengers, but to persons who may be passengers upon the other railroad, or who may be about the station for proper and lawful purposes connected therewith; but it is obvious that the obligation of the defendant is limited by its power to control the matter of constructing and laying the tracks. It had no power or authority to compel the Southern Pacific Company to extend its station grounds, or to maintain them in a suitable or different manner or condition from that which existed at the time.

The Southern Pacific Company had laid its tracks at the crossing, so that the full width of the rails projected above the ties, and the space between them was not filled in above the top of the ties. It was maintaining its rails and roadbed in this manner at the time the crossing was made and until the accident occurred. The defendant had laid its rails and was maintaining them in the same manner at that time. It had no power to compel the Southern Pacific Company to adopt a different plan. If the latter company had extended its station grounds to the place of the crossing, and had filled in the space between its tracks for the convenience and safety of its passengers, the defendant might have been bound thereafter, while maintaining the crossing, to co-operate and fill in between its own tracks to correspond with the plan of the Southern Pacific Company; but so long as the latter company did not extend its station grounds to the crossing, the plain duty of the defendant was to maintain its own tracks and roadbed to correspond with those of the Southern Pacific Company at that place. If it had maintained them at a different level, and a passenger of the other company had been injured thereby, the defendant might have been subject to a charge of negligence for such departure from the general conformation of the surface as established and maintained by the Southern Pacific Company at that place. It was under no obligation to adopt a manner of maintaining its own track at the crossing different from that adopted by the Southern Pacific Company at that place. If they were maintained in a negligent manner by the Southern Pacific Company, and without due regard for the safety of persons lawfully at that place upon its invitation, this negligence was a violation of the duty which the Southern Pacific Company owed to such persons and was not a violation of any duty which the defendant owed to them. It was the negligence of the Southern Pacific Company alone. The consequence is that such condition of the tracks and roadbed was not negligence by defendant toward the plaintiff. For these reasons we are of the opinion that the verdict is not sustained by the evidence. This conclusion renders it unnecessary to consider the other points presented in the case.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; MELVIN, J.; LAWLOR, J.

WILBUR, J. I concur in the judgment. It is the duty of a railroad company towards its intending passengers to use care in the preparation and maintenance of its premises that a person of ordinary prudence would exercise in such matters. If we assume, as respondent contends we should, that the obligation of the appellant was the same as that of the railroad company with reference to that portion of its track which is sometimes used by passengers intending to take the Southern Pacific Company's passenger trains, the instructions in this case are erroneous for the reasons that, taken as a whole, they asserted the duty of the appellant to make its tracks at the point in question safe for intending passengers. Without futher analysis of either the instructions or the evidence, it is sufficient to say that even on the theory of respondent the judgment must be reversed.

Upon the question of the duty of the care in this state with reference to the maintenance of its passenger depot grounds, see Falls v. San Francisco, etc., Co., 97 Cal. 114, 31 Pac. 901, 20 L. R. A. 520, note; Lafflin v. Buffalo & S. W. R. Co., 106 N. Y. 136, 12 N. E. 599, 60 Am. Rep. 433. See, also, upon the analogous question of the duty to provide a safe place to work, Sanborn v. Madera Flume & Trading Co., 70 Cal. 261, 11 Pac. 710; Brymer v. Southern Pacific Co., 90 Cal. 496, 27 Pac. 371; Sappenfield v. Main Street & Agricultural Park Railroad Co., 91 Cal. 48, 27 Pac. 590, Thompson v. California Construction Co., 148 Cal. 35, 82 Pac. 367.

I concur: LENNON, J.

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181 Cal. 293

BENVENUTO v. SUPERIOR COURT IN AND FOR SANTA BARBARA COUNTY et al. (L. A. 6292.)

(Supreme Court of California. Sept. 25, 1919.)

1. PROHIBITION 🔑5(1) — DENIED WHERE GRANT WOULD REQUIRE ANTICIPATION OF ACTION.

An application for a writ of prohibition directed to an inferior court will be denied, where the granting of the application would require the appellate court to anticipate the action of the inferior tribunal.

2. PROHIBITION 🔑3(2)—WRIT DENIED WHERE THERE IS ADEQUATE REMEDY AT LAW.

Where it does not appear that petitioner does not have a plain, speedy, and adequate remedy by appeal, an application for a writ of prohibition will be denied.

In Bank.

Petition by Pastine Maddalena Benvenuto for writ of prohibition against the Superior Court of the State of California in and for the County of Santa Barbara, and Hon. S. E. Crow, Judge thereof. Application denied.

A. C. Postel, of Santa Barbara (C. H. Brock, of Los Angeles, of counsel), for petitioner.

PER CURIAM. The application for a writ of prohibition is denied.

[1] We deem it proper to say that this denial is without reference to the merits of the legal question attempted to be presented by the application. Regardless of all other questions, we cannot assume to anticipate the action of the trial court on the application for confirmation of the attempted sale referred to in the petition.

[2] It may further be suggested that we are not satisfied that, in the event of unfavorable action on the part of the lower court, the petitioner's remedy by appeal would not be a plain, speedy, and adequate remedy.

All concur.

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181 Cal. 345

SCOTT v. TIMES-MIRROR CO. (L. A. 4954.)

(Supreme Court of California. Oct. 8, 1919. Rehearing Denied Nov. 6, 1919.)

1. APPEAL AND ERROR 🔑231(5) — SUFFICIENCY OF GENERAL OBJECTION TO EVIDENCE OF SIMILAR LIBELS.

In a libel action, although a specific objection as to the dissimilarity of subject-matter of other alleged published attacks upon plaintiff by defendant was not made, the general objection of incompetency, irrelevancy, and immateriality of such evidence, in each such instance, was sufficient to reserve for review the special point of dissimilarity of import.

2. LIBEL AND SLANDER 🔑100(1) — ASKING PUNITIVE DAMAGES OR ASSERTING JUSTIFICATION MAKES ACTUAL MALICE ISSUE.

Where plaintiff seeks to recover punitive damages for libel, or where the defendant alleges that the publication was justified on the ground that it was privileged, actual malice or malice in fact becomes an issue.

3. LIBEL AND SLANDER 🔑104(3), 112(2)—REMOTENESS OF OTHER PUBLISHED ATTACKS UPON PLAINTIFF.

In an action for libel, remoteness in time of the publication of other alleged attacks upon plaintiff by defendant, introduced to show malice, goes to the weight of the evidence only and not to its admissibility.

4. LIBEL AND SLANDER 🔑104(3)—ADMISSIBILITY OF OTHER PUBLISHED ATTACKS OF DISSIMILAR IMPORT.

A contention that other published attacks upon plaintiff by defendant not of similar import are not admissible in an action for libel cannot be sustained, where actual malice is an issue, since any evidence having a logical tendency to prove that the publication in question was prompted by actual malice is material, competent, and relevant.

5. COURTS 🔑90(2) — CONCURRENCE OF APPELLATE JUDGES IN DECISIONS IN BANC.

In view of Const. art. 6, § 2, requiring the concurrence of four members of court to a decision in bank, where only four justices participated in the decision and only three concurred on a point, the language used by them is not a decision of this court.

6. PLEADING 🔑129(2)—PRESUMPTION FROM UNDENIED ALLEGATION OF GOOD NAME AND REPUTATION OF PLAINTIFF.

In an action for libel where an allegation in the complaint that "at all times prior to the 6th day of February, 1915," the plaintiff "did enjoy a good name and reputation as an attorney at law," was not denied, plaintiff's good name and reputation must be presumed.

7. Libel and slander 🔑107(1)—Estimating damages to plaintiff, an attorney.

An attorney, plaintiff in libel action, is not required to prove, and in the nature of things cannot prove, the extent of his damage by showing what legal fees he has been deprived of through the libelous circulation, or what clients he has lost because of it, and the jury may consider as a basis for award of actual damages the number of the plaintiff's employés, including lawyers and stenographers, their salaries, his gross income, the wide publicity given to the libel, his holding of political office and prominence in the community, his professional standing, good name, reputation, injured feelings, and mental suffering.

8. Appeal and error 🔑979(5) — Discretionary ruling on motion for new trial for excessive damages.

Where a motion for new trial, including the ground that an award of actual damages for libel was excessive, was denied, the amount of damages allowed stands approved by the trial court, and, the question of the verdict's excessiveness being a matter primarily addressed to the trial court's discretion, the verdict cannot be disturbed upon appeal unless the award is the result of passion or prejudice.

9. Libel and slander 🔑123(10) — Punitive damages in discretion of jury.

In the matter of punitive damages for libel, juries have a wider discretion than in the matter of compensatory damages.

10. Libel and slander 🔑121(1) — Damages not excessive.

In an action by an attorney against a newspaper corporation for libel, an award of $7,500 actual damages and $30,000 punitive damages, where actual malice was proved as an issue and the defendant's property was worth about $2,000,000, the average circulation of its paper about 60,000 daily and over 100,000 on Sunday, circulating in several states, *held*, that the amount of damages was not such as to warrant the disturbance of the award on the ground of jury's passion or prejudice.

11. Appeal and error 🔑207—Objections to conduct of counsel not made below.

Where plaintiff, in arguing as his own attorney in an action for libel, referred to defendant as "the rottenest corporation I know of in California to-day," and the trial court was not requested to instruct the jury that such conduct was improper and should be disregarded by them, the matter will not be considered on appeal.

12. Libel and slander 🔑104(1) — Evidence of interview before publication of article admissible.

In an action for libel brought by an attorney against a newspaper company and consisting of an article concerning a divorce suit in which plaintiff was attorney, testimony of parties present at the interview between defendant's reporter and other reporters, and the plaintiff in divorce, was relevant and material as bearing upon the good faith of the defendant in publishing the article complained of and upon the question of actual malice which was an issue.

13. Libel and slander 🔑105(1) — In action for libel concerning attorney in divorce suit, divorce complaint admissible.

In an action by an attorney for libel against a newspaper arising out of a publication of matters concerning a divorce suit, wherein it was intimated that the attorney's client had no cause for divorce, and that he was meddling, attempting to ruin defendant, and break up his home to fill the attorney's own pocket, the verified complaint in such divorce suit was admissible to show that the detailed statement of facts in the complaint drawn by the plaintiff's employé did set forth a cause of suit, and that plaintiff acted upon the representations of his client as shown by her sworn complaint.

14. Libel and slander 🔑107(1) — Evidence of plaintiff's training, family, and business career admissible.

In an action by an attorney against a newspaper for libel, it was proper for plaintiff to testify as to his early life and training, as well as to show that he has children, and that when he settled in the town of his residence his resources were limited, and that by his own industry he has built up a successful law business.

15. Trial 🔑108 — Permitting plaintiff an attorney to argue case.

In an action by an attorney against a newspaper for civil libel, it was not error for the court to allow the plaintiff, who was represented by an attorney at law, to appear as his own attorney and argue the case to the jury.

16. Trial 🔑260(6)—Refusal of instructions covered by others given.

In an action by an attorney against a newspaper for damages for civil libel in publishing an article concerning a divorce case in which plaintiff was attorney, an instruction, that an attorney is required to take care and ascertain facts regarding his client's case before advising as to legal rights, was properly refused where the matter was covered by other instructions.

17. Appeal and error 🔑260(1)—Refusal of an instruction covered by others not error.

It is not error to refuse instructions upon matters sufficiently covered by other instructions.

18. Appeal and error 🔑761—Failure to cite authority or argument under assignments.

Where objections to the action of trial court in refusing defendant's instructions are merely stated without citation of authority or any argument beyond such bare statement that "the court also erred in refusing to give defendant's requested instructions," such assignment need not be considered.

In Bank.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action by Joseph Scott against the Times-Mirror Company for civil libel. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 174 Pac. 312.

Geo. P. Adams, Joseph L. Lewinsohn, Hunsaker & Britt, Le Roy M. Edwards and Samuel Poorman, Jr., all of Los Angeles, for appellant.

Joseph Scott, of Los Angeles, John M. Ross, of Bisbee, Ariz., and J. B. Joujon Roche and A. G. Ritter, both of Los Angeles, for respondent.

W. H. Anderson, of Los Angeles, amicus curiæ.

LAWLOR, J. This is an action for civil libel growing out of an article published in the Los Angeles Times, a daily paper owned and controlled by the defendant Times-Mirror Company, of and concerning the plaintiff, an attorney at law in the city of Los Angeles. The case was tried by jury, and a total verdict of $37,500 rendered, $7,500 as actual damages and $30,000 as punitive damages. Judgment for the full amount was made and entered. The defendant interposed a motion for a new trial, which was ordered denied. The defendant appeals from the judgment.

The plaintiff at the time of the alleged libel was, and for more than 20 years prior thereto had been, an attorney at law, practicing his profession principally in the city of Los Angeles. He alleged in his complaint:

> "That on the 6th day of February, 1915, the defendant, through evil motive, and malice, and ill will towards the plaintiff, willfully, wickedly, wrongfully, maliciously, and with intent and design to injure, disgrace, and defame this plaintiff, and to bring him into public discredit as a lawyer and as a man, and to cause the public to hold said plaintiff in contempt and ridicule, published in said newspaper of, and concerning the plaintiff, and of and concerning him in his said capacity and profession, the following false, libelous, malicious, and defamatory article, to wit:
>
> " 'The Hillman Divorce Suit.
>
> " 'Her Mind's Made Up; They Won't Make Up.
>
> " 'Having sued her husband for divorce, Mrs. Bessie Olive Hillman returned home, joined her husband in dinner and passed part of the evening with him.
>
> " 'Having been served with papers in his wife's suit, Clarence D. Hillman conducted himself about the house just as he always had, and as though no little thing like a divorce matter was pending.
>
> " 'At least, Mrs. Hillman described her domestic situation in about this way: Yesterday she said that while she had brought suit and her husband had been officially informed of the fact, neither of them so much as mentioned the matter and their appetites for dinner were normal.
>
> " 'In the office of her attorney yesterday Mrs. Hillman regaled a corps of newspaper men with a series of alleged misdeeds on the part of her husband for many years. Extreme cruelty last Monday, she said, decided her to get a divorce. It was the culmination of sixteen years of ill treatment, according to her.
>
> " 'Thursday afternoon she brought suit; Thursday evening she was very pleasant to her husband, and the same evening she is said to have told newspaper writers that she was not going to press the suit, but would go with her husband to court and dismiss the action. Her husband said the same thing.
>
> " 'Friday morning she changed her mind; *by noon she was closeted with her attorneys and after luncheon she returned home fully determined to leave her husband forever.* Reports from the Hillman home last evening were that Mr. and Mrs. Hillman enjoyed their well-appointed dinner together, as usual.
>
> " 'The Hillmans are reputed to be extremely wealthy. They live in an elegant home, and have all the other desirable things of the rich. They have eight children.
>
> " 'Sued Once Before.
>
> " 'In 1904 Mrs. Hillman brought suit for divorce, but later dismissed the action. She said yesterday she wished that she had pressed the matter. She says that her husband has a habit of remaining silent at home, only to discuss his domestic affairs through the press. When she sued for divorce before she says that he gave out interviews to the press, using there arguments which he expected to reach and convince her.
>
> " ' "This time I am going through with it," she said yesterday, "I am tired of his cruelty. All he thinks about is money. He never takes me out anywhere except to church, and that is only for show. After he found out I had brought suit for divorce he was awfully nice to me—but that doesn't make any difference, this time."
>
> " 'Joe Scott, who is attorney of record in the case, says he knew nothing about the matter until the suit was filed.
>
> " 'Son Blames Lawyer.
>
> " 'Clarence Hillman, the 14-year-old son of Mr. and Mrs. Hillman, is endeavoring to patch up matters between his parents, and stated last night at their Pasadena home *that if his mother's attorney would stop meddling he and his father "could fix things up."* "Mother has absolutely no cause for acting as she has, and we are all heart-broken because of it," the young son said. "I am simply sick and can't think of anything since this trouble came up. I can't study and didn't go to school to-day. We thought everything was all right last night and we all had supper together and mother and father went to mass together this morning, happy as could be, but when he took the smaller children to school, Mr. Scott, her attorney, called her up on the telephone and she went to Los Angeles to see him, and as a consequence came back all wrought up again. Mother can't be right or she'd never do this thing; she is peculiar; she is Irish and when she gets mad she doesn't care for her children or anybody. Her lawyers have been telling her if she'd secure a divorce that she'd get $10,000.00 cash and about $3,000.00 a month spending money. Father

gives her everything in the world she could possibly want now. He lets her have from $400.00 to $600.00 every month to spend. *Father and every one of us children are all broken up, but things will adjust themselves in spite of Mr. Scott.*"

"'Won't Be, Says Husband.

"'Mr. Hillman said last night that the suit had come to him like a thunderbolt from a clear sky. He said he had no inkling of any trouble, and stated *the whole thing is a conspiracy to ruin him.* He said that since the suit was filed his wife's attorneys had sent men to hang around his place, to find out, he supposes, how much he is worth.

"'"*If they would let my wife alone we will fix this thing up,*" he said. "She is not right; she springs this thing on me every once in a while, but she has always before fallen into the hands of attorneys who would show her the error of her ways. This time it is different, and *her attorney is trying to ruin me and break up our home to fill his own pocket.* But he will not do it; we are going to live and die in this home which we all love so well. Even if my wife should get the $10,000.00 and $3,000.00 a month she would only get it for a short while, for it would break me, as I am heavily in debt, owing several hundred thousand dollars. I have been very busy the last few days, but not one unkind word have I spoken to my wife. I gave her about $500.00 every month and she always keeps four servants and sometimes has six, while I have only one to help me on the outside with this twelve-acre estate."

"'The Hillmans won first prize with their electric coupé in the recent tournament of roses parade. The machine was smothered in roses and the youngest child, representing Cupid, rode in a cleverly-arranged seat placed in the front of the coupé. Mr. and Mrs. Hillman and the other children rode in the machine.'" (Italics ours.)

It is further alleged in the complaint that the defendant "meant to say, and was understood to mean" by the portions of the publication which we have italicized:

"That said plaintiff had persuaded and induced said Bessie Olive Hillman to begin said divorce action, and was urging her to prosecute said action, and to refuse to become reconciled with her husband, for the purpose of breaking up the home of said Bessie Olive Hillman and said Clarence D. Hillman, and of ruining said Clarence D. Hillman, and thereby obtaining the property of said Bessie Olive Hillman and her said husband, or compelling the said Clarence D. Hillman to pay to the plaintiff a large sum of money."

After further alleging that the publication was false and defamatory and that "by means thereof the plaintiff has been, and is, greatly injured and prejudiced in his reputation as aforesaid, and has also lost and been deprived of gains and profits which would otherwise have arisen and accrued to him in his said business and profession," and that the publication "was made by the defendant through ill will and malice towards this plaintiff, and with the intent, design, and purpose on the part of said defendant to injure this plaintiff in his professional standing and reputation, and to discredit and defame this plaintiff, and to bring this plaintiff into public discredit as an attorney at law, and bring him into public contempt and ridicule," the complaint prayed for $60,000 damages—$10,000 as actual damages and $50,000 as exemplary or punitive damages.

The defendant's answer, after specifically denying all of the allegations of the complaint, alleged as a separate defense that the article "was privileged, in that the publication of the same was without malice and for the public benefit." And alleged further as a separate defense that the publication was made "without any malice whatever on the part of defendant against plaintiff, and with the belief on the part of defendant that the matter in said article set forth as having been stated to said reporter by the said Bessie Olive Hillman, her husband and her son was true."

The issue of actual malice thus having been raised by the pleadings, the plaintiff introduced ten other publications made by the defendant touching the plaintiff, which were admitted in evidence by the court over defendant's objection. The publications so offerred and accepted were marked as plaintiff's Exhibits 2 to 10, inclusive.

Exhibit 2 was an article concerning the same divorce case and was published in the Times on the day preceding the publication of the article complained of. Concerning the plaintiff, the following appears:

"Unfortunately, it happened that Mrs. Hillman became wrought up while she had access to her lawyer, and he took advantage of her. Had she not been spurred to take some definite action she would not have done such an unnatural thing as to really bring a divorce action.

"There has been no particular reconciliation, for there was need of none. We are just as close as we have ever been, and we shall remain that way, and both Mrs. Hillman and I can assure you that there will never be a divorce in our family, no matter what prying lawyers may do. * * * Mrs. Hillman's suit was filed by Joe Scott."

Exhibit 3 being the Times News Bulletin of February 5, 1915, refers to the same matter in the following language:

"Wealthy Seattle-Pasadena man's wife sues for divorce in Los Angeles; he says lawyer took advantage of her."

Exhibit 4 is an account of the proceedings in the superior court whereby the Hillman divorce case was dismissed and contains the following comments concerning the plaintiff:

"Over Officious.

"Judge Raps Joe Scott; Ends Hillman Divorce.

"A change of mind on the part of Mrs. Bessie Olive Hillman, who brought a divorce suit recently against Charles D. Hillman, a Pasadena millionaire, was sustained yesterday by Judge Monroe and she was freed from her attorney, Joe Scott, who refused to recognize her wishes in the matter. Attorney Scott was left out in the cold in the case and told to collect his fee and other expenses in the case as best he could. * * *

"Mr. and Mrs. Hillman then returned to Pasadena in their limousine. Members of the family said yesterday that now that the attorney in the case has been eliminated, they expect no further trouble between the father and mother."

Exhibit 5 is an attack upon the plaintiff's professional conduct in accepting employment as attorney for the McNamaras, charged with blowing up the Times building. The article appeared in the Times on August 18, 1912, and, after stating how much money was received from union labor for the defense of the McNamaras, continues:

"How much of it did Job Harriman get? How much of it did Joseph Scott get? You union labor men who pay the piper ought to be told what tunes the piper plays. * * *

"When to the folly of the striker is added dishonest repudiation of his solemn agreement, and the brutality of hounding unfortunate men and women out of house and home, or destroying their lives by dynamite, because they stand up for their liberty to work for their livelihood, the striker is more than a fool—he is a criminal, no matter what Darrow, Harriman, Scott & Co. may say to the contrary. In this connection the disgrace to Los Angeles is that Joseph Scott, of this dynamite-murderer defense trio, is still a member of the board of education."

Exhibit 6, which appeared in the editorial column, is an attack on the plaintiff as a member of the board of education, in opposition to his candidacy for re-election to the board. It appeared in the Times of April 22, 1913, and reads as follows:

"The School Board.

"Undoubtedly one of the most important issues to be tried out in the primary election of May 6 is the membership of the board of education. The municipal conference indorsed the present board—the whole of it for re-election. The Times cannot quite follow it; it cannot assent to the return of Joe Scott, defender of the McNamaras, or of Reynold Blight, who is more or less of an agitating anarchist, if he is anything. These men are not safe guides for youth, not suitable persons to be in charge of our public instruction. The ministerial associations are supporting a ticket of their own which includes one straight-out Socialist nominee, Mr. Wheat. Such a condition of things is beyond our comprehension. Socialism would destroy Christianity; its tenets are as subversive of the Christian foundations as are those of atheism. When a process of mixing crude oil and aqueduct water has been devised and made clear to the popular mind, somebody may be able to satisfactorily explain how leaders of the Christian church can favor the election of a Harriman ticket Socialist to the school board. Still we must admit that a Socialist might be found who would be preferable to Darrow's companion, Joe Scott, or to R. Blight, who is a sort of blighted Clarence Darrow himself. We are glad that the church people are getting their eyes opened as to his true character. It is needless to say that the ministerial associations which are sincerely working in behalf of right influences in the schools, are opposed to Scott and Blight and have left them off their list."

Exhibit 7 appeared in the Times on July 23, 1914, and contained the following statements concerning the plaintiff in his position as a member of the board of education:

"The Exposure and Defeat of Joe Scott.

"The master-stroke of the majority members of the board of education on Tuesday evening will meet the unqualified approval of every friend of free education.

"In putting a quietus to the unseemly, unjustifiable and destructive squabble, which had been injected into school affairs through the malevolence of Joe Scott, by declaring that, notwithstanding the trumpeted publicity given so-called 'charges' against superintendent of schools Francis, they find no charges have been made and properly term them mere 'objections.' * * * To logically complete the miserable incident, but one more step is demanded—the resignation of Scott from the board he has disgraced.

"What a sorry spectacle this self-appointed censor has made of himself in his efforts to control the education of 70,000 children, under a system lauded by educators as the best in the country, but with which he is entirely out of harmony. For years he has treated with disrespect his colleagues on the board by seeking to do things, behind their backs, the while professing solicitude for the public schools. He has made life miserable for them behind closed doors and upbraided them in open session, all of which they have borne with a fair degree of humility in order to avoid clashes with the 'temperamentally unfit' member.

"Scott has been the steadfast objector to everything that failed to meet his approval, and has sought by technical delays and in other ways to circumvent the will of the majority; he has been the consistent fosterer of strife, but has conducted his activities so insidiously that the public has been slow to learn the truth; by his attitude toward the superintendent, whose functions he sought to usurp in many ways, he has encouraged insubordination and sneaking tactics, and is believed to have coached an under-official in an effort to discredit the superintendent; by his openly declared opposition to the intermediate schools, he has been the actual force behind the agitation of a coterie to destroy their efficiency.

"What right has a man of this sort to be a member of the Board of Education? Why did he wish to retain his place on the teachers and schools committee? His offer at Tuesday night's meeting, to gamble for the place, sets a sorry example to school children; and its prompt repudiation by President Frank was a deserved rebuke."

Exhibit 8 is an article published in the Times on February 14, 1915, after the publication of the alleged libel, and was in reference to a libel suit or suits brought by the plaintiff against the defendant. It contains the following remarks concerning plaintiff:

> "Joe Scott's Fool Raids.
>
> "Uneasy, not to say luckless, Joe Scott (once a McNamara attorney of the retiring sort), recently gave mental birth to the curious conceit that the Times was indebted to him in the sum of $60,000.00 for publishing an alleged libel upon himself. * * * Joe Scott would do well to cease pursuing a delusive ignis fatuus; he might better try to get relief from his jejune, jagged and jeopardized plight by trying, even hopelessly, to earn the requisite ducats by practicing that profession in which he has never shown with the resplendent glory of the noonday sun. * * * Joe Scott—huh."

Exhibit 9 is a cartoon published in the Times on March 1, 1915, and entitled "Nothing but Holes." It presents a large hoop covered with paper which is full of holes and across which is written "Joe Scott's Complaint in the L. A. Investment Co. Case." A man bearing in his hand a roll of paper on which appears "Court's Decision" is seen standing on the backs of two horses which are in the act of jumping through the center of the hoop.

On December 5, 1915, plaintiff's Exhibit 10 was published in the editorial columns of the Times. It reads, in part, as follows:

> "What a Monster!
>
> "The Times is not, as was represented by Joe Scott and his Arizona attorney, Ross, in their arguments before the jury in both trials of Scott's libel suit against the Times-Mirror Company, a gigantic newspaper Minotaur, hiding in the Cretan labyrinth or fort-like structure at the corner of First and Broadway—a monster pulling into its relentless maw not only youths and maidens, but also full-grown alleged lawyers who exploit divorce suits, and progressive politicians and other vermin, and who
>
> 'Be they alive or be they dead,
> Grinds their bones to makes its bread.'
>
> "When examined in the true light of the actual facts of its long and open journalistic career, how different is the attitude, standing and character of the Los Angeles Times from the untrue and unsupported representations made by Joe Scott and his man Ross in two conspicuous Superior Court cases, when these special pleaders were suffered to do their worst in their demagogic efforts to conceal the truth and poison the minds of the juries against the Times and against its actual motives, course, career and journalistic record!
>
> "It was a reckless and a desperate effort to make the jury believe something besides the truth and to bring in a verdict not in harmony with the facts and the merits of the case at issue—an effort that brought the plaintiff to the very ragged edge of failure."

All of these publications were admitted for the limited purpose of proving malice in fact. The offer of plaintiff was so limited, and the court, by its instructions specifically confined the jury to a consideration of the articles in so far as they might be deemed evidence of malice in fact, and repeatedly advised the jury that they were "not to consider the truth or falsity of them, as the truth or falsity of said articles is not in issue in this case"; and that no award of actual damages could be based in whole or in part upon any of the publications admitted in evidence excepting the one sued upon.

The transcript on appeal shows that a large number of exceptions were reserved at the trial, but the only points urged in appellant's briefs are as follows:

> "I. The court erred in admitting libelous articles not of similar import and remote in time.
>
> "II. The verdict is so grossly excessive that it shocks the conscience because: (a) The award of $7,500.00 actual damages is not supported by the evidence; (b) the evidence does not show malice on the part of the corporation in making the publication; or, if malice be shown, it is totally disproportionate to the award.
>
> "III. The plaintiff, acting as his own counsel, was guilty of misconduct constituting prejudicial error.
>
> "IV. Other errors in the admission of evidence.
>
> "V. The court erred in allowing plaintiff, who was represented by an attorney at law, to appear as his own attorney; and in permitting him to argue the case to the jury.
>
> "VI. The court erred in refusing to give instructions 2 and 3 requested by the defendant."

[1] Appellant does not criticise any of the instructions given by the court. But it is contended that the admission in evidence of plaintiff's Exhibits 5–10, inclusive, the relevant portions of which we have set out above, constituted reversible error because the articles are "not of similar import" to, and are too "remote in time" from, the publication set out in the complaint. To which respondent replies that—

> "The objection here urged was not made in the trial court, and for that reason is not entitled to consideration in this court."

At the trial the defendant objected to the admission in evidence of all of the other publications, but the defendant does not claim that Exhibits 2, 3, and 4 were improperly admitted; the only assignment of error in that behalf being as to the admission in evidence of Exhibits 5–10, inclusive. We will therefore confine our discussion in this regard to a consideration of the sufficiency of the objections as made to reserve the specific objection that the articles admitted in evidence were "not of a similar import" to, and were too "remote in time" from, the one complained of.

The record shows that Exhibit 5 was objected to on the ground that it was "incompetent, irrelevant, and immaterial." Exhibit 6 was similarly objected to and upon the additional ground that it was a privileged communication—a criticism of the plaintiff as a public official. Identically the same objection was made to Exhibit 7 as to Exhibit 6. To Exhibit 8 it was objected that—

> "It was incompetent, irrelevant, and immaterial, and of a date subsequent to the date of the article upon which this action was brought."

Exhibit 9 was objected to on the ground that it was "incompetent, irrelevant, and immaterial; being a publication subsequent to the publication of the article on which this action was brought, and having no reference to it in any way whatsoever, and not responsive to any of the issues of the case." To the introduction of Exhibit 10 objection was made that it was "incompetent, irrelevant, and immaterial, and that it was a publication made approximately ten months after the publication upon which the action was brought."

While the point as to remoteness of time was included in some of the objections, it is apparent from the foregoing that the specific objection as to dissimilarity of subject-matter now urged was not in terms made at the trial. We think, however, that the general objection of incompetency, irrelevancy, and immateriality which was made in each instance was sufficient to reserve for review the specific point of "dissimilarity of import." It has been held that the general objection, if properly made, is sufficient in all cases in which the specific grounds of objection, if stated, could not be obviated. In Nightingale v. Scannell, 18 Cal. 315, it was said, referring to Merritt v. Seaman, 6 N. Y. 168:

> "A general objection had been taken to the introduction of evidence, and it was held that, as the difficulty could not be obviated, such an objection was all that was necessary. The same point precisely is presented in this case, and we think there is nothing in reason or propriety calling for a different determination. The evidence, say the defendants, was not admissible for any purpose; and, if that be correct, the difficulty could not have been obviated, and the objection was sufficient."

See, also, Brumley v. Flint, 87 Cal. 471, 25 Pac. 683; Wise v. Wakefield, 118 Cal. 107, 50 Pac. 310.

[2] I. Appellant urges that the court erred in admitting libelous articles not similar in import to the one sued upon for the reason that—

> "Such evidence, if admitted, would lead to the investigation of collateral issues to the confusion of the jury, would take the defendant by unfair surprise, and would unjustly enhance the damages by leading to double or multiple damages, according to the number of libels received in evidence."

[3] It is well established that in actions for civil libel where the plaintiff seeks to recover punitive or exemplary damages, or where the defendant alleges that the publication was justified on the ground that it was privileged, actual malice or malice in fact becomes an issue. As we have pointed out, the issue of actual malice was raised in this case both by the demand of the plaintiff for punitive damages and by the allegation of the defendant that the publication was privileged. "The record thus presents the question," to quote from appellant's brief, "whether or no express malice on the part of the defendant in publishing an article on February 6, 1915, reporting that plaintiff had been charged with improper conduct in a divorce case, can be shown by introducing other articles, remote in time, that charge insincerity and hypocrisy in the acceptance of a retainer to defend a group of labor union dynamiters, malevolence and hypocrisy in the course pursued by him as a member of the board of education; and pettifogging arguments made to the jury in other cases against this defendant, and also charge incompetence in the 'L. A. Investment Case.' Or, in other words, in order to show malice in fact, are libels, other than the one complained of and not of similar import and published at remote times, competent, material or relevant?" Appellant continues:

> "The question is not difficult of answer, because it is settled by authority, both in this jurisdiction and in practically all other jurisdictions, that while libels of similar import are admissible, because they tend to show that the publication in suit was deliberately made, yet libels not of similar import are not admissible, and remoteness of time of publication only adds to the vice of such evidence."

It is proper at this time to point out that "remoteness in time of publication" goes to the weight of the evidence only and not to its admissibility. Wigmore on Evidence, par. 404; Evening Journ. Ass'n v. McDermott, 44 N. J. Law, 430, 43 Am. Rep. 392; Gribble v. Pioneer Press Co., 34 Minn. 342, 25 N. W. 710; Julian v. Kansas City Star Co., 209 Mo. 35, 107 S. W. 496. This, apparently, has been accepted by counsel for appellant as the law on this point, for it is said in their reply brief: "This point, being unimportant will not be further noticed."

[4, 5] In support of the contention that "libels not of similar import are not admissible," appellant has cited the following cases from this jurisdiction: Chamberlin v. Vance, 51 Cal. 75; Stern v. Loewenthal, 77 Cal. 340, 19 Pac. 579; Harris v. Zanone, 93 Cal. 59, 28 Pac. 845; Westerfield v. Scripps, 119 Cal. 607, 51 Pac. 958; Hearne v. De Young, 119 Cal. 670, 52 Pac. 150, 449. Of these appellant relies chiefly on Stern v. Loewenthal. The action there was for slander. The slander complained of consisted of two statements, "He is a thief," and, "He is

doing business on my money." The trial court had admitted in evidence and refused to strike out another statement made by defendant "that he would break Mr. Stern (plaintiff) up in business." On this point it was said:

> "Upon that question the opinions of courts have been discordant. Against the admissibility of such evidence, the opinion of Bronson, J., in Root v. Lowndes, 6 Hill (N. Y.) 518, 41 Am. Dec. 762, is characteristically clear and vigorous. Townshend, after referring to some conflicting opinions upon this point, says: 'But the better opinion appears to be that evidence of a charge of a different nature, and at a different time from that alleged in the declaration, is inadmissible to prove malice, or for any purpose. This is in effect only another form of the rule that actionable words not counted upon cannot be given in evidence unless suit upon them is barred by the statute of limitations, and their admission where the statute has run is opposed to principle, as it, in effect, restores a cause of action which has been taken away by the law.' Townshend on Libel and Slander, § 392. In that view of the question we concur, and think the court erred in denying the motion of the defendant to strike out."

The Loewenthal Case was heard in bank. However, only four justices participated in the decision, and only three of these concurred on this point. Chief Justice Searls concurred on one point only, and expressly reserved opinion upon the other—the question of alleged error in the admission of other slanderous statements. Since the concurrence of four members of the court is necessary to a decision in bank (Const. art. 6, § 2; Del Mar Water, etc., Co. v. Eshleman, 167 Cal. 666, 140 Pac. 591, 948; Pacific Wharf, etc., Co. v. County of Los Angeles, 179 Pac. 398), it is plain that the language quoted above is not a decision of this court upon the point there considered. Moreover, the case of Harris v. Zanone, supra, cited by appellant, contains language directly opposed to that relied on in the Loewenthal Case. In that case the slander charged was that the defendant had said that the plaintiff was "a damned thief." One of the questions there presented was as to the admissibility, for the purpose of showing malice in fact, of certain threats made by defendant that he would ruin plaintiff's reputation. As affording evidence of malice in fact, we can see no distinction between threats to break plaintiff up in business, the admission of which was said to be error in the Loewenthal Case, and threats to ruin plaintiff's reputation, which were held admissible in the Harris Case. In deciding the point in the Harris Case, the court said:

> "Evidence was offered in behalf of the plaintiff that the defendant had repeated the defamatory words to others upon different occasions, and there was other evidence before the jury tending to establish the falsity of the charge, *and also that the defendant had expressed a purpose to injure her reputation. If the jury believed this evidence, they were authorized to find therefrom that the defendant was actuated by express malice* in the utterance of the words of Loheide, and therefore was not entitled to the immunity of a privileged communication." (Italics ours.)

Chamberlin v. Vance, supra, which was a case where actual malice was sought to be proved, holds that slanderous words of similar import spoken of the defendant after the commencement of the action are admissible in evidence on the question of malice. The question here involved—the admissibility of words of "dissimilar import"—was not before the court in that case and was not there discussed. Likewise Westerfield v. Scripps, supra, goes no further than to declare that—

> "If language relates to the same subject-matter and is of a character from which a malicious purpose may be inferred, it is admissible."

Nor was the point here presented discussed in Hearne v. De Young, supra. It was there held that the publication objected to was not of a different nature from the one sued upon, and that therefore it was admissible.

In view of the state of our own decisions, it will serve no useful purpose to set out or discuss the numerous authorities from other jurisdictions cited by appellant on this point. Some of them may be distinguished because the statutes under which the decisions were made are different from ours, and in others no distinction is drawn between implied malice and malice in fact. And in several of the authorities the proof of other publications is received or rejected according to whether they have been barred by the statute of limitations, which is touched upon in the Loewenthal Case, the reasoning being that if not so barred the evidence should be rejected because it would tend to aggravate the damages for the particular libel and at the same time permit in the future a possible recovery for the contributing libel. If this reasoning be sound, it would seem to apply with equal force to all libels, whether similar or dissimilar in import. As we have indicated, the appellant has attempted to differentiate them, and argues that articles of similar import are admissible, but that those of dissimilar import are not. But whatever those authorities may decide, or their underlying reasoning may be, they are clearly not binding as authorities in this jurisdiction.

The rule governing the admission of evidence to prove malice in fact has been clearly laid down by this court, speaking through Mr. Justice Henshaw, in the decision of Davis v. Hearst, 160 Cal. 143, 116 Pac. 530:

"As to the nature of the evidence, as has been said, it may be direct (or express, as the Code names it), going to declarations, acts, and conduct of the defendant, showing personal ill will toward the plaintiff, but it will more usually be *indirect or inferred* (the implied malice in fact of the Code definition), *and to this end of proving the malice inferentially all legitimate evidence is admissible bearing upon the general course of conduct of the defendant toward the plaintiff*, the internal evidence furnished by the character of the libel, and any other specific facts and circumstances not in direct proof of the malice, but from which the existence may be logically inferred, herein including the circumstance, if it be found to exist, of wanton recklessness and heedlessness of plaintiff's rights." (Italics ours.)

One of the questions presented by the pleadings is whether the publication of the article of February 6, 1915, was inspired by actual malice. This is essentially and purely a question of fact. Therefore, any evidence which would logically tend to solve the question, and which is not otherwise objectionable, is admissible. The test to be applied to evidence offered for this purpose is: Does it tend to prove the state of mind of the party responsible for the publication? If the evidence has such logical import, and is not otherwise incompetent, it must be received, and it is for the triers of the fact to determine the weight to be given to such evidence. The fact that it may also tend to establish the publication of other distinct libels, published either before or after the one constituting the cause of action, is to be regarded as merely incidental and as not furnishing ground for the exclusion of the evidence. Nor is it material that other actions may thus be shown to exist against the party. Hence, where punitive or exemplary damages are sought in an action for civil libel any evidence (which in no other respect is objectionable), having a logical tendency to prove that the publication was prompted by actual malice, is material, competent, and relevant. This is the plain meaning of Davis v. Hearst, supra, and if there was any question about the state of our law on the subject prior to that decision there is none now. It is inconceivable that since the law provides for recovery upon publications made with actual malice the existence of the fact may not be established by the very best evidence—namely, evidence of other libels tending to show a malicious and vindictive attitude of mind toward the injured party. To hold otherwise would be to recognize a right in the party defamed but deny to him a full opportunity to establish and enforce it.

The true rule has been well stated by Odgers and Newell in their respective works on Libel and Slander:

"1. Extrinsic Evidence of Malice.

"Malice may be proved by extrinsic evidence showing that the defendant bore a long-standing grudge against the plaintiff, that there were former disputes between them, that defendant had formerly been in the plaintiff's employ, and was dismissed for misconduct. Any previous quarrel, rivalry or ill feeling between plaintiff and defendant—in short, almost everything defendant has ever said or done with reference to the plaintiff—may be urged as evidence of malice. The plaintiff has to show what was in the defendant's mind at the time of the publication, and of that no doubt the defendant's acts and words on that occasion are the best evidence. But if plaintiff can prove that at any other time, before or after, defendant had any ill feeling against him, that is some evidence that the ill feeling existed also at the date of publication; therefore, all defendant's acts and deeds that point to the existence of such ill feeling at any date are evidence admissible for what they are worth. * * *

"In fact, whenever the state of a person's mind on a particular occasion is in issue, everything that can throw any light on the state of his mind then is admissible, although it happened on some other occasion. * * *

"* * * The more the evidence approaches proof of a systematic practice of libeling or slandering the plaintiff the more convincing it will be." Odgers on Libel and Slander (5th Ed.) pp. 348, 349.

"Any other words written or spoken by the defendant of the plaintiff, either before or after those sued on, or even after the commencement of the action, are admissible to show the animus of the defendant; and for this purpose it makes no difference whether the words tendered in evidence be themselves actionable or not, or whether they be addressed to the same party as the words sued on or to some one else. Such other words need not be connected with or refer to the defamatory matter sued on, provided they in any way tend to show malice in defendant's mind at the time of publication. And not only are such other words admissible in evidence, but also circumstances attending the publication, the mode and extent of their repetition. The more the evidence approaches proof of a systematic practice of libeling or slandering the plaintiff, the more convincing it will be." Newell on Slander and Libel (3d Ed.) p. 405.

The rule thus expressed is supported by the following cases: Julian v. Kansas City Star Co., 209 Mo. 35, 107 S. W. 496; Register Newspaper Co. v. Worthen, 111 S. W. 693, 33 Ky. Law Rep. 840; Meriwether v. Publishers, 211 Mo. 199, 109 S. W. 750, 16 L. R. A. (N. S.) 953; Evening Journal Association v. McDermott, 44 N. J. Law, 430, 43 Am. Rep. 392; Williams Printing Co. v. Saunders, 113 Va. 156, 73 S. E. 472, Ann. Cas. 1913E, 693; Stearns v. Cox, 17 Ohio, 590; Van Derveer v. Sutphin, 5 Ohio St. 294; Botsford v. Chase, 108 Mich. 432, 66 N. W. 325; Seip v. Deshler, 170 Pa. 334, 32 Atl. 1032; Knapp v. Fuller, 55 Vt. 311, 45 Am. Rep. 618; Severance v. Hilton, 32 N. H. 289; Williams v. Hicks Printing Co., 159 Wis. 90, 150 N. W. 183; Downs v. Cassidy, 47 Mont. 471, 133 Pac. 106, Ann. Cas. 1915B, 1155; Smith v. Brown, 97 S. C. 239, 81 S. E. 633; Vial v. Larson, 132 Iowa, 208, 109 N. W. 1007; Hintz v. Graupner, 138 Ill. 158, 27 N. E. 935; Grace v. McArthur, 76 Wis. 641, 45 N. W. 518; Casey

v. Hulgan, 118 Ind. 590, 21 N. E. 322; Beshiers v. Allen, 46 Okl. 331, 148 Pac. 141, L. R. A. 1915E, 413; Brittain v. Allen, 13 N. C. 120.

[6, 7] II. Appellant contends that the judgment should be reversed because the "verdict is so grossly excessive that it shocks the conscience because: (a) the award of $7,500 actual damages is not supported by the evidence; (b) the evidence does not show malice on the part of the corporation in making the publication; or, if malice be shown, it is totally disproportionate to the award." Appellant's position is that there is no evidence whatever presented here justifying the recovery of any damages, either compensatory or punitive, and because respondent did not prove specific pecuniary loss caused by the libel he is not entitled to any compensation whatever. With this position we cannot agree.

The evidence introduced for the purpose of proving damages and upon which the jury made the award tended to show that the publication caused the plaintiff mental anguish. On this point he testified:

"I was very indignant. I felt that a great injustice had been done to me, to my office, and to my reputation. I felt it was degrading before my fellow members of the bar and before the community. It hurts yet. I believe it and I know it to be wholly untrue. I would say, so far as the statements of my office were concerned, it reflected on my office." That the plaintiff was born in England, where he was educated and matriculated in the University of London. That he came to this country while still a young man, and for a time was professor of rhetoric and English literature in a college in Western New York. That he was admitted to practice his profession in this state, and in 1894 opened an office in Los Angeles, where he has been engaged in practice ever since. That he had a general practice, including considerable probate business, trial and jury work, with an occasional criminal case, and only a limited corporation practice. That at the time of the publication of the libel complained of he employed six lawyers and a number of stenographers in his office, his office expenses, including salaries, amounting to about $1,500 a month, and his gross income about $40,000 a year. That his practice had been built up from a modest beginning, it appearing that when he started he lived and had his office in the same room. That plaintiff's practice extended to the various counties of the state, and to a large extent in Arizona. That he is admitted to practice in the United States Supreme Court and other federal courts. That plaintiff was married in 1898, and at the time of the trial his family consisted of his wife and seven children. That he commanded the confidence of the people of Los Angeles, having been a member of the board of education in that city continuously from 1904 to 1915, and was five times elected president of the board. That in addition he was for ten years director and in 1910 president of the Los Angeles chamber of commerce; director of the Equitable Savings Bank and of the Los Angeles Investment Company of the same city. That he is a member of several clubs and of the county, state, and American bar associations. That the value of the defendant's property is about $2,000,000. That the average daily circulation of the Los Angeles Times was about 60,000 and the Sunday edition about 102,000, the paper circulating throughout California and Arizona and elsewhere.

It is alleged in the complaint that—

"At all times prior to the 6th day of February, 1915, [the plaintiff] did enjoy a good name and reputation as an attorney at law."

This allegation not having been denied, the plaintiff's good name and reputation must be presumed.

The respondent is not required to prove, and in the nature of things cannot prove, the extent to which he has been damaged by this libel, or of what legal fees he has been deprived through its circulation, or what clients he has lost because of it. It is well settled that in such cases as this a jury may consider as a basis for its award of actual damages all of such matters as those set out above, including the wide publicity given to the libel, plaintiff's prominence in the community where he lives, his professional standing, his good name and reputation, his injured feelings, and his mental sufferings. Cahill v. Murphy, 94 Cal. 29, 30 Pac. 195, 28 Am. St. Rep. 88; Turner v. Hearst, 115 Cal. 395, 47 Pac. 129; Davis v. Hearst, 160 Cal. 143, 185, 116 Pac. 530.

[8] Appellant's motion for a new trial was made on the ground, among others, that the award of actual damages was excessive. The motion was denied. The amount of such damages, therefore, stands approved by the trial court, and, under the well-established rule, the question of the excessiveness of the verdict being primarily addressed to the discretion of the trial court, we cannot disturb it unless it appears that such award is the result of passion or prejudice. In Swain v. Fourteenth St. R. R. Co., 93 Cal. 179, 28 Pac. 829, it was said:

"The amount of the verdict in this case is large, but we cannot say that it is suggestive of either passion or prejudice on the part of the jury. In fixing damages in this class of cases, which is left to the discretion of the jury, and when the verdict has been approved by the trial court, this court is not authorized to grant a new trial upon the ground of excessive damages, except in a case where it is plain that the verdict was not the result of the fair and honest judgment of the jury."

See, also, Gomez v. Scanlan, 155 Cal. 528, 102 Pac. 12; Dunn v. Hearst, 139 Cal. 239, 73 Pac. 138; Aldrich v. Palmer, 24 Cal. 516; Meyer v. Great Western Ins. Co., 104 Cal. 381, 38 Pac. 82; Hickey v. Coschina, 133 Cal. 81, 65 Pac. 313. In the latter case it was said:

> "The court below had the power to, and no doubt did, carefully weigh and consider the evidence for the purpose of determining whether or not the verdict was the correct conclusion from all the testimony in the case. It had the power to set aside the verdict, even though the evidence was conflicting, if convinced that it was unjust, or not in accord with the weight of the evidence. Here we have no such power. The presumptions are all in favor of the correctness of the verdict. To this presumption is added the sanction of the court below in denying the motion for a new trial."

[9] In Wilson v. Fitch, 41 Cal. 386, where there was no proof of actual malice, and, as was held by the court, not a case for punitive damages, it was said in answer to the claim that the damages awarded were excessive:

> "The court will not interfere in such cases unless the amount awarded is so grossly excessive as to shock the moral sense, and raise a reasonable presumption that the jury was under the influence of passion or prejudice. In this case, whilst the sum awarded appears to be much larger than the facts demanded, the amount cannot be said to be so grossly excessive as to be reasonably imputed only to passion or prejudice in the jury. In such cases there is no accurate standard by which to compute the injury, and the jury must, necessarily, be left to the exercise of a wide discretion; to be restricted by the court only when the sum awarded is so large that the verdict shocks the moral sense, and raise a presumption that it must have proceeded from passion or prejudice."

In the matter of punitive damages it is clear from the authorities that juries have a wider discretion in this regard than they have in the matter of compensatory damages. Voltz v. Blackmar, 64 N. Y. 440; Day v. Woodworth, 13 How. 363, 14 L. Ed. 181; Bennett v. Hyde, 6 Conn. 24; Hayner v. Cowden, 27 Ohio St. 292, 22 Am. Rep. 303; McConnell v. Hampton, 12 Johns. (N. Y.) 234.

[10] In Luther v. Shaw, 157 Wis. 234, 147 N. W. 18, the court in affirming the award of punitive damages said:

> "Where the jury are properly given such broad discretion with reference to exemplary damages, as indicated by the code of instructions whereby they were told they might assess against the defendant a sum which they deemed just and proper, and best calculated to be an example to him and to others, such jury are entitled to accept these instructions in good faith as meaning just what they say. How, then, can it be said that their verdict is perverse? They disregarded no evidence and violated no instructions in fixing these exemplary damages. Their estimate of what would be sufficient as a punishment and a deterrent and an example was very high as compared with the actual damages assessed and high from any point of view, but it would hardly be candid to invite them, in the language of this instruction, to fix such sum which expressed their judgment in such matter and then charge them with bias or perversity because the measure of their abhorrence of defendant's conduct and their judgment of what would be a sufficient punishment and deterrent was represented by a larger sum of money than that which some other man or men would have allowed."

We cannot say upon the record before us that the damages awarded by the jury, either actual or punitive, have been given under the influence of passion or prejudice, and hence the award cannot be disturbed.

[11] III. Appellant has called attention to the alleged misconduct of the plaintiff before the jury. In some of the instances referred to objection was made, but in others no objection was interposed, and this group includes the principal claim of misconduct wherein the plaintiff in his argument to the jury, referring to the defendant, said: "The rottenest corporation I know of in California to-day is this same corporation." In no case was the court requested to instruct the jury that the conduct objected to was improper and that it was to be disregarded by them. Where the action of the trial court is not thus invoked, the alleged misconduct will not be considered on appeal, if an admonition to the jury would remove the effect thereof. People v. Shears, 133 Cal. 154, 65 Pac. 295; People v. Babcock, 160 Cal. 537, 117 Pac. 549; Grossetti v. Sweasey, 176 Cal. 793, 169 Pac. 687. From an examination of the record on this point we are of the opinion that, even if the plaintiff had been guilty of misconduct, an admonition from the court would have removed the effect thereof in every instance.

[12] Under the heading, "Other Errors in the Admission of Evidence," appellant mentions, first, the testimony of Mr. Ritter and of Mr. Roach regarding the interview between Mrs. Hillman and several reporters, including a representative of the Los Angeles Times, which took place in the office of the respondent the day before the publication of the libel complained of in this action. A motion was made at the trial to strike out certain portions of this testimony on the ground that it was immaterial and irrelevant, which motion was denied by the court. Appellant assigns this ruling as error. There is no merit to this objection. The testimony was clearly relevant and material as bearing upon the good faith of the defendant in publishing the article in suit, and also upon the question of actual malice.

[13] IV. A further assignment of error under this head is the admission in evidence of the verified complaint in the Hillman Case, it being contended that the subject-matter of the complaint was beside the issue, and that acts of cruelty therein detailed may have given the jury the impression that the respondent was "a veritable St. George." This evidence was offered for the purpose of "establishing the motives of the attorney filing the complaint." The court in admitting this

evidence stated to the jury that the "facts and allegations therein are not to be deemed to be taken by you conclusively as true, but they are evidence of what was told Mr. Scott at the time of filing the complaint." Now, it is not strictly true that this is evidence of what was told Mr. Scott at the time of filing the complaint, because the record shows that Mr. Scott did not personally interview Mrs. Hillman regarding the subject-matter of the complaint. The fact is that the verified complaint was handed to Mr. Scott by his subordinate, who drew it, and was signed and filed by Mr. Scott. In other words, the verified complaint constituted the representations on which he as an attorney acted in the case by subscribing thereto and filing it. We think that the argument of respondent in his brief presents the correct reason for holding the complaint admissible:

> "The gist of the statements attributed to Hillman and his fourteen year old son, in the article upon which this action is based, was that Mrs. Hillman had no cause for divorce, and that the suit was the result of respondent's meddling and attempt to ruin Hillman and 'break up his home to fill his own pocket.' The respondent has the right to show these statements were false, and the complaint sworn to by Mrs. Hillman and signed by respondent as her attorney was competent to show that if her allegations were true she did have a well-grounded cause for divorce, and the suit was not filed by her as a result of being 'wrought up' by respondent, pursuant to a conspiracy to ruin the defendant and break up his home."

The complaint was admissible for the purpose of showing the nature and character of the charges made by Mrs. Hillman against her husband under oath, and the fact that the plaintiff by filing said complaint acted upon such representations.

[14] In addition to the foregoing, it is urged that the court erred in allowing the respondent to give a "biographical sketch of himself." This contention cannot be supported. It has been held that in an action for libel it is proper for the plaintiff to testify as to his early life and training, as well as to show that he has children, that when he settled in the town of his residence his resources were limited, and that by his own industry he has built up a successful business. Smith v. Hubbell, 142 Mich. 637, 106 N. W. 547; Cyrowsky v. Polish American Publishing Co., 196 Mich. 648, 163 N. W. 58.

[15] V. It is next urged by appellant that—

> "The court erred in allowing plaintiff, who was represented by an attorney at law, to appear as his own attorney, and in permitting him to argue the case to the jury."

In support of this contention, appellant quotes from Boca, etc., R. R. Co. v. Superior Court, 150 Cal. 153, 88 Pac. 718, as follows:

> "It is, however, the settled law of this state that, while a party to an action may appear in his own proper person or by attorney, he cannot do both, and that as long as he has an attorney of record in an action the court cannot recognize any other as having management or control of the action, and the party can act only through his attorney."

It is to be noted, however, that an entirely different situation from the one before us was there presented. The plaintiff corporation in that case had through its attorney of record moved to dismiss a certain action instituted by it. While this motion was still pending, a written request or notice of dismissal was sent to the clerk of the court by the manager of the plaintiff corporation. It was held that the order of the court ignoring this notice was properly made; the court pointing out further that until an attorney has been removed or substituted "the client cannot assume control of the case." While this case correctly states the law on the issues there involved, it does not apply here.

A situation practically identical to the one in this case was presented in Conroy v. Waters, 133 Cal. 211, 65 Pac. 387. It was there said:

> "Appellant further objects that plaintiff, who is an attorney at law, licensed to practice before all the courts of this state, was represented on the trial by Lucian Earle, his attorney of record, and that upon motion of Lucian Earle, plaintiff * * * was by order of the court 'associated' with said Earle as attorney in the case. It was contended that his was a special privilege conferred upon the plaintiff whereby he was allowed not only to appear by attorney, but at the same time to appear in person. Whatever irregularity may be detected in this order of the court, we think it sufficient to say that it was clearly an irregularity without injury, and that no reversal of the case should be had for the assigned reason."

[16] VI. Appellant complains of the action of the trial court in refusing to give instructions 2 and 3 requested by the defendant. Instruction 2 reads, in part:

> "It is the duty of an attorney at law to take care and to ascertain what the facts in regard to his client's case are before advising the client as to his or her legal rights and the legal steps to be taken to obtain relief."

Appellant does not point out the applicability of the instruction to the facts. It is probably addressed to the claim of appellant that the Hillman divorce action was brought prematurely by the plaintiff. In any event, we do not think the failure to give the instruction in any way prejudiced the rights of the defendant. Moreover, instruction No. 22 which was given contains this language:

> "A lawyer whose services are sought by husband or wife with a view of commencing an action for divorce is not justified, through hope

of gain or other advantage to himself, to take any action to prevent such reconciliation."

[17] Defendant's instruction 3, which was refused by the court, reads, in part:

> "It is not sufficient on the issue of malice for the plaintiff to prove that the defendant had malice against him, but plaintiff must go further and prove that the publication complained of was made by defendant because of the malice complained of."

It is a sufficient answer to this objection to state that the substance of this instruction was given, among others, in instructions Nos. 8, 9, 12, 28, 35, and 36. For instance, the latter instruction declares, in part:

> "You can consider the articles published in the newspaper of the defendant prior and subsequent to the publication of the article complained of only as bearing on the question as to whether the article complained of was published by the defendant with actual malice. * * *"

[18] The action of the trial court in refusing defendant's instructions Nos. 5, 7, 8, and 9 is also assigned as error. But the objections are merely stated without any citation of authority or any argument beyond the bare statement that "the court also erred in refusing to give defendant's requested instructions." We do not feel called upon to consider points so presented. Gray v. Walker, 157 Cal. 381, 108 Pac. 278; Born v. Castle, 175 Cal. 680, 167 Pac. 138; Dore v. Southern Pacific Co., 163 Cal. 182, 124 Pac. 817.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LENNON, J.; OLNEY, J.; MELVIN, J.

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TODD et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

(S. F. 9072.)

(Supreme Court of California. Oct. 9, 1919.)

1. MANDAMUS 🔑167—MATTERS CONSIDERED ON APPLICATION FOR SUBSTITUTION OF ATTORNEYS.

On application for a writ of mandate to require the superior court to grant a motion for substitution of attorneys, letters, affidavits, and consent of the petitioners, which were attached to and made a part of the motion, may be considered, though the motion was made on the ground that the appearance of the attorney was unauthorized by petitioners.

2. ATTORNEY AND CLIENT 🔑75(1)—RIGHT OF CLIENT TO CHANGE ATTORNEY.

A client has the right to change his attorney at any time, except where the attorney has an interest in the subject-matter of the suit, and this right of discharge exists even though a contingent fee has been agreed upon, or an irrevocable power of attorney given, and notwithstanding the attorney may have rendered valuable services or the client be indebted to him.

3. PRINCIPAL AND AGENT 🔑43(2)—INTEREST PROTECTING POWER OF ATTORNEY AFTER DEATH OF MAKER.

The interest which can protect a power of attorney after death of the person who creates it must be an interest in the thing itself, a power coupled with an interest being a power which accompanies or which is connected with an interest.

4. PRINCIPAL AND AGENT 🔑34 — INTEREST MUST COEXIST TO MAKE POWER OF ATTORNEY IRREVOCABLE.

To impart an irrevocable quality to a power of attorney in the absence of an express stipulation, and as the result of legal principles alone, there must coexist with the power an interest in the thing or estate to be disposed of or managed under the power.

5. PRINCIPAL AND AGENT 🔑37—WHEN POWER OF ATTORNEY IRREVOCABLE IN TERMS OR AT LAW.

While, as a general rule, a power of attorney may at any time be revoked by the party conferring it, yet, where a power of attorney forms a part of a contract and is security for money or for the performance of an act which is deemed valuable, it is generally made irrevocable in terms, or, if not so, is deemed irrevocable in law.

6. PRINCIPAL AND AGENT 🔑37—WHEN POWERS OF ATTORNEY REVOCABLE.

Though a power of attorney is made in terms irrevocable, that fact will not prevent revocation by the constituent where the power is not at the same time coupled with an interest or given as security for the payment of money, or for the performance of an act deemed of value.

7. CONTRACTS 🔑162 — WRITTEN CONTRACT WITH REPUGNANT CLAUSES CONSTRUED ACCORDING TO ITS INTENT.

Where there is an inconsistency between two clauses in a written contract, the repugnancy must be reconciled so as to give effect to the repugnant clauses, in keeping with the general intent or predominant purpose of the instrument.

8. PRINCIPAL AND AGENT 🔑37—REVOCATION OF POWER OF ATTORNEY TO COLLECT LEGACIES.

A power of attorney given by legatees to one to collect their legacies *held* to create an interest in favor of the donee of the power only to the extent of reimbursement and compensation, and hence, though the power declared that it was irrevocable, the legatees might revoke the power, and, where the attorney in fact had procured an attorney at law, the legatees may have another attorney substituted for him.

9. PRINCIPAL AND AGENT 🔑37—REVOCATION OF POWER OF ATTORNEY NOT AFFECTING COMPENSATION.

Where legatees gave a power of attorney to one to collect their legacies, *held*, that revocation of the power would not deprive the attorney in fact of any right to reimbursement for moneys expended or compensation for services rendered.

In Bank.

Application by Sophia Todd and another for writ of mandate to be directed against the Superior Court of the State of California in and for the City and County of San Francisco, and John T. Nourse, Judge thereof. Writ granted.

T. E. K. Cormac and Wal J. Tuska, both of San Francisco, for petitioners.

Shelton & Levy, of San Francisco, for respondents.

LAWLOR, J. Application for a writ of mandate. On April 28, 1919, the petitioners herein filed an application for a writ of mandate to be directed against the respondents, the court having refused to grant a motion made by the petitioners for the substitution of attorneys in the matter of the estate of Christine Sharbach, deceased. On May 1, 1919, an alternative writ of mandate was issued by this court, and on June 2, 1919, the respondents interposed a demurrer to the petition on the ground that it does not state facts sufficient to constitute a cause of action for a writ of mandate. At the same time the respondents filed an answer to the petition. The matter was thereupon orally heard and submitted for decision.

Petitioners, Sophia Todd and Louise Weber, residents of England, were named as legatees in the will of Christine Sharbach, who died in San Francisco on November 21, 1917. On January 3, 1918, each of the petitioners executed a separate power of attorney to L. O. Thieme of Chicago, Ill.; the powers being identical except as to the name of the constituent. That of Louise Weber reads as follows:

"Power of Attorney.

"Know all men by these presents: That I, Louise Weber, of 46 Carlton street, West Hartlepool in the county of Durham, England, spinster, being of lawful age, do hereby make, constitute and appoint L. O. Thieme of Chicago, Illinois, to be my true and lawful attorney in fact with full power and authority to collect, receipt for, and sue for my distributive share, legacy or claim of any kind, nature or description, which I may have against or may now or at any future date be entitled to from the estate of Christine Sharbach, deceased, and to take possession of any personal property disbursed in kind by the personal representative of said estate; also to collect any policies of insurance, or death benefits in which I may be named as beneficiary; to take charge of and manage any real estate in which I may have an interest, to collect rents, pay taxes and to institute and conduct any proceedings for the partition or sale of any such real estate, and to institute, conduct or defend all suits at law or in equity which may concern the subject-matter of this instrument, to retain and discharge counsel, to execute refunding bonds, statutory bonds, or bonds of any kind, nature or description, to enter my appearance and waive notice in the matter of any final accounting, to indorse checks and other papers of whatsoever kind, to compromise claims, to execute releases and to execute all other suitable instruments in writing, to carry into effect the various powers herein granted, and to do and perform all other acts as fully and effectually as I might do or perform if personally present, with full power to appoint and discharge substitutes, hereby revoking all powers of attorney heretofore executed by me.

"And for and in consideration of the sum of one dollar to me in hand paid, the receipt of which is hereby acknowledged, and in further consideration of services rendered and to be rendered and moneys to be advanced for court cost and other necessary expenses in this behalf by my said attorney in fact, I do hereby assign, transfer and set over unto my said attorney in fact all of the subject-matter of this power of attorney, that is to say, of all property, real or personal, to which I may be entitled out of the estate of Christine Sharbach, deceased, or which arise out of the death of said deceased in any manner whatsoever, it being my intention that this power of attorney shall be construed as a power of attorney, coupled with an interest in the subject-matter thereof.

"After deducting the interest herein assigned, and his expenses and outlays in and about performing his duties, said attorney in fact shall remit the balance of the funds on hand to me thru his corresponding bank.

"In witness whereof I have hereunto set my hand and seal this third day of January, A. D. 1918."

On January 22, 1918, L. O. Thieme executed a power of substitution in favor of Eugene W. Levy, an attorney at law of San Francisco, as follows:

"Know all men by these presents: That I, the undersigned, L. O. Thieme, of the city of Chicago, state of Illinois, by virtue of the power and authority to me given in and by the letters of attorney dated January 3, 1918, of Sophia Todd and January 3, 1918, of Louise Weber do hereby substitute and appoint Eugene W. Levy attorney at law of the city of San Francisco, in the county of San Francisco, and state of California as the true and lawful attorney and substitute of myself and the said constituents named in the said letters of attorney, to do, execute and perform all and every act and thing requisite and necessary to be done, as fully to all intents and purposes as the said constituents or I myself could do if personally present, hereby ratifying and confirming all that the said attorney and substitute hereby made, shall do in the premises by virtue hereof and of the said letters of attorney."

Pursuant to the foregoing substitution, Mr. Levy, on January 30, 1918, filed a notice of appearance in the proceedings in the estate of Christine Sharbach, deceased, as attorney for the petitioners herein; the will of the deceased having been admitted to probate on December 21, 1917. The estate consists entirely of stocks and bonds, and there is no litigation in connection with these legacies; the administration of the estate being purely formal. On November 11, 1918, notice was served upon Mr. Levy that petitioners would, on November 18th, following, apply to the superior court of the city and county of San Francisco for an order substituting T. E. K. Cormac, Esq., "as attorney for the said Sophia Todd and Louise Weber, respectively, in all proceedings in the matter of the estate of Christine Sharbach, deceased, in the place of the said Eugene W. Levy, Esq." The motion, which was heard and denied on April 21, 1919, after a number of continuances granted at the request of Mr. Levy, was "made on the ground that the appearance of the said Eugene W. Levy as attorney for the said Sophia Todd was unauthorized by the said Sophia Todd; and that the same is in furtherance of justice, and will be heard upon letters, affidavits, and consent of the said Sophia Todd, copies of which papers are hereto annexed, and other oral and documentary evidence." The notice of Louise Weber was in identical terms.

The letters and affidavits here referred to show that the petitioners on April 5, 1918, three months after executing the power of attorney to L. O. Thieme, and two months after Mr. Levy had filed an appearance, executed a power of attorney in favor of T. E. K. Cormac, Esq., of San Francisco, "by which he is empowered to represent us in California, and elsewhere in America, for all purposes connected with estates of said decedent, and by which we *expressly canceled, withdrew and revoked the power of attorney we had formerly given to L. O. Thieme & Co. * * * and under which they or any substitutes or agents of theirs might be claiming to represent us in California or elsewhere.*" (Italics ours.)

Petitioners contend that under section 284 of the Code of Civil Procedure they "have the absolute right to change their attorney at any stage of the proceedings," and that the motion for substitution of attorneys made to the court below, supported by the letters and affidavits showing that the power of attorney held by Mr. Levy had been revoked by petitioners, should have been granted. Section 284 reads:

> "The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows:
>
> "(1) Upon consent of both client and attorney, filed with the clerk, or entered upon the minutes;
>
> "(2) Upon the order of the court, upon the application of either client or attorney, after notice from one to the other."

It is evident that the motion herein was made under subdivision 2.

It is urged on behalf of respondents that, since the motion for substitution specified particularly that petitioners' present attorney was not authorized to represent them, they are confined to that ground here, and that if it be found that the allegation was not well taken the order denying the motion must be upheld and the writ denied. In other words, respondents argue that if it be found that Mr. Levy was at any time authorized to represent the petitioners the writ must be denied without going into the question whether that authority has been revoked. In support of this contention respondents cite Rundberg v. Belcher, 118 Cal. 589, 50 Pac. 670. In that case application was made for a writ of mandate for the substitution of attorneys, which was denied on the ground that the petition did not state facts authorizing the granting of the writ, namely, it did not appear from the record that notice, as required by subdivision 2, § 284, Code of Civil Procedure, and section 1005, Id., had been given to the attorney there sought to be substituted out of the case. The court said:

> "While mandate will lie to compel judicial action, and in some instances even specific action (Wood v. Strother, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249), and is an appropriate remedy in a proper case to obtain the relief here sought (People v. Norton, 16 Cal. 436), it may not be invoked to require a judicial officer to act in a particular way, except it appear by necessary legal deduction from the facts stated that the aggrieved party has been denied a right which it was the plain legal duty of the officer to grant, and without his proper discretion to refuse."

[1] While it is true, as we have pointed out, that the motion herein was made on the ground "that the appearance of the said Eugene W. Levy as the attorney" for the petitioners "was unauthorized" by them, it is also true that the motion was made "upon letters, affidavits and consent" of the petitioners, which documents were attached to and made a part of the motion. These, therefore, became a part of the facts which, under the plain terms of the decision in Rundberg v. Belcher, supra, are to be considered by this court in making the "legal deduction" as to whether "the aggrieved party has been denied a right which it was the plain legal duty of the officer to grant, and without his proper discretion to refuse." As we have seen, the import of these documents is that the present attorney was not authorized by the petitioners to represent them in the probate proceedings, and, further, that the power of attorney under which he claimed authority to act had been revoked by them.

Respondents contend that the power of attorney which Mr. Levy holds as the substitute of Mr. Thieme is irrevocable; that it is made so by the language:

> "I do hereby assign, transfer and set over unto my said attorney in fact all of the said

subject-matter of this power of attorney, that is to say, of all property, real or personal, to which I may be entitled out of the estate of Christine Sharbach, deceased, or which arise out of the death of said deceased in any manner whatsoever, it being my intention that this power of attorney shall be construed as a power of attorney coupled with an interest in the subject-matter thereof."

[2] It is well settled that a client has a right to change his attorney at any time, except where the attorney has an interest in the subject-matter of the suit. In 6 Corpus Juris, at page 677, it is said:

> "This right of discharge exists even though a contingent fee has been agreed upon, or an irrevocable power of attorney has been given (Carver v. U. S., 7 Ct. Cl. 499; People v. Norton, 16 Cal. 436; Crosby v. Hatch, 155 Iowa, 312, 316, 135 N. W. 1079), or the attorney has rendered valuable services under his employment (Gage v. Atwater, 136 Cal. 170 [68 Pac. 581]), or the client is indebted to him therefor, or for moneys advanced in the prosecution or defense of the action (Gage v. Atwater, supra). There is an exception, however, where the attorney has acquired an interest in the property. Louque v. Dejan, 129 La. 519, 56 So. 427, 38 L. R. A. (N. S.) 389; Gulf, etc., v. Miller, 21 Tex. Civ. App. 609, 53 S. W. 709; Wylie v. Coxe, 15 How. 415, 14 L. Ed. 753."

It is said in 2 R. C. L. 957:

> "The right of a client to change his attorney at will is based on necessity in view both of the delicate and confidential nature of the relation between them, and of the evil engendered by friction or distrust. According to some decisions, an exception to the general rule as to the power of the client to discharge his attorney at will seems to exist where the power of the attorney is coupled with an interest in the cause of action. Loque v. Dejan, 129 La. 519, 56 So. 427, 38 L. R. A. (N. S.) 389."

[3, 4] It becomes necessary, therefore, to consider what constitutes a power coupled with an interest and whether the interest here given is such as to render the power irrevocable. What constitutes a power of attorney coupled with an interest has been considered in numerous decisions. The leading case on the subject, however, is the decision rendered by Chief Justice Marshall in Hunt v. Rousmanier, 8 Wheat. 174, 5 L. Ed. 589. In that case the owner of an interest in a certain vessel, then at sea, to secure a loan of money, executed to the lender contemporaneously with the loan a power of attorney authorizing him to sell the borrower's interest in the vessel, which power, by its terms, was to become void on payment of the loan. The borrower died before payment, and the question was presented whether his death operated to revoke the power. It was decided that the power was revoked by the death of the grantor. The general doctrine that a power must be exercised in the name of the principal, and does not survive his death, was held to be applicable. But the court, in the decision of the question, proceeded to consider the exception to the rule in cases where the power was coupled with an interest, and to define the meaning of that phrase. In a luminous statement the chief justice confined the scope of the exception to cases where, together with the power, there was vested in the donee an estate, right, or interest in the subject of the power, as distinguished from an interest in the proceeds of the power when exercised. In the former case he declared that the power would not be extinguished by the death of the creator of the power, because it attached to the estate of the donee in the subject thereof, and was capable of execution in his own name after the death of the principal, unlike cases where the power was unconnected with any interest in the thing itself, and the only interest was in the execution of the power. The learned Chief Justice said:

> "It becomes necessary to inquire, what is meant by the expression 'a power coupled with an interest'? Is it an interest in the subject on which the power is to be exercised? Or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the interest which can protect a power after the death of the person who creates it must be an interest in the thing itself. In other words, the power must be ingrafted on an estate in the thing. The words themselves seem to import this meaning. 'A power coupled with an interest' is a power which accompanies or is connected with an interest. The power and the interest are united in the same person. But if we are to understand by the word interest an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases when the interest commences, and therefore cannot, in accurate law language, be said to be 'coupled' with it."

The doctrine thus enunciated has been adhered to in the following well-reasoned cases: Barr v. Schroeder, 32 Cal. 617; Frink v. Roe, 70 Cal. 296, 11 Pac. 820; Hammond v. Allen, 11 Fed. Cas. 382; Nicks' Heirs v. Rector, 4 Ark. 251, 280; Schauber v. Jackson, 2 Wend. 1, 54; Terwilliger v. Ontario, 149 N. Y. 86, 92, 43 N. E. 432, 434; Frederick's Appeal, 52 Pa. 338, 342, 91 Am. Dec. 162; Flagstaff Co. v. Patrick, 2 Utah, 313; Alworth v. Seymour, 42 Minn. 526, 44 N. W. 1030; Louque v. Dejan, 129 La. 519, 56 South. 427, 38 L. R. A. (N. S.) 389; Gulf, etc., v. Miller, 21 Tex. Civ. App. 609, 53 S. W. 709; Wylie v. Coxe, 15 How. 415, 14 L. Ed. 753; Mansfield v. Mansfield, 6 Conn. 559, 16 Am. Dec. 76; Hartley & Minor's Appeal, 53 Pa. 212, 91 Am. Dec. 207.

In Hartley & Minor's Appeal a situation quite similar to the one in the present case was presented, the chief difference being that there the constituent did not assign her legacy to the attorneys in fact. In that case Hannah Gallion made to Hartley and Minor a power of attorney to collect and receive all money and property coming to her as heir of John Douglass, deceased, with power to convey her interest in the real estate of the decedent, "the said Hartley and Minor to receive as compensation for their services herein one-half of the net proceeds of my interest in said estate which may be collected or received by them as my attorneys, after paying all costs and expenses, they to receive no further compensation for any services they may render or expenses they may incur or pay as my attorneys." Subsequently she gave another power of attorney to one Howland for the same purpose, and in it revoked that to Hartley and Minor. The latter, as attorneys of Hannah Gallion, petitioned the court for a citation to the administrator of Douglass' estate to settle his account. This was objected to because of the power of attorney to Howland. On this ground the court refused to grant the citation, and dismissed the petition. Hartley and Minor appealed from this decree. The appellate court said:

> "There was no error committed by the court below in holding the power of attorney of Hannah Gallion to the appellants to be revocable. It was an ordinary agency, constituted by letter of attorney, to act for her to enforce a settlement of his accounts by the administrator of her father's estate, in which she was interested, and to collect any moneys or property that might belong, or be coming, to her. For these services the attorneys were to have one-half of the net proceeds of what they might receive or recover for her. The plaintiffs in error suppose that this clause rendered the power irrevocable by their principal, under the idea that it was a power coupled with an interest. This was a mistake, as all the authorities show. To impart an irrevocable quality to a power of attorney in the absence of an express stipulation, and as the result of legal principles alone, *there must coexist with the power an interest in the thing or estate to be disposed of or managed under the power*. An instance of frequent occurrence in practice may be given of the assignment of vessels at sea, with a power to sell for the benefit of the holder of the power, or of anybody else who may have advanced money and who it was agreed should be secured in that way. * * *
>
> "In the case in hand the power and the interest could not coexist. The interest the appellants would have would be in the net proceeds collected under the power, and the exercise of the power to collect the proceeds would *ipso facto* extinguish it entirely, or so far as exercised. Hence the appellants' interest would properly begin when the power ended." (Italics ours.)

[5] But there are powers which the constituent cannot revoke, although they do not come within Chief Justice Marshall's definition of a power coupled with an interest. This is clearly recognized by him in Hunt v. Rousmanier, supra. After stating the general rule that a power may at any time be revoked by the party conferring it, he says:

> "But this general rule, which results from the nature of the act, has sustained some modification. Where a letter of attorney forms part of a contract, and is security for money, or for the performance of an act which is deemed valuable, it is generally made irrevocable in terms, or, if not so, is deemed irrevocable in law."

An instance of a letter of attorney given as security for money is presented in Norton v. Whitehead, 84 Cal. 264, 24 Pac. 154, 18 Am. St. Rep. 172. In that case a contractor borrowed from the plaintiff, his foreman on the work, various sums of money to enable him to carry on the contract. Afterwards he executed to the plaintiff an assignment of all moneys due or to become due "for any work I may perform, the assignment to remain good and in full force until all notes due, or which are to become due * * * from me are paid." Later he gave plaintiff a power of attorney reciting that "whereas I am now desirous that all moneys that have become or may become due to me by reason of my performance of said contract shall be paid" to plaintiff, and giving him power to collect such moneys. These instruments were deposited with the other parties to the contract. The contractor died and the work was completed by his administrator. It was held that the plaintiff had such an interest in the moneys due on the contract as to prevent a revocation of the power on the contractor's death, and that the plaintiff was entitled to collect it as against the administrator.

[6] But it has been held that, even though the power of attorney is made in terms irrevocable, that fact will not prevent revocation by the constituent, where the power is not at the same time coupled with an interest or given as security for the payment of money, or for the performance of an act deemed of value. Blackstone v. Buttermore, 53 Pa. 266; Bonney v. Smith, 17 Ill. 531; Kilpatrick v. Wiley, 197 Mo. 123, 95 S. W. 213; Martin v. Lamkin, 188 Ill. App. 431, 437; McKellop v. Dewitz, 42 Okl. 220, 140 Pac. 1161, 52 L. R. A. (N. S.) 255; 6 C. J. 677. In Blackstone v. Buttermore, supra, it was said:

> "A mere power, like a will, is in its very nature revocable when it concerns the interest of the principal alone, and in such case even an express declaration of irrevocability will not prevent revocation. An interest in the proceeds to arise as mere compensation for service of executing the power will not make the power irrevocable."

It is well settled, therefore, that in order to constitute an irrevocable power of attorney there must coexist with the power a beneficial interest in the subject thereof which is enforceable in the name of the attorney in fact and will survive the constituent; or the power must be given as security for the payment of a sum of money other than that which arises as compensation through the exercise of the power; or as security for the performance of some act of value.

It now remains for us to examine in the light of the foregoing authorities the power of attorney in the instant case, and to determine whether or not it is coupled with such an interest, or given as security, either for the payment of money or the performance of an act, so as to make it irrevocable. As we have seen, the power of attorney in this case forms a part of a contract which in express terms purports to assign to the attorney in fact all of the petitioners' interest in the estate, and at the same time expressly stating that it is the intention of the constituents that it shall be a power of attorney coupled with an interest. The letter then goes on to say:

> "After deducting the interest herein assigned, and his expenses and outlays in and about performing his duties, said attorney in fact shall remit the balance of the funds on hand to me through his corresponding bank."

[7-9] Respondents in their answer on this point have this to say:

> "There is an inconsistency between this clause and the preceding assignment of the entire interest of the legatee, because if such assigned interest were deducted, there would be nothing left to remit. If the two clauses were deemed irreconcilable, the instrument would be interpreted most strongly against the petitioner, the promisor. Civ. Code, § 1654. Consequently the assignment would be upheld. The inconsistency cannot be permitted to defeat the plain terms of assignment and the paramount provision of the instrument.
>
> "But the inconsistency is apparent and not real. When aided by the settled rule of construction that repugnancy must be reconciled so as to give effect to the repugnant clauses, subordinate to the general intent and purpose (Civ. Code, § 1653), the meaning of the power of attorney becomes plain. The predominant purpose to create a power coupled with an interest and thus an irrevocable agency is expressly declared. To insure this result the entire interest is transferred. But the assignment is not intended to be absolute so as to divest the petitioner of all further claim to her legacy. The transfer is really one in trust pursuant to which the attorney in fact takes the legal title with a corresponding duty to account. He himself has a beneficial interest sufficient at least to pay for his services and outlays."

That there is an inconsistency between the two clauses is clear. Nor do we question respondents' statement of the rule of construction that under such circumstances the repugnancy must be reconciled so as to give effect to the repugnant clauses in keeping with the general intent or predominant purpose of the instrument. But we cannot agree with respondents in their statement of what is the "predominant purpose" or "paramount provision" of the instrument. It is clear to us that the chief purpose of the constituents here was not, as respondents contend, "to create a power coupled with an interest and thus an irrevocable agency," but rather to make an assignment in trust to the attorney in fact in order to facilitate the collection of the legacies, and to insure the reimbursement of the attorney in fact for his outlays, and for compensation for his services. Now, since the reimbursements and compensations were to be taken from the legacies, it may be conceded that they are to that extent an interest in the subject of the power, and that the interest arose when the assignment was made; that is to say, the power and the interest concurred. The assignment, in other words, created a present interest in the legacies, but only in the sense we have indicated—to the extent of reimbursements and compensation. But this does not render the power irrevocable. The mere expression, "a power coupled with an interest," does not necessarily render the power irrevocable. It is plain from the foregoing authorities that the interest which the attorney in fact must have in the subject of the power in order to render the power irrevocable is such a beneficial interest in the thing itself, apart from the proceeds, that if the power were revoked he would be deprived of a substantial right. In other words, the relation of the attorney in fact to the subject-matter must be such that a revocation of the power would be inequitable. Such is not the case here. The interest in the proceeds of what may be collected is not, strictly speaking, a beneficial interest in the legacies. The interest is nothing more than an assurance that the attorney in fact will be reimbursed and compensated out of the legacies when collected. A revocation of the power would in no way deprive the attorney in fact of any right, for the reason that he is entitled to be reimbursed for any sums expended by him and to be compensated out of the legacies for any services rendered under the power up to the time of revocation. Nor can the creation of a trust, which has placed the bare legal title in the attorney in fact, with a corresponding duty to account, be considered upon any theory as conferring upon the attorney in fact such a beneficial interest as to render the power irrevocable. Fairly considered, the contract herein creates a trust with a corresponding duty to account. It has no meaning other than this. The case would be quite different if, in addition to providing for reimbursements and compensation, the contract vested in the attorney in fact a definite share in the ownership of the legacies. In such an event, the power would be "ingrafted upon an estate in the thing," and under such a contract to permit the revocation of the power and substitute the attorney in fact out of the case would be to prevent him from exercising the right of property.

Petitioners urge that the power of attorney is unconscionable and should not, therefore, be recognized in equity, since it professes to assign all of petitioners' legacy without consideration. It is likewise contended that the power of attorney was secured through fraud and misrepresentation. It is sufficient to say that such questions have no proper place in the determination of this proceeding. The order of substitution should have been made.

Let a peremptory writ of mandate issue.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; LENNON, J.; WILBUR, J.; MELVIN, J.

42 Cal. App. 694

PAGE v. MINTZER et al. (Civ. 2895; S. F. 8887.)

(District Court of Appeal, First District, Division 2, California. Aug. 15, 1919. Opinion of Supreme Court Denying Rehearing, Oct. 13, 1919.)

INFANTS ⚷7—MUNICIPAL CORPORATIONS ⚷147—MINOR IN CHARGE OF OFFICE OF SUPERINTENDENT OF STREETS DE FACTO OFFICER.

An unbonded minor, in charge of the office of superintendent of streets, who was performing the duties of the office, designating himself assistant, the superintendent himself being on leave of absence, was a de facto officer, as far as landowners were concerned, and they could not claim that a contract signed by him in the name of the superintendent, followed by his name as "assistant," was not valid; the work having been done satisfactorily at prices fixed by the council in its acceptance of the bid of the contractor.

In Bank.

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Proceeding by L. L. Page against Lucio M. Mintzer and others. Judgment for plaintiff, and defendants appeal. Affirmed by the District Court of Appeal, and rehearing denied by the Supreme Court.

John F. Cassell, of San Francisco, for appellants.

Johnson & Shaw, of Oakland, for respondent.

BRITTAIN, J. The defendant property owners appeal from a judgment foreclosing the lien of a street assessment in the city of Richmond. The only question is as to the validity of certain acts performed by the assistant superintendent of streets.

There is no question regarding the proceedings by which the city council acquired jurisdiction to order the work to be done. Upon proper advertisement the plaintiff's bid for the work was properly accepted. It is not suggested that the work was not well done, within reasonable time, in entire accord with the specifications, and for the agreed price. There is no question of the regularity or fairness of the distribution of the cost upon the property. It is not suggested that the defendants' property was not directly benefited by the work, nor that the assessment on defendants' lots was not in proportion to the benefits received.

The work was done under the Vrooman Act (St. 1885, p. 147), which requires that after the award has been made the superintendent of streets shall enter into a contract with the successful bidder, and in the contract fix the time for the commencement and completion of the work, which time may be extended under certain conditions by the superintendent of streets. From the record in the present case it appears that long prior to the institution of the proceedings involved, one Blankenship, who was the superintendent of streets, appointed an assistant, W. D. Boswell, whose appointment was approved by a resolution of the city council. About the time the bid of the plaintiff was accepted, by another resolution of the council, Blankenship, the superintendent of streets, was granted a leave of absence for two weeks. The contract, which in neither form nor substance is objected to by the defendants, was signed by the contractor on December 30, 1908. At that time Blankenship was absent from the city of Richmond. He returned on January 2, 1909. When the contractor signed the contract, Boswell was in entire charge of the business office of the superintendent of streets. During the absence of Blankenship he transacted all the business of the superintendent of streets with members of the city government, contractors, employés of the street department, and others. When the contractor signed the contract, he paid to Boswell, for the city, $400 required to cover preliminary expenses, whereupon Boswell, with a rubber stamp, appended to the contract the name of "N. M. Blankenship, Superintendent of Streets of the City of Richmond," and wrote beneath it, "By W. D. Boswell, Assistant Superintendent of Streets." The contract was then attested: "Signed, sealed, and delivered in the presence of H. H. Turley, City Clerk." In the contract the time of commencement and completion of the work was fixed. Subsequently Blankenship was succeeded in office by R. L. Fernald, and Boswell continued as assistant superintendent of streets. The city council granted certain extensions of time for the completion of the work. The Vrooman Act provides that the superintendent of streets may extend the time under the direction of the city council. One of the extensions was under the incumbency of Blankenship, and one during that of Fernald. Both times the name of the superintendent of streets was signed by Boswell, who in one instance added, after his name, "Ass't Supt. of Sts.," and in the other, "Ass't." Boswell never took oath of office, he filed no bond, and when the contract was signed he was but 19 years old.

It is maintained by the appellants that there was no contract signed by the superintendent of streets; that because the superintendent of streets was absent at the time the purported contract was signed, he did not exercise the discretion vested in him in fixing the time of commencement and completion of the work; and that in no case did the superintendent of streets extend the time in accordance with the provisions of the statute. It is argued that Boswell did not pretend to act independently as a de facto officer, because he signed the contract in the name of the superintendent of streets; that there was no de jure office of assistant superintendent of streets, and therefore there could not be a de facto holder of the nonexistent office; that he was not a deputy superintendent of streets, because the utmost that he could have claimed was that he acted under the resolution approving his appointment, and all he did claim was that he was assistant superintendent of streets; that the superintendent of streets did not and could not delegate to Boswell the performance of the functions imposed by the Vrooman Act on the superintendent of streets; and that the contractor in dealing with the public official was charged with notice of the extent and limitations of his authority.

The learned judge of the trial court showed himself to be one of those to whom Mr. Justice Oliver Wendell Holmes referred in his classic on the Common Law (page 36) when he said: "The law is administered by able and experienced men, who know too much to sacrifice common sense to a syllogism." He properly decided that under the facts the property owner should pay for the work which had been done. The Supreme Court of the United States exercised the same common sense in a case in which it denied the jurisdiction of the Circuit Court to try a Cherokee Indian for the murder of a white man. The Cherokee Nation claimed jurisdiction over the defendants upon the theory that the murdered man was an Indian by adoption, by reason of his having married a Cherokee woman. At the time the marriage license was issued one Triplett was the clerk, and R. M. Dennenberg, his deputy. Both the clerk and his deputy were absent, and the name of the deputy was signed to the license by his son. Substantially the same contentions were made in that case as here concerning the validity of the document in question. In holding the marriage license to be valid, the Supreme Court said:

> "It is true that the younger Dennenberg, who signed the marriage license, was neither clerk nor deputy, but he was an officer de facto, if not de jure. He was permitted by the clerk and the deputy to sign their names; he was the only person in charge of the office; he transacted the business of the office, and his acts in their behalf and in the discharge of the duties of the office were recognized by them and also by the Cherokee Nation as valid. Under those circumstances his acts must be taken as official acts, and the license which he issued as of full legal force. As to third parties, at least he was an officer de facto; and if an officer de facto, the same validity and the same presumptions attached to his actions as to those of an officer de jure." Nofire v. United States, 164 U. S. 657, 17 Sup. Ct. 212, 41 L. Ed. 588.

The fact that Boswell was a minor does not militate against the rule declared in the Nofire Case. Wimberly v. Boland, 72 Miss. 241, 16 South. 905; People v. Dean, 3 Wend. (N. Y.) 438; Hooper v. Goodwin, 48 Me. 79-80.

In the Nofire Case the deputy's name was signed by his son without the addition of the son's name. In this case the name of the superintendent of streets was signed with addition of the name of the assistant. No reason appears to exist for holding either the contract or any extension of time invalid because Boswell signed his name, when, under the rule in the Nofire Case, they would have been held valid if he had failed to sign his name.

While there is some difference in the facts of the two cases, the reasoning of the court in Oakland v. Donovan, 19 Cal. App. 488, 126 Pac. 388, in holding valid a contract signed by an acting superintendent of streets, applies to this case. When one is in charge of the physical office of a public official and is performing the duties of the office he is, as to third persons dealing with him in good faith, the de facto officer.

The Vrooman Act provides for appeals, and section 11 (Stats. 1885, p. 157) expressly provides that no assessment shall be held invalid except upon appeal to the city council for any error, informality, or any defect in any of the proceedings prior to the assessment, where jurisdiction to order the work to be done has been established by publication of the resolution of intention. In the present case there is no record of any appeal having been made by the property owner to the council. As has been stated, the work was done satisfactorily and at the prices fixed by the council in its acceptance of the bid of the respondent, and under such circumstances it cannot be held that there was any error in the trial of the case which resulted in a miscarriage of justice. Const. Cal. art. 6, § 4½. The case appears to be within the rules of Chase v. Trout, 146 Cal.

350, 80 Pac. 81, and Farley v. Reindollar, 174 Cal. 707, 165 Pac. 19.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

Opinion of Supreme Court, in Bank, Denying Rehearing.

PER CURIAM. The application for hearing in this court after decision by the district court of appeal of the first appellate district, division two, is denied.

In denying such hearing we are not to be understood as assenting to any view that if there was no valid contract for the doing of the work the judgment could nevertheless be affirmed for the reason that there was no appeal by the property owner to the council. We say this for the reason that the opinion may possibly be open to some such construction.

All concur except OLNEY, J., not participating.

(43 Cal. App. 80)

AMERICAN IMPROVEMENT CO. v. LILIENTHAL et al. (Civ. 2929.)

(District Court of Appeal, First District, Division 1. California. Aug. 30, 1919. Rehearing Denied by Supreme Court Oct. 28, 1919.)

1. BANKRUPTCY 🔑376 — "COMPOSITION" DEFINED.

A "composition" is a proceeding under which a bankrupt may settle with his creditors, if the majority agree, by the payment of a lump sum, to be distributed ratably among the general creditors, and such sum as may be necessary to pay priority claims and costs of the proceedings.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Composition.]

2. BANKRUPTCY 🔑387 — CONFIRMATION OF COMPOSITION IN EFFECT A DISCHARGE.

Under Federal Bankr. Act, §§ 14c, 70b (U. S. Comp. St. §§ 9598, 9654), confirmation of a composition in bankruptcy is in effect a discharge, superseding the bankruptcy proceedings and reinvesting the bankrupt with all his property free from the claims of creditors.

3. BANKRUPTCY 🔑387 — COMPOSITION RESTORES BANKRUPT TO POSSESSION OF PROPERTY.

While a bankrupt is reinvested with all his property by a composition, the effect is no more than to place it back in his hands as it was before the insolvency proceedings were instituted, and, no adjudication having been made, the debtor is never divested of his property.

4. BANKRUPTCY 🔑387, 418(1) — EFFECT OF COMPOSITION AND DISCHARGE ON PROCEEDINGS TO ENFORCE DEBTS.

A composition in bankruptcy has no more effect than a discharge would have under the same circumstances, both releasing the bankrupt from all his provable debts, except those specified in federal Bankr. Act, § 17 (U. S. Comp. St. § 9601), a discharge not being a payment or extinguishment of the debts, but simply a bar to all future proceedings for enforcement, except such as are by way of enforcement of a lien therefor not in itself invalid; the discharge having merely destroyed the remedy.

5. BANKRUPTCY 🔑433(1) — EFFECT OF DISCHARGE ON VALID LIEN.

A valid lien created on the property of a bankrupt more than 4 months before filing of the petition is not affected by his discharge, which does not operate to cast off a valid lien given or acquired for the debt, either a lien by contract or by legal proceedings, and does not operate to prevent its enforcement, being purely personal to the bankrupt.

6. BANKRUPTCY 🔑387—EFFECT OF COMPOSITION ON LIEN SECURED BY FILING TRANSCRIPT OF JUDGMENT.

A composition with his creditors confirmed by the bankruptcy court released the debtor from further personal liability to pay a judgment obtained against him, but did not affect the security of lien obtained by the judgment creditor by filing transcript in the county recorder's office of a county, in which the debtor owned property not exempt from execution, more than 4 months before institution of the proceeding.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the American Improvement Company against E. R. Lilienthal, Leon Sloss, W. P. Hammon, and others, resulting in final judgment for plaintiff. From a special order after such judgment denying the motions of defendant Hammon to stay and recall executions and to discharge the judgment of record, he appeals. Cause remanded, with instructions to quash execution. Order otherwise affirmed.

Charles W. Slack, of San Francisco, for appellant.

Wm. P. Hubbard, of San Francisco, for respondent.

WASTE, P. J. This is an appeal by W. P. Hammon, one of the defendants in an action commenced in the superior court of the city and county of San Francisco by the American Improvement Company against E. R. Lilienthal and others, from a special order, made after final judgment in the action, denying the motions of the defendant Hammon to stay and recall executions on the judgment and to discharge the judgment of record.

Judgment for the sum of $5,813.72 was recovered on October 19, 1916, against the defendants as guarantors of the payment of a promissory note executed by Northern Electric Railway Company and delivered to the plaintiff. Judgment was docketed on October 20, 1916, and a certified copy of the transcript of the docket was filed in the office of the county recorder of the county of Santa Barbara on November 8, 1916, at which latter date the defendant Hammon was the owner of certain real property, not exempt from execution, situated in that county. On the same date a transcript of the judgment was filed in the office of the county recorder of Placer county. The judgment is final, no part of it has been paid, and it has never been satisfied, unless by the composition in the bankruptcy proceedings, hereinafter referred to.

An involuntary petition in bankruptcy was filed against the defendant Hammon on September 27, 1917, in the District Court of the United States for the Northern District of California, Southern Division. Thereafter Hammon filed in the bankruptcy proceedings an offer to pay the sum of $250,000 in satisfaction of his liabilities. On August 31, 1918, the District Court made an order confirming the composition, the offer having been accepted by a majority, in number and amount, of the creditors. No order of adjudication of bankruptcy has ever been made in the proceedings. The plaintiff was included in the schedule filed by Hammon, in the bankruptcy proceedings, as one of the secured creditors. It has had full knowledge and notice of the proceedings, and of the composition, and the proceedings in relation thereto. It never filed any claim in the bankruptcy proceedings, nor participated therein in any respect whatsoever. It received no money upon its judgment, under the composition or otherwise, and took no part in the composition.

An execution on the judgment was issued on September 19, 1918, directed to the sheriff of the county of Santa Barbara, and under it certain real property was advertised for sale. The property had been conveyed by Hammon to the Oilfields Syndicate on September 6, 1917, less than one month prior to the filing of the petition in bankruptcy, and 10 months after plaintiff's judgment lien attached. It was not included in the list of assets of the defendant scheduled therein. Executions on the judgment, directed to the sheriffs of Placer, Monterey, Fresno, and Alameda counties, and of the city and county of San Francisco, were also issued on September 19, 1918, but no levies appear to have been made thereunder.

Motions were made by the defendant Hammon, previous to the time appointed for the sale of the real property, to stay and recall the executions and to discharge the judgment of record on the ground that the judgment had been satisfied and discharged by the composition effected by Hammon with his creditors in the bankruptcy proceedings, and the lien of the judgment extinguished thereby. The motions were denied, and from the order denying the motions this appeal is taken.

One proposition is presented for consideration on this appeal: Is a judgment lien, obtained by filing a transcript of the judgment in the county recorder's office of the county in which the bankrupt owns property not exempt from execution, destroyed by involuntary bankruptcy proceedings commenced more than 4 months after such filing, when a composition between the bankrupt and his creditors was reached and confirmed by the court?

Concisely stated, it is the contention of appellant that the effect of the order of confirmation, made in the bankruptcy proceedings, was to discharge the bankrupt, Hammon, from his indebtedness to the plaintiff, and to revest in the bankrupt the title to his property; that the order of confirmation, being in effect a discharge, the bankrupt was released thereby from liability on the judgment, the lien of which was avoided, although obtained more than four months prior to the filing of the petition in bankruptcy.

[1] A composition is a proceeding under which a bankrupt may settle with his creditors, if the majority so agree, by the payment of a lump sum to be distributed ratably among the general creditors, and such sum as may be necessary to pay priority claims and costs of the proceedings. The proposed composition is presented to the court, and, after notice and hearing, if approved by the court, an order is made confirming the same.

[2] Confirmation is in effect a discharge. 2 Remington on Bankruptcy, § 2349; Cumberland Glass Mfg. Co. v. De Witt, 237 U. S. 447, 35 Sup. Ct. 636, 59 L. Ed. 1042, 34 Am. Bankr. Rep. 723; United States ex rel. Adler v. Hammond, 104 Fed. 862, 44 C. C. A. 229, 4 Am. Bankr. Rep. 736; In re Friend, 134 Fed. 778, 67 C. C. A. 500, 13 Am. Bankr. Rep. 597. Its effect is to supersede the bankruptcy proceedings, and reinvest the bankrupt with all his property free from the claims of his creditors. In re Rider (D. C.) 96 Fed. 808, 3 Am. Bankr. Rep. 179; section 70f of the Bankrupt Act (Act July 1, 1898, c. 541 30 Stat. 565 [U. S. Comp. St. § 9654]).

Section 14c (section 9598) of the Bankrupt Act provides:

> "The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition, and those not affected by a discharge."

[3-6] While the bankrupt is reinvested with all his property by the composition its effect in that regard is no more than to place it back in his hands as it was before the insolvency proceedings were instituted. Strictly speaking, no adjudication of bankruptcy having been made, defendant was never divested of his property. Houston v. Shear (Tex. Civ. App.) 210 S. W. 976, 43 Am. Bankr. Rep. 462, 469. The composition has no more effect than a discharge would have

under the same circumstances. Both a discharge and a composition releases the bankrupt from all his provable debts, except those specified in section 17 (section 9601) of the act. A discharge, however, is not a payment or an extinguishment of the debts; it is simply a bar to all future legal proceedings for the enforcement of the debts or obligations discharged, except such as are by way of enforcement of a lien therefor, not inself invalid. The discharge has merely destroyed the remedy, but not the indebtedness. Zavelo v. Reeves, 227 U. S. 629, 33 Sup. Ct. 365, 57 L. Ed. 676, Ann. Cas. 1914D, 664; 2 Remington on Bankruptcy, 2668, 2672. A valid lien, created on the property of the bankrupt more than 4 months before the filing of the petition in bankruptcy, is not affected by his discharge. Evans v. Rounsaville, 115 Ga. 684, 42 S. E. 100, 8 Am. Bankr. Rep. 236. The discharge does not operate to cast off good and valid liens, given or acquired for the debt, either a lien by contract or by legal proceedings, nor to prevent their enforcement. It is purely personal to the bankrupt. Evans v. Staalle, 88 Minn. 253, 92 N. W. 951, 11 Am. Bankr. Rep. 184; Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 88 N. W. 703, 58 L. R. A. 770, 7 Am. Bankr. Rep. 510; Paxton v. Scott, 66 Neb. 385, 92 N. W. 611, 10 Am. Bankr. Rep. 80. Undoubtedly, the composition released Hammon from further personal liability to pay the judgment obtained against him in the action, but it did not affect the security afforded by his lien. Bassett v. Thackara, 72 N. J. Law, 81, 60 Atl. 39, 16 Am. Bankr. Rep. 786.

Appellant contends that the judgment against him was satisfied by the composition; that as the Bankruptcy Act makes no provision concerning the existence of the lien of the judgment, after the judgment itself has been discharged by composition, the lien was itself released and discharged thereby and ceased to exist. The cases already cited by us refute that contention. A discharge is not a payment or extinguishment of the debt. Only the remedy, not the indebtedness, has been destroyed—the debt can no longer be enforced as a personal obligation. Zavelo v. Reeves, supra. Section 67c (section 9651) of the Bankruptcy Act provides the condition under which a lien, created by or obtained in any suit or proceeding in law or equity begun against a person within 4 months before the filing of a petition in bankruptcy, by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt. Section 67f of the act provides that—

> "All levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court" shall otherwise order.

It will be noted that these provisions apply only to liens obtained within four months prior to the filing of the petition in bankruptcy, and only then, in the event that an adjudication in bankruptcy shall result. Nothing in the act to which our attention has been called makes any such provision as to judgments or liens obtained more than four months prior to the filing of the petition. To the contrary, the courts have held that, as to such lien another rule is applicable.

Referring to section 67f, the United States Supreme Court has said:

> "In our opinion the conclusion to be drawn from this language is that it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that where the lien is obtained more than 4 months prior to filing the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within 4 months the property is discharged therefrom, but not otherwise. A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. If this were not so the date of the acquisition of a lien by attachment or creditor's bill would be entirely immaterial." Metcalf v. Barker, 187 U. S. 165, 174, 23 Sup. Ct. 67, 71 (47 L. Ed. 122).

See, also, In re Snell (D. C.) 125 Fed. 154; In re English (D. C.) 122 Fed. 113; Oilfields Syndicate v. American Improvement Co., 256 Fed. 979, in the District Court of the United States for the Southern District of California, February 27, 1919.

It would seem, therefore, that the lien of plaintiff, having been obtained more than four months prior to the petition in bankruptcy filed against defendant, if otherwise valid, was not affected by the composition reached by defendant and his creditors in the bankruptcy proceedings.

That the lien attached by filing the transcript of judgment in Santa Barbara county is not open to dispute. It continued for two years from and after the date of filing (Code Civ. Proc. § 674) and had been in force for over 11 months when the petition in bankruptcy was filed.

Appellant and respondent have devoted much time to a consideration of the question whether or not plaintiff was a secured creditor of defendant. Whether plaintiff is or is not a secured creditor would not, in our opinion, alter the relation of the parties toward each other in connection with plaintiff's right, under the present facts, to proceed to realize on its lien, which was preserved to it by the composition. No authorities have been cited to us holding that if it were a secured creditor it would be compelled, upon composition, to surrender its security to defendant. Such would be the practical result if plaintiff were not now allowed to enforce its lien. We are not here dealing with the right of a secured creditor to stand upon his right to a certain portion of the assets of the estate by virtue of some security upon property of the bankrupt, but with the right of a judgment lienor to enforce his lien, acquired by legal process, after he has been cut off from all further legal proceedings for the collection of his debt.

When counsel for the appellant admits in his brief that "there is also no doubt that if a lien is acquired in legal proceedings without the 4-month period, the lien is not discharged by an adjudication of and a discharge of the lien debtor in bankruptcy, there being no composition," he concedes the respondent's case. As we have before pointed out, the effect of a composition and a discharge is the same.

No liens were acquired by plaintiff in the counties of Fresno, Monterey, or Alameda, or in the city and county of San Francisco; the transcript of the judgment not having been recorded in either. The cause is remanded to the lower court, with instructions to recall and quash the execution issued to the sheriffs of Fresno, Monterey, and Alameda counties, and to the sheriff of the city and county of San Francisco. Otherwise the order of the lower court refusing to recall and quash the execution is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

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KEYES v. NIMS. (Civ. 1981.)

(District Court of Appeal, Third District, California. Aug. 25, 1919. On Petition for Rehearing, Sept. 24, 1919.)

1. Appeal and error 🔑989 — Review of findings of fact.

On appeal, in determining whether the findings of fact of the trial court are supported, only the testimony presented by the prevailing party need be considered, and any adverse showing made by the other party may be disregarded.

2. Partnership 🔑14—"Joint adventure" distinguished.

One of the features which distinguishes a "partnership" from a "joint adventure" is the element of principal and agent which inheres in the partnership relation, each partner embracing the character both of principal and agent, being the former when he acts for himself in the partnership, while in a joint adventure no one of the parties can bind the joint adventure.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Joint Adventure; Partnership.]

3. Joint adventures 🔑4(1) — Rights between members.

The resemblance between a partnership and a joint adventure is so close that the rights as between adventurers are governed practically by the same rules that govern partnerships.

4. Joint adventures 🔑5(1)—Right of member to sue for accounting.

A joint adventurer, as a partner in a partnership may do, may sue in equity for an accounting of the profits flowing from the joint adventure, even where the adventure has been closed and a party thereto is entitled to a sum certain as his share; such right not being precluded by his right to sue at law.

5. Joint adventures 🔑5(1)—Right of member to bring action at law.

One party in a joint adventure may sue the other at law for a breach of the contract, or a share of the profits or losses, or a contribution for advances made in excess of his share, as where the adventure has been closed and a party thereto is entitled to a sum certain as his share of the adventure.

6. Joint adventures 🔑5(2)—Relief granted though pleading alleged partnership.

In an action by joint adventurer for an accounting and termination of the relation, a decree adjudging an accounting and termination of the relation will be sustained, where the facts pleaded and the evidence warrant the decree, although the complaint alleged that the relation was a partnership.

7. Partnership 🔑265—Effect of contract with third party.

Where a partnership agreement was entered into, and a third party, with the consent of both parties to the partnership agreement, was given a one-sixth interest in the partnership by each of such parties, the purpose of the partnership not being changed, the taking of such third person into the partnership did not constitute the making of such an agreement as would operate to supersede and abrogate the original agreement between the original members, although the terms were more definitely specified.

On Petition for Rehearing.

8. Appeal and error 🔑832(1)—Oversight corrected without rehearing.

A rehearing need not be granted because the District Court of Appeal by oversight failed to consider the question of interest allowed in a judgment, and such matter may be considered and disposed of on an application for rehearing without ordering a rehearing.

9. Joint adventures 🔑5(1)—In accounting interest allowed on plaintiff's share.

In an action by a member of a joint adventure for an accounting, court did not err in allowing interest on the share that plaintiff was entitled to on defendant's sale of a royalty contract belonging to the adventure, although the defendant maintained that there was no joint adventure and that plaintiff had no interest whatever, and plaintiff maintained that he had a half interest, and it appeared from the evidence that he was only entitled to a third interest; matter of arriving at the amount after determining plaintiff's interest being a matter of simple computation.

10. JUDGMENT ⚷250—CONTRACT SUED ON IN CONFORMITY TO PLEADING.

In an action by a joint adventurer for an accounting, where plaintiff sued on an alleged partnership agreement between him and the defendant for one-half the profits, fact that the evidence showed that, after plaintiff and defendant had entered into the agreement, they took in a third member and each gave him a one-sixth interest, and that defendant had purchased the interest of the third party, who thereupon ceased to be a member of the partnership, a judgment in favor of plaintiff for one-third of the profits of the joint adventure was not based upon a contract other than that alleged in the complaint; the plaintiff being under the impression that the third party had dropped out of the adventure and abandoned his rights rather than to furnish money required, being ignorant of the transfer of such third party's share to defendant.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by A. V. Keyes against F. B. Nims. From judgment for plaintiff, defendant appeals. Affirmed.

Clary & Louttit, of Stockton, for appellant.
Lafayette J. Smallpage and Scott Rex, both of Stockton, for respondent.

HART, J. The action was brought to secure the dissolution of an alleged partnership between the parties and for an accounting. A trial was had before the court sitting without a jury, and judgment was entered dissolving the partnership and awarding plaintiff damages with interest and costs, amounting in the aggregate to $6,960. The appeal is by defendant from said judgment. Appellant contends that the evidence is insufficient to support several of the findings of the court, the first finding attacked being numbered 1, which stated that the parties hereto "formed a partnership."

The finding that the relation existing between the parties was that of a partnership was based upon a written instrument (hereinafter to be called the "Keyes-Nims contract") which is in the following language:

> "Stockton, Cal., September 26, 1916.
>
> "It is hereby agreed between F. B. Nims of Stockton, California, and A. V. Keyes of Stockton, California, that all dealings and contracts entered into with the Samson Sieve-Grip Tractor Company of Stockton, California, after the 27th day of September, 1916, that each shall have an equal interest, that is, share and share alike.
> F. B. Nims.
> "A. V. Keyes."

It is argued by appellant that the above agreement did not contain the essential elements of a partnership agreement, and that the parties, at the time of the signing thereof, did not intend to become partners. It is also contended by appellant that the said Keyes-Nims contract was never acted upon so as to "launch" a partnership. The above propositions will be considered in their order.

The consideration of the points thus relied upon by appellant will be clarified by first presenting a brief statement of the facts leading up to the execution of the said instrument and of the subsequent dealings between the parties.

The plaintiff testified that he had been engaged for about ten years in the business of selling investment securities, and that, in 1916, he secured a contract from the Samson Sieve-Grip Tractor Company (hereinafter called the Samson Company) under the terms of which he was to endeavor to sell $150,000 worth of the capital stock of the company on a 10 per cent. commission basis. On September 20, 1916, plaintiff presented to defendant a "form" letter of introduction from J. M. Kroyer, president of the Samson Company, and endeavored to interest defendant in the purchase of stock. Plaintiff had previously suggested to Mr. Kroyer the advisability of establishing a manufacturing plant in the Middle West. In the course of the conversation with defendant, plaintiff mentioned the matter of building a factory in the Middle West. Defendant said that he had just returned from Michigan and that he had a friend there who was desirous of entering into a contract for the agency of some tractor company. Plaintiff testified:

> "I told Mr. Nims at this time, 'Mr. Nims, I feel that I can get a contract from the Samson Company if I had some man with me who was financially responsible,' that I knew that the Samson Company would not give me a contract because I did not have the means to carry out the idea that I had, and asked him if he was, * * * and he said that he was, that he would go as strong as $40,000."

Plaintiff said that defendant requested him to take the matter up with the Samson people, which he did, with the result that on September 26, 1916, the Samson Company addressed to plaintiff a letter in which it was stated that at a directors' meeting it was decided to enter into such an agreement if satisfactory arrangements could be made. The letter also made tentative proposals for the execution of a contract. Plaintiff immediately submitted this letter to defendant, its terms were discussed, and defendant suggested that plaintiff write a counter proposal, which he did. During this conversation, plaintiff said:

> "Mr. Nims, would you mind signing some kind of a simple agreement that in case anything happened to us, you having the contract in your name as we have discussed it, I will have something to show that I have an interest therein?"

Defendant replied: "Certainly." Plaintiff prepared the Keyes-Nims contract and it was signed by defendant. The witness testified that in several conversations he had with defendant they had talked generally about how the matter should be financed. He testified:

> "I stated to Mr. Nims that I didn't have money enough at that time hardly to pay the expenses incurred in the sale of this stock, and that I would have to wait before I could put in any money until such time as I had sold that stock and derived the commissions therefrom."

Plaintiff showed defendant a copy of his commission contract with the Samson Company, and witness stated that defendant said:

> "That he was willing to finance me until such time as I got in returns from the sale of this stock."

A contract between the Samson Company and defendant was drawn up, and plaintiff said he had four or five interviews with defendant in which its terms were discussed by them. The contract was executed on October 23, 1916. By its terms defendant was given the right to erect one or more plants and to sell tractors in certain designated territory in the United States and Canada. Certain payments by defendant to the company were specified, the first being $2,500 to be paid upon the signing of the contract.

Plaintiff testified that, about the 15th of October, 1916, defendant said to him that he (defendant) had a friend, of the name of Mr. Clarke, whom he had taken the liberty to invite into the proposition. Two or three days later a meeting was held at the Hotel Stockton at which were present plaintiff, defendant, and C. D. Clarke. As to what then occurred plaintiff testified:

> "There was a general discussion regarding different methods that we should finance this company in the Middle West, and Mr. Nims told Mr. Clarke, in so many words, that I would receive from the sale of the stock of the Samson Company something over $10,000; * * * I had a 10 per cent. contract to sell $150,000 worth of stock. I replied that was true, and followed that up by stating that I would be perfectly willing, when that stock was sold and I would receive my money from it, to put in any amount that would be agreed upon by us gentlemen at a later date, five or ten thousand dollars. * * * Mr. Nims stated to Mr. Clarke that he had to take care of me until such time as I sold the stock * * * Mr. Clarke suggested that he would come in with us and put up his third and send a check in a few days. Mr. Nims said, 'Well, boys, I am going through with it anyway.' Mr. Clarke says, 'Be assured in a few days I am going to come in.' * * * During this conversation no mention was made of the contract between Mr. Nims and myself."

It further appears, and the court found, that on or about October 17, 1916, and prior to the obtaining of the royalty contract from the Samson Sieve-Grip Tractor Company, the plaintiff and defendant, by mutual consent, both offered to C. D. Clarke one-sixth of their respective interests, that said Clarke accepted said offer, and that thereupon the interests of said partnership and its assets of said Clarke, plaintiff and defendant were equal, each acquiring a one-third thereof; "that, during the month of January, 1917, defendant, without the knowledge or consent of plaintiff, agreed to return to said Clarke all moneys which he had theretofore advanced towards the aforesaid partnership business and in return therefor the said Clarke agreed without the knowledge or consent of plaintiff to assign to defendant his one-third interest in and to said partnership and its assets;" that during the month of April, 1917, the said agreement between said Clarke and the defendant was consummated in accordance with the terms thereof; and that thereupon the said Clarke ceased to have any interest in said partnership or its assets.

On or about April 3, 1917, defendant sold to the Samson Company his royalty contract with the company and received the sum of $22,500. When plaintiff learned of this fact, he asked defendant what he was "to get out of it," to which defendant replied, "You don't get a thing."

Upon an accounting, subsequent to the trial, it was stipulated that defendant received $22,500; he was credited with $2,500, the payment made by him on account of the contract, and $574.20, disbursements made by him, leaving net proceeds in his hands of $19,425.80. Plaintiff waived all claims for expenses and disbursements made by him, and the judgment in his favor was for one-third of said $19,425.80.

It is proper to say and briefly to show herein that the defendant's version of the transaction between him and the plaintiff was, in material particulars, wholly at variance with that of the latter. The defendant testified: That, at the time of the conference at the Hotel Stockton, it was understood that he and plaintiff owned the contract jointly. "I guess," he continued, "there is no question as to Mr. Keyes being a partner up to that time. Mr. Clarke understood it so; so did I." Referring to conversations leading up to the execution of the Keyes-Nims contract, witness said plaintiff told him "that he had a contract with the Samson Company by which he would make $15,000, and, outside of a thousand he wanted to pay on his house, he could put the entire balance into the business"; that as the expenses accrued each was to put in his share of the money. The witness said that he told plaintiff that Mr. Clarke was desirous of coming into the business; that plaintiff consented to Clarke coming in and "said we would divide it three ways, that we would each put up $833.33, which would have to be paid to the Samson Company within two or three days." as to the meeting at the Hotel Stockton, which defendant said was on October 17th, he testified:

> "It was discussed that we would raise a fund of either five or ten thousand dollars each as a nucleus upon which to start our new plant. Mr. Clarke said, 'Mr. Keyes, are you ready to put up this money?' Mr. Keyes says, 'Yes, I will put up my money right off, right away.' * * * I said, 'Whether either one of you go in or not, I have decided I am going to take on this contract.' Mr. Clarke said, 'Any one who doesn't put up his money doesn't get in.' Mr. Keyes said that was agreeable to him. He sanctioned that."

Clarke and defendant each paid $1,250 of the first payment of $2,500 to the Samson Company.

C. D. Clarke testified, regarding the meeting at the Hotel Stockton, as follows:

> "We discussed the financing of the contract with the Samson Company. I said: 'Boys, I am going to pay this money anyhow; I am going to take care of the contract.' And we each agreed to pay our share at once; that is to say, I agreed and Mr. Keyes agreed. I said, 'I will take one-third of it.' Mr. Keyes said he would pay one-third of it. The matter of failure to pay was brought up, and I said, 'Who fails drops out.' Mr. Keyes said, 'That is O. K.'"

The witness said that defendant did not say at the meeting that he would carry plaintiff for his share of the money that was to be paid upon the Samson Company contract.

[1] But, in determining whether the findings of the court are supported, we are required only to look to the testimony presented by the plaintiff, and, if sufficient, we may disregard, in such consideration, any adverse showing made by the defendant. It cannot be doubted that the testimony of the plaintiff amply supports all the vital findings made by the trial court; hence, the following must be regarded and accepted as the established facts of the case: That the Keyes-Nims agreement, as given above, was made and entered into by and between the plaintiff and the defendant; that the intention of the parties, as expressed or contemplated by said agreement, was, according to an admission by the defendant, to enter into copartnership with respect to all dealings and contracts which they might have or enter into with the Samson Sieve-Grip Tractor Company, and that they were each to have an equal interest in such dealings and contracts; that, after the said agreement had been made, one Clarke was invited to enter as a third party into the agreement, and upon the consent of the plaintiff as well as that of the defendant did join the two latter in the proposed arrangement as a party thereto; that Clarke and the defendant advanced their respective proportions of the aggregate amount of money required to carry out the agreement; and that the defendant agreed to advance the plaintiff's part thereof upon the agreement and understanding that the plaintiff, upon receiving certain moneys he had in prospect, would repay the defendant the money so advanced for plaintiff.

The theory of the respondent, and the complaint proceeds upon that theory, is that the relation between the plaintiff and the defendant as produced by the agreement was that of a partnership; and the court below so decided. Counsel further contends, however, that if, strictly, the relation so produced was not that of a partnership, it certainly was that of a joint adventure.

[2] It is obvious that the agreement, as originally formed, contemplated that there should be a division between the plaintiff and the defendant of the profits derived from the business or enterprise in which they agreed to jointly engage, and to this extent the relation created between them by the agreement bears the earmarks of a partnership, which, as defined by our Code, is "the association of two or more persons, for the purpose of carrying on business together, and dividing its profits between them." Civ. Code, § 2395. On the other hand, the agreement related to a single transaction, viz., the procurement of a contract from the Samson Company whereby the plaintiff and defendant would be permitted and authorized to erect one or more plants and to sell said company's tractors in certain designated territory in the United States and Canada; the plaintiff and the defendant, as seen, to share equally in said contract and the profits accruing therefrom. It is said by the authorities that one of the distinctions differentiating a partnership from a joint adventure lies in the fact that, while a partnership is ordinarily formed for the transaction of a general business of a particular kind, a joint adventure relates to a single transaction, although the latter may comprehend a business to be continued for a period of years. It is also said that another feature distinguishing a partnership from a joint adventure is the fact that a corporation incapable of becoming a partner may bind itself by contract for a joint adventure, the purposes of which are within those of the corporation. 23 Cyc. p. 453. There are other features which differentiate the two relations, among which may be mentioned the element of principal and agent which inheres in the partnership relation, each partner embracing the character both of a principal and agent, being the former when he acts for himself in the partnership. Story on Partnership, § 1; Jackson v. Hooper, 76 N. J. Eq. 185, 74 Atl. 130, 135. In a joint adventure, no one of the parties thereto can bind the joint adventure.

[3-5] But there is a considerable amount of law upon this subject, the discussion of

which here may well be regarded as academic, since it is a matter of absolutely no consequence, so far as the decision of this case is concerned, whether the relation created between the parties to this action is that of a partnership or a joint adventure, or a limited partnership, which we are inclined to believe it to be; for it is held by the cases that the resemblance between a partnership and a joint adventure is so close that the rights as between adventurers are governed practically by the same rules that govern partnerships. 15 Rul. Case Law, p. 500. Accordingly, a joint adventurer, as a partner in a partnership may do, may sue in equity for an accounting of the profits flowing from the joint adventure. It is true that one party in a joint adventure may sue the other at law for a breach of the contract or a share of the profits or losses or a contribution for advances made in excess of his share, as where the adventure has been closed and a party thereto is entitled to a sum certain as his share of the adventure; but the right thus to sue at law does not preclude a suit in equity for an accounting. Rul. Case Law, p. 507.

[6] The complaint here proceeds, as we have stated, upon the theory that the agreement between the parties involved the establishment of a partnership relation, and the court's decision was according to that theory, the interlocutory judgment decreeing a dissolution of "said partnership" that plaintiff is entitled to one-third of the net profits realized from "said partnership business," and that plaintiff have an accounting of said "partnership business" to determine the amount of said net profits, etc. Conceding that it is difficult to determine with accuracy from the pleaded facts and the evidence, or the agreement itself, whether the relation created by said agreement was a partnership or a joint adventure relation, still it is, of course, plain that either one or the other of those relations is thus disclosed, and, since the enforcement of the rights of the parties may be accomplished by or through the agency of remedies applicable and pertinent alike to both relations, it is, as above suggested, a matter of no consequence here whether the relation between the parties be that of a partnership or that of a joint adventure. An accounting and a termination of the relation in either case may be had in a proceeding appropriate to such relief in a court of equity (Jackson v. Hooper, supra), and therefore, if we assume that the relation between the parties was that of a joint adventure rather than that of a partnership, the decree herein comes as clearly within the issues made by the pleadings as though the complaint had specifically alleged that the agreement was a joint adventure. It follows that, whether the relation between the parties was that of a partnership or that of a joint adventure, the evidence, is, upon its face, sufficient to have warranted the court below in finding and adjudging, as it did find and adjudge, that the plaintiff was entitled to one-third of the profits realized from the joint enterprise which was the subject of the agreement between him and the defendant and to an accounting for the purpose of determining the extent or amount of such profits.

The second point made by the appellant is that the original partnership, if such it was, whereby the plaintiff and the defendant associated themselves together for the purpose of securing the contract referred to in their written agreement, was never "launched"—that is, the partnership as then formed at no time proceeded to or did carry out the purposes for which it was organized.

The position of appellant with respect to that proposition may perhaps the better be stated in the language of his brief, viz.:

> "In the case at bar, the terms of the two contracts were inconsistent. There were two parties to the Keyes-Nims agreement. There were three parties to the Clarke agreement. Nothing was said in the Keyes-Nims agreement as to what amount of money each of the parties was to advance, or when. A condition precedent to obtaining an interest in the Clarke agreement was the payment of $833.33 forthwith by each party who desired to 'come in.' Everything done by appellant in protecting the Samson contract, and subsequently disposing of said contract, was in pursuance of the Clarke agreement. After giving Keyes a reasonable time within which to advance his $833.33, as stipulated in the Clarke agreement, he no longer considered that Keyes had an interest in the project. If Keyes had intended to rely on the original Keyes-Nims agreement, he should have declined to accept the three-cornered proposition made at the conference at the Hotel Stockton on October 17, 1916."

This position involves an attack upon the findings that the interests of plaintiff and defendant in "such partnership, as originally formed," were equal, each being entitled to three-sixths interest, and that on or about October 17, 1916, and prior to the procurement of the royalty contract from the Samson Company, "plaintiff and defendant, by mutual consent, both offered to C. D. Clarke one-sixth of their respective interests"; that Clarke accepted said offer; and that thereupon each of the parties to the agreement, plaintiff, defendant, and Clarke, owned a one-third interest "in said partnership" and its assets. It also involves the question whether there is a variance between the plaintiff's pleading and the proof; that is to say, whether the agreement declared upon by plaintiff is the agreement proved.

It is argued that, when Clarke was admitted into the partnership or association, upon the terms then agreed upon, viz. that each should contribute an equal amount to finance the concern, an entirely new contract was made which superseded and abrogated the original agreement between plaintiff and defendant; that, Keyes having failed to pay his proportion of the amount which it was then agreed would be necessary to carry out the purpose of the association, he forfeited whatever rights he might have acquired in the new arrangement or agreement.

As has been shown, the plaintiff testified and the court found that when the agreement between him and the defendant was entered into it was agreed that he was to share equally in the profits and that the defendant promised and agreed to advance for plaintiff his share of the expenses of the venture or partnership and also any other sums of money which might become due from plaintiff to the partnership, "until such time as plaintiff would be financially able to reimburse defendant for such advances." The plaintiff testified, as seen, that such was also the understanding and agreement between him and defendant at the time Clarke was brought into the arrangement or agreement.

[7] It is clear that, so far as plaintiff's right to a share of the profits realized from the enterprise is concerned, it is immaterial whether it be true or not that the circumstance of admitting Clarke into the association or partnership worked a new agreement which superseded and abrogated the original agreement between Keyes and Nims. The original agreement by Nims that he would advance whatever sums of money that might become due to the partnership from Keyes was reaffirmed by him at the time Clarke entered into the agreement as a party thereto. Moreover, Clarke was admitted into the partnership, if such it was, upon the consent and agreement of the plaintiff as well as that of the defendent; hence, if it was a new agreement, it was one which was made by all the parties, including the plaintiff. But, if the effect of the original agreement was to create a partnership relation between Keyes and Nims, as we believe it was, the fact of the taking of Clarke into such partnership did not constitute the making of such an agreement as would operate to supersede and abrogate the original agreement between Keyes and Nims. The situation, upon Clarke entering the partnership, was simply this: That Keyes and Nims had entered into an agreement of partnership for carrying on a certain designated business, and, before carrying out the purpose of the agreement, took into the partnership, already so established and formed, another party as a partner therein. There was nothing in the terms of the so-called "new agreement" different from those of the agreement between Keyes and Nims, except that said parties disposed of certain of their interests to the new partner and entered into an understanding that each of the three should contribute equally to the financing of the enterprise, should share equally in the profits accruing therefrom, and bear equally the burdens thereof. In fact, no more can be said of the effect of taking Clarke into the partnership than that it was either a qualification of the original agreement, to which Keyes as well as Nims actually subscribed, whereby another partner was taken in and the terms more definitely specified, or that it was merely an agreement subsidiary or ancillary to the original.

The cases cited by appellant are not in point here because the facts thereof are materially variant from those of this case. For instance, in the case of Black v. Hunter, 169 Cal. 632, 147 Pac. 463, cited by appellant, the original agreement, which involved a combination or association of the parties thereto for the purpose of effectuating a sale of particular tracts of land to the county of Los Angeles, to be used by the county for the erection thereon of a hall of records, had been entirely abandoned by the parties after a futile effort by them to make a sale of the properties. If appears that the parties to said agreement were one Hunter and the appellant Black, who, having learned that Rowan & Co., real estate brokers, had other lands which they were trying to sell to the county, to be used for the same purpose, took said Rowan & Co. in with them and made them parties to their agreement; the purpose being to put an end to the rival proposition of said brokers. It was this agreement that was abandoned because of a failure to make the sale. Subsequently Hunter and Rowan & Co. entered into a contract whereby they agreed between themselves to secure the right to sell the same lands to the county and, if successful, to divide equally between themselves the commissions realized from the sale. The sale was effected by them, and they received the stipulated commissions, whereupon Black, who was not a party to the second agreement, brought suit to recover a share of the commissions, claiming:

> That "the first contract was one of copartnership; that the second was not a substitute for it, but merely took Rowan & Co. into the transaction as an agent of the copartnership; and therefore the cancellation of the second contract (and appellants admit that it is no longer in existence) did not abrogate the original agreement of copartnership."

The Supreme Court, through Mr. Justice Melvin, held that the finding that the tripartite agreement had been terminated by the parties themselves and said agreement abandoned was fully sustained by the evidence. And even if, as the appellant in that case contended, the original agreement had not been abrogated by the subsequent or tripartite agreement but was a part of the latter, the abandonment and cancellation of the tripartite agreement by all three parties thereto would necessarily have involved the abandonment and cancellation by said parties of the original agreement.

But be that as it may, in this case there was not an abandonment of the original agreement, by the acts of the parties themselves, as was true in the case above considered, nor was there any evidence or pretense that the agreement to which Clarke became a party was independent of any and all consideration of the original contract. Keyes had conceived and proposed the scheme to Nims, who, in writing, agreed with the former to enter upon its consummation with him upon the understanding that they should share equally in the profits resulting from it. Nims suggested to Keyes the advisability of "taking in Clarke" because the latter was able to assist in financing the proposed enterprise, and in taking him in, both Keyes and Nims acted with reference to and in view of the agreement between them as originally formed. They, in other words, merely brought Clarke into their agreement, as originally formed, as a party thereto with themselves. Indeed, there was nothing to take Clarke in on but the agreement, for the business itself to which the agreement related had not been started or even the facilities for its operation obtained at that time.

The other cases cited by the appellant in their facts bear no nearer analogy to the instant case than does the case of Black v. Hunter, above considered. The principles discussed in those cases are therein soundly applied, but the facts to which they are therein applied are entirely different from those with which we are here confronted.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Petition for Rehearing.

HART, J. [8] In his petition for a rehearing the appellant calls our attention to the fact that, in our original opinion, we overlooked the proposition urged by him in the briefs that the court below erred in allowing the plaintiff interest on the latter's share of the amount for which the defendant sold the royalty contract with the Samson Company. The failure to consider the question of interest was purely an oversight, and, as it is an important question herein, it should have been considered; but we do not see the necessity of granting a rehearing for that purpose, and we will therefore consider and dispose of the point on this application without ordering a rehearing.

Counsel for appellant take the position that the demand declared upon by the plaintiff was uncertain or unliquidated, and that therefore it was error to include in the judgment against appellant interest on the amount awarded the plaintiff from the date of the sale and the payment of the money to appellant, which was April 3, 1917. In support of this position there are cited many California cases, of which the leading ones are: Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164; Easterbrook v. Farquharson, 110 Cal. 311, 42 Pac. 811; and Edwards v. Arp, 173 Cal. 476, 160 Pac. 551.

The reason for the denial of interest on unliquidated demands is said to be "that the person liable does not know what sum he owes, and therefore can be in no default for not paying." Cox v. McLaughlin, supra. But it is further said in that case:

> "We are not prepared to say, in general terms, that no interest in any case can be recovered in an action upon contract for an unliquidated demand. Mix v. Miller, 57 Cal. 356, decided since the adoption of the Code, and McFadden v. Crawford [39 Cal. 662], decided previously, attest the doctrine that in this state interest is allowable on such demands under some circumstances. These were cases in which the contract had been fully performed by the creditors, the fruits thereof accepted by the debtors without objection and they were clearly in default and in the latter case *the only question was as to value*." (Italics ours.)

This language is approvingly adopted into the opinion in Easterbrook v. Farquharson, 110 Cal. 317, 42 Pac. 811, supra.

In the case of Robinson v. American Fish Co., 17 Cal. App. 212, 220, 119 Pac. 388, 391, the defendant had agreed with the plaintiff and a number of assignees of the latter to purchase fish from them, to be delivered to the defendant in the city of San Francisco. Action was brought by plaintiff to recover the aggregate sum of $815.60, which amount represented the demands of the plaintiff and his several assignees for fish delivered by them to defendant. The court awarded judgment to plaintiff in the total sum sued for, together with interest thereon at the legal rate of 7 per cent. per annum from the date of the delivery of the fish. In that case, on appeal, it was strenuously insisted that the demands declared upon were unliquidated, and that the trial court therefore erred in allowing interest from the date of the delivery of the fish. There was a dispute therein as to whether the price agreed upon for the fish was a cent and a half or two cents per pound. This court, disposing of the question of interest in that case, said:

> "There is no merit in the contention that the plaintiff was not entitled to interest on the several pleaded claims from the 23d day of October, 1910—the day on which the fish mentioned in the complaint were sold and delivered to appellant. The quantity of fish sold to and received by appellant and the price to be paid therefor were definitely fixed and known to appellant. It was not necessary, in other words, to resort to evidence in court or to an accounting or by

an accord between the parties to establish the amount due. To the contrary, the amount was susceptible of ascertainment by simple computation. Cox v. McLaughlin, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100, and cases therein cited; Easterbrook v. Farquharson, 110 Cal. 311, 317, 42 Pac. 811; Courtney v. Standard Box Co., 16 Cal. App. 600, 117 Pac. 778. Indeed, there seems to have been no dispute as to the quantity of fish delivered to appellant by Meng, and while there was some controversy involving the price per pound which Junta agreed to pay therefor—that is, whether the price agreed upon was a cent and a half or two cents per pound—still the total amount due at either price was capable of ready ascertainment by mere computation, and therefore required no accounting to reach the precise sum due. As is said in Courtney v. Standard Box Co., 16 Cal. App. 600, 117 Pac. 778, so it is true here: 'Whether interest has been allowed upon the theory that compensation is thus awarded plaintiff for the use of his money, past due (section 1917, Civ. Code), or as damages for defendant's (appellant's) wrongful withholding of said money from plaintiff (section 3287, Civ. Code), in either case the allowance was perfectly proper.' "

(We also call special attention to the Courtney Case, cited above in the Robinson Case.) It should be stated that a petition for a hearing of the Robinson Case by the Supreme Court after judgment by this court was denied.

The comparatively recent case of Howard v. Hobson Co., 176 Pac. 715, was an action by one broker against another to recover one-half of the amount in excess of that for which certain real estate was to be sold for the owner; an agreement having been entered into by and between the brokers whereby they were to divide equally between themselves such excess amount. Judgment went for the plaintiff, with legal interest from the date of the sale of the property by the other broker. The evidence disclosed that the expenses incident to the negotiation and consummation of the sale of the property were to be deducted from the amount which the brokers were to receive as their compensation for effecting the sale. The contention on appeal in that case as to interest was, among other objections urged against the allowance of interest, that the demand sued on was unliquidated, and that, consequently, interest was not allowable prior to the date of the entry of judgment. That contention was rejected, and, among other things, this court said:

> "As above stated, the moment that the sale of the ranch was fully effected and completed by the defendant, that moment the latter became indebted to the plaintiff in an amount equal to one-half of the net sum received by the defendant over and above that paid for the property to the owner of the ranch; and at that moment of time the amount due the plaintiff became certain and definite or capable of becoming readily so by the simplest of arithmetical calculation by the defendant of the difference between the 'excess amount' and the amount of the expense which it was necessary for it to incur to negotiate and consummate the sale. The defendant, of course, knew precisely what the expense of selling the ranch amounted to, and, of course, knew the 'excess amount' received by him from the sale over the purchase price. The amount due the plaintiff, therefore, constituted, within the meaning of the law, a liquidated demand."

The Supreme Court, it should be remarked, denied a hearing in that case after judgment in this court.

[9] In the present case the defendant, according to the findings, which are sufficiently supported, became indebted to the plaintiff in the sum to which the latter was entitled as a partner the moment that he (defendant) sold the royalty contract and received the money therefor. The plaintiff, it is true, sued for one-half of the amount received by the defendant for the royalty contract, while the court awarded him one-third of the amount only. But this did not make the demand uncertain or unliquidated. The defendant, it appears, at all times had control and management of the enterprise. He knew whether Clarke had or had not paid over his share of the amount agreed upon as the necessary total amount to launch the enterprise. The plaintiff appears to have had very little knowledge of what was going on in the prosecution of the ends of the copartnership, and it is probable, having heard that Clarke had withdrawn from the concern, that he sued on the theory that Clarke had never paid over his share of the working capital of the firm, and was therefore, as a matter of fact, never a partner, and hence conceived that he was entitled to one-half of the profits of the enterprise, or of the amount for which the defendant sold the royalty contract. But whether the defendant was entitled to one-half of the amount received for the royalty contract or to one-third only is entirely immaterial, so far as the question of interest is concerned. The defendant knew, as we may assume from the findings, that the plaintiff had an interest in the partnership. What that interest was was a disputed question between them, but it was either a one-half or a one-third interest. As to this, then, the only question to be determined was as to the extent of the plaintiff's interest. Whether it was found to be one-half or only one-third, in either case the demand was certain, definite, and liquidated.

The cases holding that interest is not allowable are where the demand is based upon a quantum valebat or a quantum meruit, in which it must be determined upon the evidence what the amount is, or where the amount of the demand must be determined by an accounting or by an examination of numerous accounts and counterclaims. This is not such a case, as we have shown. As stated, the amount of the demand here was ascertainable by a mere determination of the question whether the plaintiff's interest was one-half or only one-third in the partnership, and the defendant himself, if he knew the plaintiff had any interest at all, knew whether it was the one or the other. Therefore, when we consider the reason upon which is founded the rule that, generally speaking, interest will not be allowed on an unliquidated demand prior to the date of the entry of judgment therefor, viz., "that the person liable does not know what sum he owes, and therefore can be in no default for not paying," we readily perceive that the demand sued on here does not come within that rule; that is, that it is not unliquidated in the sense that interest is not payable upon it from the date the money was received by defendant.

The case of Easterbrook v. Farquharson, supra, cited by the appellant, was where the plaintiff leased to the defendant's assignor certain real property, upon which the lessor was to and did erect a building, under an agreement that on the last day of the term of the lease the lessor would pay the lessee two-thirds of the appraised value of the building, to be ascertained by three appraisers, one of whom was to be selected by the lessor, one by the lessee, and the third by the two so selected. The two appraisers appointed by the parties failed to select a third, and themselves failed to agree upon the value of the building. Some six months thereafter, nothing further having been done in the matter of the appraisement of the value of the building, although the lessor and lessee in the meantime had considerable negotiations looking to an adjustment of the matter, the lessor brought suit, setting forth the facts and the impracticability of securing an appraisement by the scheme agreed upon by him and the lessee, averring his readiness at all times to pay the defendant (lessee) two-thirds of the cash value of the building, and asking the court to determine the value of the building at the date of the termination of the lease, and so fix the amount due from him to defendant. The trial court found the value of the building, and, while in its findings it did not fix upon the plaintiff or his appraiser the responsibility for failure to agree upon an appraisement, nevertheless allowed interest on the amount found to represent the value of the building from the date of the termination of the lease. The Supreme Court held that the allowance of interest from the date of the termination of the lease was erroneous, and said:

"To entitle respondent to interest as damages he must bring himself within the terms of section 3287 of the Civil Code. That section awards interest to every person who is entitled to recover damages, certain, or capable of being made certain, by calculation, where the right of recovery is vested in him upon a particular day. But damages are the compensation for the unlawful act or omission of another (Civ. Code. § 3281), and, as has been said, appellant had been guilty of no wrong. He went into court asking a settlement of his account with respondent, and under section 1917 of the Civil Code the sum bore interest only from the day of its judicial ascertainment."

It is plainly manifest that the above case is not in point here, and is no authority against the allowance of interest in the present case from the date the right of recovery was vested in the plaintiff, which was the time when the defendant received the money for the royalty contract.

It is not necessary to review the case of Edwards v. Arp, 173 Cal. 476, 160 Pac. 551, supra, also cited by appellant in the petition; it being only necessary to say that in its facts it presents an entirely different situation upon the question of interest from that we find here.

[10] The appellant further asks in his petition that the case be reopened for a further review of questions considered in the original opinion. We are satisfied with the views expressed and the conclusion announced in the former opinion as to the legal nature of the agreement between the parties hereto and the effect of making Clarke a party to said contract. We may repeat, though, what we have already said, that we do not consider that the contract sued on is at variance with the one proved. The fact merely is, according to the result reached by the trial court from the proofs, that the plaintiff sued upon the theory that he had a larger interest in a partnership than he in fact was entitled to. Thus the situation is the same as where a party sues for a certain sum alleged to be due under a contract with the defendant, but the proof shows that he is entitled to judgment for a less sum than that demanded by his complaint. Such a result, of course, does not mean that the plaintiff sued on one contract and proved and recovered on another.

The petition for a rehearing is denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

43 Cal. App. 116

MORGAN et al. v. DIBBLE et al. (Civ. 2987.)

(District Court of Appeal, First District, Division 1, California. Sept. 2, 1919.)

1. TRIAL 🔑398—INCONSISTENT FINDINGS IN SPECIFIC PERFORMANCE SUIT.

In action for specific performance of contract for sale of land, a finding that the purchase price was excessive, and the contract inequitable, was fatally inconsistent with a finding that purchasers had received adequate consideration for agreement, and that agreement was just and reasonable.

2. SPECIFIC PERFORMANCE 🔑49(2)—UNREASONABLENESS OF CONTRACT BECAUSE OF EXCESSIVE PURCHASE PRICE.

Under Civ. Code, § 3391, contract for sale of land providing for an excessive purchase price, and being therefore inequitable, will not be specifically enforced; since specific performance will not be granted unless contract was just and reasonable and the consideration adequate.

3. SPECIFIC PERFORMANCE 🔑128(1)—GRANT OF DAMAGES UPON DENYING PERFORMANCE.

Where contract for sale of land was valid but inequitable, equity in refusing to grant specific performance, because contract was not just and reasonable and the consideration adequate, cannot grant vendor damages for expenses incurred in order to fulfill their part of contract; since equity has no right to afford relief unless case is one for equitable interposition.

4. VENDOR AND PURCHASER 🔑330—EXPENSES NOT RECOVERABLE FOR BREACH OF CONTRACT BY VENDEE.

Under Civ. Code, § 3307, expenses incurred by vendors in order to perform their part of the contract are not recoverable items of damages for breach of contract by vendee.

5. SPECIFIC PERFORMANCE 🔑28(2) — DENIAL WARRANTED BY UNCERTAINTY OF CONTRACT.

Contract for sale of land providing for assumption by purchaser of mortgages on land, but being uncertain as to the property included in the mortgages, the parties to whom and by whom executed, whether already executed or to be executed, the terms of the notes or other evidence of indebtedness to be given, if any, the matter of partial payments, and whether mortgages did actually or were to date from the date of their execution, or from the date of the contract, *held* so uncertain as to warrant denial of specific performance.

6. COVENANTS 🔑3—UNCERTAINTY OF PROVISION AS TO RIGHT OF WAY.

Provision of land contract that vendors shall "give a right of way for a pipe line from Fifth street over the eastern boundary of five-acre lot 3" *held* so indefinite as to amount to no covenant at all.

7. VENDOR AND PURCHASER 🔑50 — ESCROW INSTRUCTIONS NOT PART OF ORIGINAL LAND CONTRACT.

Instrument prepared by title company with whom deeds were to be left in escrow, consisting of instructions to the company and not signed by vendor until after expiration of period within which the contract could be consummated, and after vendors had withdrawn their deed and certificate of title from the escrow, was not a separate agreement of sale or a supplemental part of the first agreement.

8. SPECIFIC PERFORMANCE 🔑94—FINDING OF COURT AS TO ABILITY OF VENDORS TO PERFORM ERRONEOUS.

Where mortgage on land was not for term provided in agreement, and where land was subject to public easements, which could not be removed, and where vendors executed a lease on the property extending beyond the time when the property was to be exchanged for that of purchasers, court was not warranted in finding, in vendor's action for specific performance, that vendors had performed, or were in a position to perform, all the terms of the contract.

9. VENDOR AND PURCHASER 🔑143—PURCHASER'S KNOWLEDGE OF EASEMENTS ON LAND NOT A WAIVER.

Where land contract required vendors to furnish good title, except as to specified incumbrances, as a condition of the sale, even actual knowledge by purchasers of public easements upon land, which could not be removed, would not be deemed, while contract remained executory, to imply a waiver of substantial fulfillment of the condition of title.

10. VENDOR AND PURCHASER 🔑119 — PURCHASER'S RIGHT TO RESCIND ON INABILITY TO FURNISH GOOD TITLE.

Where vendors agreed to furnish good title as a condition of the sale, but could not comply therewith because of public servitudes upon land, which could not be removed, purchasers were entitled to rescind contract at any time; the title being incurably defective by reason of the public servitudes.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by Joseph B. Morgan and others against Horace P. Dibble and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Leroy A. Wright and Thomas D. McLean, both of San Diego, for appellants.

Henry A. Hunter, of Long Beach, for respondents.

WASTE, P. J. This is an action to revise and specifically perform an agreement for the sale and purchase, or, more properly speaking, an exchange, of real estate, and for damages, in the event specific performance cannot be had. Plaintiffs, so they allege, agreed to sell, and the defendants agreed to buy, a tract of land in Imperial county, and certain shares of stock of Imperial Water Company, No. 1, located on said land and appurtenant thereto, for the sum of $30,700. As part payment of the purchase price the defendants agreed to convey to plaintiffs real property in San Diego county, which plaintiffs agreed to accept at the mutually agreed price of $6,000. As another part payment of the purchase price defendants agreed to assume a first mortgage of $5,000, payable on or before August 1, 1914, with interest at the rate of 8 per cent. per annum, payable semiannually, which plaintiffs agreed to execute upon the Imperial county property. As the balance of the purchase price the defendants agreed to assume a second mortgage on the same property, made payable to Bert Morgan, one of the plaintiffs, in the sum of $19,700, payable on or before 10 years from date, with interest at the rate of 7 per cent., payable semiannually.

The contract was to be performed within 60 days from its date.

The contract contained a stipulation that the Imperial valley ranch should be free and clear of all incumbrances, other than the two mortgages just noted, except the last installment of taxes for the fiscal year 1914–15. In this connection plaintiffs alleged in their complaint that, at the time of the execution of the contract, it was mutually agreed and understood that the Imperial county property should be conveyed by the plaintiffs subject to rights of way then existing thereon, but that, through inadvertence and mistake, the agreement failed to so express the true agreement of the parties.

The plaintiffs alleged their readiness and ability, at all times, and full performance on their part, but that defendants had refused to comply with the terms of the agreement; that the consideration for the agreement was adequate, and the same was, as to the defendants, just and reasonable. The defendants, answering, admitted the execution of the agreement, but denied that it constituted a valid contract of sale; denied that the right of way clause was the result of mistake or inadvertence; denied performance on the part of the plaintiffs; and denied that the consideration for the agreement as to them was adequate, or that the contract was reasonable or just. It was alleged in the answer that the minds of the parties never met, in the execution of the agreement; that it had been abrogated by other proposals and offers, never accepted by defendants; that plaintiffs by their acts had worked a rescission of the contract, which, it was further alleged, had been obtained by fraud, and misrepresentation, as to the value of the Imperial valley ranch, the character and nature of its surface, and of its soil, and its adaptability for irrigation and subdivision purposes.

The trial court found that the contract of sale was made, as alleged by plaintiffs, and that subsequently an agreement supplemental to and a part of the original contract was entered into by the parties. In its findings it construed the two agreements together and thereafter refers to them as the "agreements." This supplemental agreement will be referred to hereafter as the "escrow instructions." The court made no finding on the issue raised by the pleadings as to the mistake alleged to have been made in the original contract relative to the rights of way, but did find that the assent of the defendants to the agreements was not obtained by the misrepresentation of the plaintiffs, nor under the influence of any mistake. It further found that the plaintiffs had performed, or offered to perform, all on their part to be done, and that they at all times had been ready, willing, and able to so do, but that defendants had on their part refused. The sufficiency of the evidence to support these findings will be considered later.

[1] Continuing, the court found that—

> "Defendants herein have received an adequate consideration for said agreements, and that said agreements were, and now are, as to said defendants, just and reasonable."

After other declaration of facts, the court then finds:

> "That the land agreed to be sold, and purchased by said defendants, under said agreements, was, and is, worth a sum less than the sum of $30,000, as specified in said agreements, and that said price is excessive, and the contract inequitable, and that on account, and solely by reason thereof, specific performance should be denied to plaintiffs."

These findings are fatally inconsistent.

The court also found that plaintiffs, relying on the agreements entered into between themselves and defendants, had, "in order to fulfill their part of said contract, necessarily incurred certain expenses, as follows": certificate of title to their land, $150; commission for obtaining the loan, covered by the first mortgage to be assumed by defendants, $100; and for the agent's commission for making the sale, or exchange of the property, $1,200—all to their damage in the sum of $1,450. As conclusion of law the court found that plaintiffs were not entitled to specific performance, but were entitled to judgment against defendants, and each of them, for the sum of $1,450, and costs of suit. Such judgment was thereupon entered, and defendants appeal. No appearance was made in this court on the part of respondents, and no brief has been filed in their behalf, although the transcript on appeal was filed February 1, 1917, and appellant's opening brief was filed within 30 days thereafter, as required. Such palpable neglect on the part of those supposedly interested, in the matter in litigation, leads us to assume that they have no faith in the righteousness of the judgment secured by them in the lower court. Our examination of the record lends confirmation to this conclusion.

[2-4] The trial court having found that the land agreed to be sold to defendants was worth less than the sum agreed to be paid, and that the price of $30,000 was excessive,

and the contract therefore inequitable, was correct in denying plaintiffs a decree in specific performance. Such a decree cannot be supported in the absence of a finding that the contract was just and reasonable, and the consideration adequate. Civ. Code, § 3391; Gibbons v. Yosemite Lumber Co., 172 Cal. 714, 716, 158 Pac. 196. Appellants contend that under the findings the court should not have awarded the plaintiffs damages. There are contracts, perfectly valid, which a court of equity will not set aside for any unfairness, but which are so unfair that specific performance will not be decreed. White v. Sage, 149 Cal. 613, 615, 87 Pac. 193. In such cases the party is left to his remedy at law. Agard v. Valencia, 39 Cal. 292, 302; Prince v. Lamb, 128 Cal. 128, 129, 60 Pac. 689. The right to pecuniary compensation in lieu of specific performance "assumes, of course, a sufficient contract, performance or an offer to perform by the plaintiff, and every other element requisite, on his part, to the cognizance of his case in chancery." Milkman v. Ordway, 106 Mass. 232, 254. There is no authority for holding that equity can grant damages unless some case of equitable relief is made out also, to which the damages would be applicable or subsidiary. Bourget v. Monroe, 58 Mich. 563, 566, 25 N. W. 814. An action to recover damages in lieu of specific performance lies not at law, but in equity, for the right to such damages depends upon the right to specific performance, and is not available until the latter is established. Cooley v. Lobdell, 153 N. Y. 596, 603, 47 N. E. 783. A court of equity will not grant pecuniary compensation, in lieu of specific performance, unless the case presented is one for equitable interposition. Marks v. Gates, 154 Fed. 481, 83 C. C. A. 321, 14 L. R. A. (N. S.) 317, 321, 12 Ann. Cas. 120. "In other words, the ancillary power to award compensatory damages can only be exercised in a case where the equitable relief prayed for might have been given." Clark v. Rosario Mining & Milling Co., 176 Fed. 180, 189, 99 C. C. A. 534, 543. Judgment for damages therefore, should not have been entered against the defendants. Furthermore, the items of the damages, included in the court's findings, as the basis for the judgment, do not fall within the provisions of section 3307 of the Civil Code, which provides the measure of damages caused by breach of an agreement to purchase an estate in real property.

[5] The original agreement of sale falls short of the requirements necessary to support an action in specific performance, which can only be granted when the contract is definite and certain. Meyer v. Lincoln Realty Co., 14 Cal. App. 756, 757, 113 Pac. 333; Minturn v. Baylis, 33 Cal. 129. It is not definite and certain in all its terms. The agreement provides that the defendants shall "assume a first mortgage of five thousand dollars due on or before five years from date, it being further understood that no payment shall be made on the principal until at least one year shall have elapsed, and any payment shall be made on any regular interest pay day. Interest on said $5,000 to be at the rate of 8 per cent. payable semiannually," and, further, the defendants shall "assume a second mortgage made payable to Bert Morgan of $19,700, payable on or before ten years from date interest payable at 7 per cent. per annum payable semiannually." While, as was said in Carr v. Howell, 154 Cal. 372, 378, 97 Pac. 885, 888, "the fact that mortgages sometimes, or even usually, contain other terms and covenants than those here prescribed, does not render the contract uncertain," we are of the opinion that there is such a dearth of facts in the contract here under consideration, relative to the property, included in the mortgages, the parties to whom and by whom executed, whether already executed or to be executed, the terms of the notes or other evidence of indebtedness, to be given, if any, the matter of partial payments, and whether said mortgages did actually or were to date from the date of their execution, or from the date of the contract, as to render the contract uncertain in that particular.

[6] The provision in the contract that the plaintiffs shall "give a right of way for a pipe line from Fifth street over the eastern boundary of five-acre lot 3" is so indefinite as to amount to no covenant at all. The further stipulation that "this agreement includes an option by which" plaintiffs "may purchase lot 6 of block 145 during the next six months for the sum of four thousand dollars to be deducted from the second mortgage," is likewise uncertain.

[7] The document which the parties direct the abstract company to use "as your instructions for this exchange" cannot in our judgment be considered as a separate agreement of sale, or a supplemental part of the first agreement. The instructions were prepared by the title company, according to the evidence of plaintiff J. B. Morgan, "for the purpose of carrying out the contract," and in express terms "relate back to date of August 1st to correspond with a certain agreement of sale and purchase made and entered into on said last-mentioned date between the parties hereto." They were not signed by respondent Joseph B. Morgan until some time after the expiration of the 60-day period within which the contract of sale, or exchange, could be consummated, and after the respondents had withdrawn their deed and certificate of title from the escrow. The respondents and he had utterly failed to reach an agreement respecting a number of matters connected with the transaction, which they had made subject to treaty and further negotiation after the signing of the original agreement. His object in signing the instructions appears to have been the result of a belated attempt to

put defendants in default for failing, as plaintiffs at first contended, and alleged in their original complaint, to carry out the terms of the escrow instructions.

The plaintiffs abandoned all reliance on the escrow instructions, as a contract of sale, or exchange, very early in the case. In their amended complaint on which they went to trial they omitted all reference to it, and relied solely on the original agreement. During the trial they sought and secured its introduction in evidence in order "to show that the escrow instructions mention the rights of way, and that defendants had actual knowledge of their existence." It was not until the lower court intimated that it would grant the motion of defendants for a nonsuit, that plaintiffs asked and were granted permission, we think improperly, to set it up by an amendment to their complaint. From all the evidence the court should have granted the motion for the nonsuit.

[8] Appellants also contend that the finding of the lower court, that plaintiffs had performed, or were in position to perform, all the terms of the contract imposed on them, is not supported by the evidence, and that in fact plaintiffs could not perform, because of the following facts: That the first mortgage on the Imperial valley ranch executed by plaintiffs was not for the term provided in the agreement; that their land was subject to public easements which could not be removed; and that the plaintiffs executed a lease on the property extending beyond the time when the exchange was to be made. We think this contention of appellant must also be upheld.

After the respective parties had each visited and inspected the other's land, they met to discuss the details of the exchange. The agreement was there read and explained, "taking each line at a time." All parties being satisfied therewith, it was signed and deposited with an abstract company, together with certain escrow instructions, signed by all the parties, excepting Bert Morgan, one of the plaintiffs, who did not affix his signature thereto within the 60 days allowed for performance of the contract, and until long after a serious disagreement had arisen between the parties, and according to appellant, after there had been a mutual rescission of the contract. Plaintiffs also executed and deposited with the abstract company a first mortgage on their property for $5,000 in favor of one George Birkett, but payable in three instead of five years, as required in the contract. The trial court found, and the evidence satisfies us, that this departure from the original stipulation was agreed to by defendants.

[9, 10] In the original contract, as before stated, the stipulation relating to title to plaintiffs' property is that it is to "be free and clear of all other incumbrances" than the two mortgages specified and taxes for the fiscal year 1914-15. In the escrow agreement the stipulation is that it shall be free from all incumbrances other than taxes, and the mortgages provided for in the contract of sale except: "2. The rights of way for roads, ditches and canals now of record." About 10 acres of the land were shown by the evidence to be covered by rights of way for a railroad, a canal system, and county roads. Appellants contend that nowhere in the record does it appear that these rights of way were ever recorded. This appears to be so. Our examination and conclusion in this regard is confirmed by the statement of the lower court made during the trial. If the lower court, in deciding the case, was proceeding on the theory that the defendants had actual notice of these easements, it seems to have overlooked its own opinion, expressed during the trial, that such was not the case, particularly as to the railroad and parts of the county roads. Plaintiff Bert Morgan testified he did not call the attention of the defendants to these easements before the agreements were entered into. The evidence indicates that defendants did not know of the extent and location of these easements until about the time of the trial. Since the respondents were in express terms obliged to make good title (except as to incumbrances specified), as a condition of sale, even actual knowledge by the purchasers of the true status of the rights of way would not be deemed, while the contract remained executory, to imply a waiver of substantial fulfillment of the condition for title. Snowden v. Derrick, 14 Cal. App. 309, 314, 111 Pac. 757; Prentice v. Erskine, 164 Cal. 446, 450, 129 Pac. 585. At the time of the execution of the contract of sale, and when it should have been performed, the title to plaintiff's land was incurably defective by reason of the public servitudes, a cloud which in the nature of things plaintiffs could not remove by ordinary methods of business negotiation. Defendants could have rescinded at any time. Prentice v. Erskine, supra, 164 Cal. 449, 129 Pac. 585.

This defect in the vendor's title made it impossible for the plaintiffs to perform.

Plaintiffs, after the agreements with defendants were entered into, also executed a lease of their land and delivered possession thereunder to third parties, who continued in such occupancy and were on the land at the time of the trial of the action. The time within which possession might be regained by plaintiff was a matter of some conjecture, depending upon the action of the lessees in possession.

Plaintiffs were therefore not in position to and were never able to perform their contract. The finding of the trial court to the contrary is not supported by the evidence.

The judgment is reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

181 Cal. 425

FLICKENGER et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

(S. F. 8889.)

(Supreme Court of California. Oct. 10, 1919.)

1. MASTER AND SERVANT 🔑367 — DISTINCTION BETWEEN "EMPLOYÉ" AND "INDEPENDENT CONTRACTOR."

A motor truck owner doing a truck business, who is engaged to do hauling for another without agreement as to compensation and without being required to report before going to work or after, and who is allowed to haul as he pleases, except that he is expected to do a day's work, and expecting the customary pay covering operating expenses and services of men and trucks, *held* an "independent contractor" and not an "employé," as those terms were used prior to adoption of Workmen's Compensation Act of 1917.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé; Independent Contractor.]

2. MASTER AND SERVANT 🔑367—WHAT CONSTITUTES INDEPENDENT CONTRACTOR WITHIN WORKMEN'S COMPENSATION ACT.

Workmen's Compensation Act 1917, § 8(b), providing that all persons rendering service are employés, "except those who render services other than manual labor for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means" of its accomplishment, restricts the term "independent contractor," and consequently enlarges to a corresponding degree the meaning of the term "employé."

3. MASTER AND SERVANT 🔑347 — STATUTE CHANGING TERMS "EMPLOYÉ" AND "INDEPENDENT CONTRACTOR" UNCONSTITUTIONAL.

Workmen's Compensation Act 1917, § 8(b), in so far as it restricts the term "independent contractor" and enlarges the meaning of the term "employé," is unconstitutional as attempting to change the scope of Const. art. 20, § 21, as amended 1911.

4. MASTER AND SERVANT 🔑347—CONSTITUTIONAL AMENDMENT AS AFFECTING CONSTITUTIONALITY OF WORKMEN'S COMPENSATION ACT.

A contention that, if any doubt remains upon the question of the constitutionality of Workmen's Compensation Act 1917, § 8(b), defining "employé" and "independent contractor" as attempting to modify Const. art. 20, § 21, that the same was removed by the adoption of a new constitutional amendment in 1918, is without force in a proceeding where a personal injury resulted before the latter amendment.

In Bank.

Proceeding under the Workmen's Compensation Act by Lillian Reeves for compensation for the death of her husband, Tarvin A. Reeves, against M. P. Flickenger, employer, and the Ætna Life Insurance Company, insurer. An award was made by the Industrial Accident Commission, and the defendants, insurer and employer, bring certiorari. Award annulled.

Redman & Alexander and E. L. Stockwell, all of San Francisco, for petitioners.

Christopher M. Bradley, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

LAWLOR, J. This is a writ of certiorari to review an award made by the Industrial Accident Commission against the Ætna Life Insurance Company as insurance carrier for M. P. Flickenger, in favor of Lillian Reeves in the sum of $4,346 as compensation for the death of her husband, Tarvin A. Reeves, who was killed while hauling hay for Flickenger.

For some time prior to the accident Reeves was the owner of an automobile truck and was engaged in the "truck business" in the city of Bakersfield. He received most of his calls through a telephone which he had in a cigar store. Reeves had formerly done hauling for one W. A. Ferguson, using his own motortruck and receiving $15 per day for his services. Not long before Reeves was killed Ferguson retired from the trucking business and turned it over to Reeves. Thenceforward Reeves was ready to do a general trucking business on his own account, and any calls that thereafter would come to Ferguson were to be referred to him.

Flickenger, who was in the feed and fuel business, was engaged in hauling with his own truck a quantity of hay to some sheep and cattle that were starving on a ranch about 8 miles from Edison, a small town 10 miles distant from Bakersfield. It was raining and the roads were in very bad condition. The work of moving the hay was not progressing rapidly enough with one truck, and hence Flickenger found it necessary to secure help, and so he engaged Reeves and two others to assist in hauling the hay. The deceased went to work on the morning of March 9, 1918, and about the middle of the afternoon of March 11th, while crossing the Santa Fé track with his truck, was struck by a locomotive and sustained injuries from which he died a few hours later.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] The chief question presented here is as to the status of Reeves in performing this service: Was he an independent contractor or an employé of Flickenger? The facts in this regard are these: Flickenger testified that, owing to the condition of the roads and the fact that no certain amount of work could be accomplished in any given time, no definite price was agreed upon and no time set for the completion of the work, but that he told Reeves "to go out and haul hay and keep at hauling it and we will not make any definite arrangement, but when you are through hauling, why you will find you will not be dissatisfied with the terms of settlement." He testified further that he sent one of his employés with Reeves the first trip to show him the best road and where to unload the hay. After that Flickenger left Reeves to haul as he pleased, and did not require him to report either before or after work, though he expected him to put in a full day. Mrs. Reeves testified that deceased had told her that it was "day work" and that he supposed he would get $15 a day, which was the price he was accustomed to get when he worked with his truck. Flickenger further testified that he had paid each of the other men $15 a day. This amount included, not only the services of the men and the trucks, but also covered all necessary expenses for oil, gasoline, repairs, and the like in connection with the operation of the trucks.

From these facts the Industrial Accident Commission found:

> "That said injury arose out of and in the course of such employment, was proximately caused thereby, and occurred while the employé was performing service growing out of and incidental to the same."

It was further found:

> "That at the time of said injury the employé was not engaged in any of the occupations or employments excluded by section 8 of the Workmen's Compensation, Insurance and Safety Act of 1917 from the provisions of said act."

In addition to the death benefit of $4,346 there was an award of $100 for funeral expenses and $30 for medical expenses.

Petitioners contend that the facts do not support the finding that deceased was the employé of Flickenger, but that he "was an independent contractor as that term was used prior to the adoption of the Compensation Act," that the award can be sustained only under the statutory definition of the term "employé" appearing in section 8(b) of the Compensation Act of 1917, and that section 8(b) is therefore unconstitutional. In other words, the position of petitioners is this: Section 8(b) of the Compensation Act of 1917 has changed and enlarged the meaning of the term "employé," by restricting the definition of what constitutes an "independent contractor," so as to include in the former classification persons who, under the law, as it stood prior to the constitutional amendment of 1911, authorizing the creation of the commission, and prior to the passage of section 8(b), would have come under the latter designation; that this section is unconstitutional because it is an attempt to extend the jurisdiction of the Industrial Accident Commission beyond the limits prescribed by section 21, art. 20, of the Constitution, which confines the authority of the Industrial Accident Commission to the settlement of disputes arising between employers and employés, by bringing into the list of "employés" persons who prior to this legislative enactment were classed as "independent contractors." Section 8(b) reads as follows:

> "(b) Any person rendering services for another, other than as an independent contractor, or as expressly excluded herein, is presumed to be an employé within the meaning of this act. The term 'independent contractor' shall be taken to mean, for the purposes of this act: Any person who renders service, other than manual labor, for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." Stats. 1917, p. 835.

The terms "employé" and "independent contractor" had been frequently defined by the courts of this state prior to the amendment to the Constitution authorizing the creation of the Industrial Accident Commission. Article 20, § 21. In White v. City of Alameda, 124 Cal. 95, 56 Pac. 795, it is said:

> "There is no necessary distinction between the terms 'servant' and 'employé.' * * * The term 'employé' may sound more euphonious than the term 'servant,' but there is no substantial difference between the two except as the statute makes a difference."

Section 2009 of the Civil Code defines a servant as "one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master."

The status of employé has been distinguished from that of an independent contractor in the following cases: Boswell v. Laird, 8 Cal. 469, 68 Am. Dec. 345; Du Pratt v. Lick, 38 Cal. 691; Bennett v. Truebody, 66 Cal. 509, 6 Pac. 329, 56 Am. Rep. 117; Ahern v. McGeary, 79 Cal. 44, 21 Pac. 540; Hedge v. Williams, 131 Cal. 455, 63 Pac. 721, 64 Pac. 106, 82 Am. St. Rep. 366; Louthan v. Hewes, 138 Cal. 116, 70 Pac. 1065; Green v. Soule, 145 Cal. 96, 78 Pac. 337; Houghton v. Loma Prieta Lumber Co., 152 Cal. 500, 93 Pac. 82, 14 L. R. A. (N. S.) 913, 14 Ann. Cas. 1159; Houghton v. Loma Prieta Lumber Co., 152 Cal. 574, 93 Pac. 377; Pearson v. Potter Co., 10 Cal App. 245, 101 Pac. 681.

In Bennett v. Truebody, supra, it was said:

"The plumber was left to produce the desired result in his own way. If that did not constitute him an independent contractor, we do not know what would. There was no stipulation as to the amount to be paid for the work, but that is an immaterial circumstance in this case."

The court there referred to and cited with approval the early case of Milligan v. Wedge, 12 Adol. & E. 737, where a butcher hired a drover to drive a bullock from one specified place to another. Coleridge, J., held that the drover was an independent contractor.

So, also, the difference between an employé and an independent contractor has been clearly stated in a number of decisions in this state since the creation of the Industrial Accident Commission, which definitions are in entire accord with those laid down in the authorities above cited. In Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 Pac. 721, where the question involved was whether the injured teamster was an employé or an independent contractor, it was said:

"It is undisputed that the contract between Stevens and Tittle did not cover any definite period. It is also undisputed that the latter's foreman directed Stevens and his driver in the matter of the materials to be hauled. There was no agreement regarding the bulk of matter or the number of loads per day, but each wagon was to be used for the period of eight hours a day both in removing the rubbish and surplus sand. * * * Neither did he pay Mr. Stevens a certain sum for use of the teams and another sum for personal services. * * * But it is urged with much force that since the foreman for Tittle Company directed Stevens in the matters of the materials to be hauled, the latter was not an independent contractor—that the test of what constitutes independent service lies in the control exercised, and that the driver being under the supervision of the foreman was, therefore, an employé of Tittle. It is true that many authorities specify 'control' of the person performing work as the means of differentiating service from independent employment. The test of 'control,' however, means 'complete control.' For example, the citizen who hires a taxicab to take him to a certain place exercises that amount of control over the driver, but he does not thereby become the man's employer. * * * 'It is well settled that where one person is performing work in which another is beneficially interested, the latter may exercise over the former a certain measure of control for a definite and restricted purpose, without incurring the responsibilities, or acquiring the immunities, of a master, with respect to the person controlled.' * * * In the case at bar confusion arose out of the fact that Stevens drove his own team, but we see nothing in that fact which made him a servant and not a contractor. * * * It has been said that the true test of a contractor is that he renders service in the course of an independent occupation, following his employer's desires in the results, but not in the means used, * * * but in weighing the control exercised we must carefully distinguish between authoritative control and mere suggestion as to detail or the necessary co-operation where the work furnished is part of a larger undertaking. * * * In Chisholm v. Walker & Co., 2 B. W. C. C. 261, a case very much like the one at bar, arising under a workman's compensation statute, it was held that the man who received a certain sum per day for the work of himself and his horse was not engaged in a 'contract of service.' A similar ruling was made in Ryan v. County Council of Tipperary, 5 B. W. C. C. 578."

See, also, Donlon Bros. v. Industrial Accident Comn., 173 Cal. 250, 159 Pac. 715; Fidelity & Deposit Co. v. Brush, 176 Cal. 448, 168 Pac. 890; Parsons v. Industrial Accident Comn., 173 Pac. 585.

In Fidelity & Deposit Co. v. Brush, supra, it was said:

" 'It has been said that the true test of a contractor is that he renders service in the course of an independent occupation, following his employer's desires in the results, but not in the means used (1 Shearman & Redfield on Negligence [6th Ed.] 396), but in weighing the control exercised we must carefully distinguish between authoritative control and mere suggestion as to detail or the necessary co-operation where the work furnished is part of a larger undertaking. Standard Oil Co. v. Anderson, 212 U. S. 221, 222, 53 L. Ed. 480, 29 Sup. Ct. Rep. 252. The same principles are announced in Fink v. Missouri Furnace Co., 82 Mo. 276, 52 Am. Rep. 376.' "

Applying the principles of the foregoing authorities to the instant case, it becomes apparent that Reeves was an independent contractor and not an employé. As we have seen he was engaged in the "truck business," which is an independent occupation, and not only had his own patronage, but had taken over Ferguson's as well. He had his own truck and was doing a general hauling business. Flickenger merely told him what he desired to have hauled and Reeves loaded his truck in his own way at times suited to his own convenience; he never reported before going to work or after; no one controlled his actions at any time, except that he was expected to do a full day's work. Reeves was obliged to furnish his own appliances and pay all expenses in the operation of the truck and was not subject to any "authoritative control" at any time. In other words, Flickenger was interested only in the result to be attained, but not in the means by which it was to be accomplished.

[2] We may now consider whether a different result will be reached if we accept the definition of an "independent contractor" as it appears in section 8(b) of the Compensation Act of 1917. That section divides persons who render service into two classes: "Employés" and "independent contractors." All persons rendering service are employés except those who render service "other than manual labor, for a specified recompense for a specified result, under the control of his principal as to the result of his work only

and not as to the means by which such result is accomplished." We are of the opinion that the effect of this definition is to restrict the term "independent contractor" and consequently enlarge to a corresponding degree the meaning of the term "employé."

[3] To apply the test "other than manual labor" and exclude thereby from the classification of "independent contractors" all those persons who perform manual labor, and bring them into the classification of "employés," is a distinct enlargement of the latter class, and a consequent extension of the jurisdiction of the Industrial Accident Commission beyond the limits of the original constitutional grant of authority to the legislature. Article 20, § 21, Const. And, likewise, if we give effect to the phrase "for a specified recompense," as it appears in section 8(b), we are bringing into the definition of what constitutes an independent contractor an element which, according to the foregoing authorities, did not exist at the time of the adoption of the constitutional amendment, and which was not a part of the definition prior to the passage of the Compensation Act of 1917. That the effect of this clause would be to enlarge the meaning of the term "employé" and thus extend the jurisdiction of the Industrial Accident Commission needs no demonstration. Though if we make the test by applying the rule to the facts in the instant case it at once becomes apparent that the decedent would have been the employé of Flickenger and not an independent contractor for the service he performed was not "for a specified recompense." If this view be correct, and we entertain no doubt that it is, section 8(b) must be held to be unconstitutional to the extent which we have indicated that it is an attempt to enlarge the jurisdiction of the commission. This court in a recent decision in passing upon the constitutionality of section 30 of the Workmen's Compensation Act of 1917, speaking through Mr. Justice Wilbur, had this to say:

> "The terms 'employers,' 'employés' and 'employment,' as used in section 21, art. 20, of the Constitution, as amended in October, 1911, must be construed in the light of their meaning at the time of the adoption of the amendment and cannot be extended by legislative definition, for such extension would, in effect, be an amendment of the Constitution, if accepted as authoritative." Pacific Gas & Electric Co. v. Industrial Accident Comn., 181 Pac. 788.

[4] Respondents contend, however, that—

> "If any doubt remains upon the question of constitutionality, it has been removed by the adoption by the people in 1918 of a new constitutional amendment authorizing workmen's compensation, which definitely ratifies and affirms the scope of the act."

While it is not so designated, the reference must be to section 21 of article 20, as amended in 1918. But there is no merit in this contention. It is sufficient to point out that this constitutional provision went into effect eight months after Reeves was killed and six months after the commission decided this case, and consequently can have no application here.

It follows that the award must be annulled, and it is so ordered.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; SHAW, J.; MELVIN, J.; OLNEY, J.

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181 Cal. 336

OSBORN et al. v. HOYT et al. (L. A. 5213.)

(Supreme Court of California. Oct. 7, 1919. On Petition for Rehearing, Nov. 6, 1919.)

1. PLEADING ⚷8(6) — THAT CONTRACT WAS ILLEGAL, CONCLUSION OF LAW.

An allegation that a contract to will property was "against public policy and wholly illegal and void" was merely the averment of a conclusion of law, and would not put in issue the question of the violation of U. S. Rev. St. § 2290 (U. S. Comp. St. § 4531), relating to contracts concerning unpatented homesteads.

2. WILLS ⚷68 — CONVEYANCE DEFEATING CONTRACT TO DEVISE PROPERTY SUBJECT TO ATTACK BEFORE DEATH.

Where one who had contracted to will specific property conveyed it to others, an action brought before his death to have a trust declared in the property was not prematurely commenced.

3. EVIDENCE ⚷448—PAROL EVIDENCE THAT WRITTEN CONTRACT TO DEVISE WAS FOLLOWED BY ELEMENTS OF DEFENDANT'S CONDITION ADMISSIBLE.

In an action to have a trust declared in land, in that defendant had contracted to will such property to plaintiffs, and had then conveyed it, oral testimony as to "certain improvements" made upon the property, and how they tended toward the "amelioration and betterment" of defendant's condition, was competent to explain the circumstances of the agreement and the matters to which it related; Civ. Code, § 1647, making such evidence admissible.

4. WILLS ⚷59 — IMPROVEMENTS SUFFICIENT CONSIDERATION FOR CONTRACT TO DEVISE.

Improvements made upon land, tending towards the amelioration and betterment of the owner's condition, is a sufficient consideration for a contract to will such property to the persons making the improvements.

5. WILLS ⚷65 — UNCERTAINTY OF CONSIDERATION OF CONTRACT TO DEVISE NOT AVAILABLE OF SUBSEQUENT GRANTEES.

Where one claiming under a contract to devise land seeks to have a trust declared in the land as against the grantees in a conveyance executed by the prisoner after the making of the contract, the grantees cannot complain of uncertainty as to the consideration for the contract, where the conveyance was without consideration.

6. VENDOR AND PURCHASER 🔑235—WHERE GRANTEES WITHOUT CONSIDERATION KNEW OF OTHERS' RIGHTS, EQUITABLE CONSIDERATIONS NOT AVAILABLE.

Where a deed is given without consideration to grantees possessing full knowledge of the rights of persons injuriously affected by it, no equitable considerations are available to them.

7. APPEAL AND ERROR 🔑181—OBJECTIONS NOT MADE BELOW NOT REVIEWABLE.

Alleged errors asserted for the first time on appeal will not be considered.

Department 2.

Appeal from Superior Court, Los Angeles County; W. A. Anderson, Judge.

Action by Earl R. Osborn and Will E. Chapin against Silas Hoyt and others. Judgment for plaintiffs is affirmed in the District Court of Appeal and rehearing is denied in Supreme Court.

H. C. Millsap and F. E. Davis, both of Los Angeles, for appellants.

Frank C. Collier and John Schlegel, both of Los Angeles, for respondents.

MELVIN, J. Plaintiffs sued to have a trust declared in their favor to certain real property which, as alleged, had been deeded by Silas Hoyt, in fraud of plaintiffs and in violation of their rights, to said Hoyt's daughters, defendants Mary E. Hicks and Rachel H. Jolley, charged with full knowledge of the right of plaintiffs and of the fraud. The asserted rights of plaintiffs arose from a written agreement by the terms of which Silas Hoyt promised to make a will giving and devising to plaintiffs all of his right, title, and interest in and to the land in question which he then had or might thereafter acquire. During the trial Silas Hoyt died. A decree was given in favor of plaintiffs to the effect that upon the death of Hoyt plaintiffs became the owners and entitled to the possession of the land, and that defendants Mary E. Hicks and Rachel H. Jolley hold the land in trust for plaintiffs, and commanding that they execute a proper deed of the property to plaintiffs. From the judgment Mrs. Hicks and her sister and their husbands, who were joined with them as defendants, take this appeal.

A most interesting state of facts is developed from this record. Hoyt was an eccentric man, living alone upon wild land in Big Tejunga Canyon, in Los Angeles county. His daughters had long been alienated from him and were living in the East. Plaintiffs desired the hunting privileges on this land, and went there to gain permission from the occupant. That was in 1902. They found Mr. Hoyt a feeble man, 82 or 83 years of age. He was in abject poverty, was very weak physically, and was living in a filthy log cabin. The hunters divided their food with the feeble and apparently starving man, and were glad to see him apparently growing stronger. Their interest in him grew, and during the years following they did much to make his surroundings better and his physical condition more comfortable. Among other things they directed him in the matter of changing his occupation of the land from that of a mere squatter to a claimant of rights which later culminated in his securing a patent to the land (160 acres in area) in the early part of 1913. They piped water to his cabin and garden; installed ditches that enabled him to irrigate a garden patch; built a good road from near the mouth of the canyon to his property (a distance of about three miles); built a clubhouse on the land, and stocked it with provisions, to which the old man was given access without charge; furnished a stable and feed for his horses; financed the survey of the property; sent for his daughters, so that the old man's last years might be comforted by their society; and did many other things for him.

On June 16, 1902, Hoyt leased to plaintiffs the property occupied by him from July 1, 1902, for the term of five years. Mr. Hoyt agreed to be caretaker, and was to receive a rental of $50 per annum. He was to continue to live on the property, and the plaintiffs, according to the terms of the lease, agreed "to begin improvements upon the said property within one year" from the date of the instrument. On June 23, 1902, certain water rights were conveyed to plaintiffs, and all water rights were conveyed to them by another writing early in July of that year. On September 1, 1902, the agreement upon which this suit is based was executed. Among other things there was the following recital:

"And whereas, the said Chapin and Osborne have undertaken and promised to carry to completion certain improvements upon the said ranch in the Big Tejunga Canyon; and whereas, the said improvements all tend towards the amelioration and betterment of the physical and temporal condition of the said Hoyt, and greatly conduces to his comfort and convenience; and whereas, the said Hoyt appreciates the physical and temporal and financial benefits that accrue to him through such improvements; and whereas, the said Hoyt is desirous of providing such a remuneration in return therefor as is within his power." And in consideration of the premises Hoyt promised "to give, devise, bequeath, and will unto the said Chapin and Osborne, at the time of his death, all his right, title, and interest in and to that certain tract of land above mentioned and being known as Hoyt's ranch, in the Big Tejunga Canyon, county of Los Angeles, state of California, together with all water rights which the said Hoyt may have as incident or perquisite thereto in accordance with former documents."

This was followed in the next year by a deed from Hoyt of certain mining rights, and on April 19, 1912, the plaintiffs executed a writing reciting a consideration of $10, for which they bargained, sold, and surrendered all of their "rights, interest, title, and demand in and under that certain lease * * * dated June 16, 1902, and recorded in Book 56, page 25, of leases, Los Angeles county records," together with any claim they might have in any land or premises therein mentioned and the term of years therein yet to come. The instrument concludes as follows: "And, further, we hereby certify that said hereinbefore described lease has been canceled, and that all our rights thereunder have been terminated."

This is the instrument by which appellants insist the plaintiffs denuded themselves of all claim of every sort against Hoyt or the property. There is no basis for such contention. The instrument relates to the lease, and not to the agreement to make a will.

But the counsel for appellants argue that this release was made in order that Hoyt might comply with the homestead law of the United States, and make oath that his application was for his exclusive use and benefit, and not directly or indirectly for the use or benefit of any other person. They contend that the enforcement of the contract to make a will would amount to sanctioning a fraud upon the government, and in this behalf they cite Anderson v. Carkins, 135 U. S. 483, 10 Sup. Ct. 905, 34 L. Ed. 272, Hafemann v. Gross, 199 U. S. 342, 26 Sup. Ct. 80, 50 L. Ed. 220, and similar authorities, holding that a homestead right cannot be perfected without perjury by the homesteader where there has been an alienation or a contract for alienation.

[1] Respondents insist that there was no real issue upon the supposed violation of public policy in the making and enforcement of the agreement by which Hoyt promised to make a will in their favor. In their answer the defendants denied that there were written and oral agreements or negotiations between plaintiffs and Hoyt, as set forth in the second amended complaint, but averred that, if there were any such contracts, then they were and each was "against public policy and wholly illegal and void"; making special reference to the agreement to make a will. This was merely the averment of a conclusion of law, unsupported by any allegation of facts, and we cannot avoid holding that by it the question of the violation of public policy was not put in issue. Callahan v. Broderick, 124 Cal. 80, 56 Pac. 782; Del Campo v. Camarillo, 154 Cal. 647, 98 Pac. 1049; Moran v. Bonynge, 157 Cal. 295, 107 Pac. 312. Appellants assert, however, that in the absence of demurrer to the answer, and in view of the fact that at the outset their counsel set forth orally their theory that the contract was void because in violation of section 2290, United States Revised Statutes (U. S. Comp. St. § 4531), this court must assume that respondents waived the infirmity in the pleadings by proceeding to trial without objection to said statement. But, even if we accept this interpretation of the law, the record fails to reveal any proof of the procedure by which Mr. Hoyt obtained his patent, or any showing that in fact it was given to him under the homestead law. This conclusion relieves us from all necessity for discussing the very interesting question whether or not an agreement to make a will was an alienation or promise to alienate property in contravention of the statutes of the United States.

[2] There is no force in the contention that the action was prematurely commenced in the lifetime of the testator. It is true that in Rogers v. Schlotterback, 167 Cal. 35, 138 Pac. 728, this court held that where one is promised a child's share under the laws of succession the statute of limitations does not begin to run until the promisor's death, and that under the contract therein considered James Taylor Rogers "had no enforceable right under his contract in regard to such land or any other property prior to the death of William H. Rogers." In further discussion of the subject the court, by the present chief justice, then an associate justice, used the following language:

> "He [James Taylor Rogers] had no right of action of any character against William H. Rogers and his grantees at any time during the life of said Rogers, except that possibly he might have maintained an action in equity to obtain a decree protecting him against future possible injury to his rights, as was done in Van Duyne v. Vreeland, 12 N. J. Eq. 142, 153, where the chancellor said that 'if this court does not interfere now for the protection of the complainant, and secure this property at the death of Vreeland, it may have passed into the hands of a bona fide purchaser, and the complainant then be remediless.' The case just referred to was, however, one where the conveyance was clearly and unmistakably in violation of the agreement, as the plaintiff was entitled thereunder to *all* the property that the deceased might leave."

The case at bar comes clearly within the rule announced in the New Jersey case, because the contract now before us was one whereby the promisor agreed to make a will devising *specific* property, which was, as alleged in the bill of plaintiffs, virtually all of his estate.

[3] Appellants attack certain rulings of the court admitting oral testimony. All of

this testimony was necessary to describe the "certain improvements upon the said ranch," and how they tended "towards the amelioration and betterment" of the old man's condition. This testimony was competent to explain the circumstances of the agreement and the matters to which it related. Sec. 1647, Civ. Code; Snyder v. Holt Manufacturing Co., 134 Cal. 324, 66 Pac. 311.

[4] That the agreement is supported by an adequate consideration is evident from the facts recited herein.

[5, 6] Nor was the agreement too uncertain for enforcement. Hoyt's duty under it is expressed in no uncertain terms, and appellants are not in a position to complain of any other uncertainty, because there is no denial in the answer of the allegation in the complaint that the deed was without consideration. Where a deed is given without consideration to grantees possessing full knowledge (as did Mr. Hoyt's daughters) of the rights of the persons injuriously affected by it, no equitable considerations are available to them. Rogers v. Schlotterback, 167 Cal. 35, 138 Pac. 728.

The finding of fraud was amply supported.

[7] In the closing brief appellants assert that there is no proof that Hoyt died intestate, or, having died leaving a will, that he failed to comply with his contract. They also complain because the representative of his estate was not made a party to the action after his death. These alleged errors are asserted for the first time on appeal, and, even if material, would receive no attention.

The judgment is affirmed.

We concur: LENNON, J.; WILBUR, J.

On Petition for Rehearing.

PER CURIAM. In denying the petition for rehearing we would say that it was not intended either to hold or to imply that there need be an issue raised by the pleadings as to the illegality of the contract sought to be enforced by the action in order that the question of illegality may be considered. Kreamer v. Earl, 91 Cal. 112, 27 Pac. 735. But in the present case no facts showing the contract to be illegal were either pleaded, shown in evidence, or found.

The application for a rehearing is denied.

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181 Cal. 443

CARY v. LONG, Mayor, et al. (S. F. 9228.)

(Supreme Court of California. Oct. 20, 1919.)

1. JUDGMENT 🔑720—CONCLUSIVENESS ON OVERRULING OBJECTIONS TO AWARD OF ARBITRATORS.

Where a city agreed with the tenant of land, a portion of which was taken for a highway, that the matter should be submitted to arbitration, and the award of the arbitrators was duly filed in the superior court, pursuant to Code Civ. Proc. § 1283, *held* that, the award which was attacked in that court on the ground of misconduct, fraud, error, and excess in amount having been sustained, and an appeal from the judgment of the superior court having been dismissed, the award and judgment cannot thereafter be attacked by the city on the ground that it was not made in good faith, etc.

2. MUNICIPAL CORPORATIONS 🔑1011—ARBITRATION OF CLAIMS FOR DAMAGES FOR TAKING LAND FOR HIGHWAY.

Under Code Civ. Proc. § 1281, providing that persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them, a city may through its regularly constituted officials agree to submit to arbitration claims for damage arising out of the taking of real property for highway, urged by an occupant of the property.

3. MUNICIPAL CORPORATIONS 🔑865(2) — JUDGMENT ON ARBITRATORS' AWARD BASED ON TORT NOT WITHIN DEBT INHIBITION OF CONSTITUTION.

Where a city stipulated with an occupant that it should be allowed to proceed with the construction of a highway over his premises, and that the question of damages should be ascertained thereafter, and the condemnation action was abandoned, the route of the highway having been changed, and the occupant, asserting that he had been injured, entered into an agreement with the city for the submission of his claim for damages to arbitration, the award of the arbitrators and judgment thereon were based on tort, which may be enforced under St. 1901, p. 794, by compelling city authorities to make provision in the budget for payment of the claim, and was not within the inhibition of Const. art. 11, § 18, limiting contractual indebtedness which may be incurred by cities.

4. MANDAMUS 🔑176—TO COMPEL PAYMENT OF JUDGMENT AGAINST CITY, LEAVING TERMS DISCRETIONARY.

Under Act March 23, 1901 (St. 1901, p. 794), which is an act to provide for the payment of judgments against counties, cities, and towns, officers having authority to levy taxes may provide at their option for payment of the judgment in annual installments spread over successive years, provided that no payment shall be less than one-tenth of the whole of the judgment; hence a writ of mandate to compel municipal officials to make provision for payment of a judgment against the municipality should leave the officials free to exercise their discretion in determining whether the judgment should be paid by single levy or by ten annual levies.

In Bank.

Application by Julian E. Cary for writ of mandate, to be directed to J. N. Long, as Mayor of Richmond, and others, requiring provision to be made in the budget to pay a judgment. Writ issued.

Beverly Hodghead and T. John Butler, both of San Francisco, for petitioner.

D. J. Hall, of Richmond, and Alvin Gerlack of San Francisco, for respondents.

PER CURIAM. In this case the following opinion, prepared by Mr. Justice Richards, was filed in the District Court of Appeal of the First Appellate District, Division 1:

"Application for a writ of mandate, whereby the petitioner seeks to have the respondents, who are the properly constituted officials of the city of Richmond, commanded to include in the tax levy of said city for the current year an amount sufficient to pay a judgment which the petitioner holds against said city for the sum of $17,000, with interest. The facts out of which the claim of said petitioner, which ripened into said judgment, arose, are practically undisputed and are briefly as follows:

"On the 22d day of June, 1913, the city of Richmond commenced an action in the superior court of Contra Costa county against the Atchison, Topeka & Santa Fé Railway Company, Julian E. Cary, the petitioner herein, and certain other defendants, to condemn certain lands described in the complaint in said action for the purpose of constructing a highway from the central portion of the city of Richmond to the outer harbor. The line of said highway, according to the averments of said complaint, ran across certain lands of the Atchison, Topeka & Santa Fé Railway, of which the said defendant Cary was in possession under an arrangement with the railway company which permitted him to use said lands for or in connection with a brickyard. After the inception of said suit, and in order to expedite the construction of said highway, a stipulation was entered into between the attorneys of record for the parties to said action, by the terms of which the city was permitted to immediately proceed with the construction of said highway over the lands described in said complaint as belonging to said railway company and as occupied by said Cary, without first ascertaining the amount of damages to be paid to the said defendants for the taking and use of said lands. By the express terms of the stipulation entered into between the attorneys of record for the plaintiff in said action and the attorneys of record for said defendant Cary 'the question of the amount of damage which shall be sustained by said J. E. Cary by the taking of said property and the construction of a highway thereover by the city of Richmond as described in said complaint is to be determined at the trial of said cause, and said plaintiff hereby agrees that it will pay to said J. E. Cary promptly the amount of any judgment which may be awarded and fixed as the damage herein and without appeal therefrom, unless plaintiff should abandon said proceedings within the time and in the manner provided by section 1255a of the Code of Civil Procedure of the state of California.' Subsequent to the making of said stipulation the city of Richmond, being unable to make satisfactory terms with Cary as to his claim for damages, a resurvey of the line of the highway was made, which removed its route from the lands occupied by Cary, and the construction of said highway proceeded to completion along its new alignment. In the meantime the said plaintiff, the city of Richmond, made a settlement with the railway company by which it agreed to pay a certain sum for the damages caused by the taking of such portion of the lands of said corporation as were occupied by the highway according to its new alignment. Having thus disposed of the claims, both of the railway company and of said Cary, in so far as these related to the taking of the lands owned or held in use by either for the purposes of said highway, the condemnation suit was not pressed to trial, and was in fact practically abandoned, since the purposes for which it was instituted had been fully subserved. There remained, however, certain claims for damages which were insisted upon by Cary as having been suffered by him through the construction of said highway, and which were asserted by him to have arisen by reason of the destruction of a spur track connecting his brickyard with the main line of the Santa Fé Railroad, and also by reason of the interruption in his business and the restriction of his storage facilities and certain other items of incidental damage resulting from such construction. These various elements of alleged damage were itemized in 17 specific claims which he presented against said city, and upon which apparently he threatened to bring an action against the municipality. In order to arrive at an adjustment of these claims as between itself and said Cary, the city of Richmond, through its duly constituted officials, entered into an agreement for the arbitration thereof. This agreement of arbitration, which was executed by the respective parties thereto on the 29th day of July, 1916, proceeded to recite the fact of the institution of said condemnation suit and of the making and substance of the aforesaid stipulation therein, and then provided that 'whereas, said highway has been constructed and completed, and disputes and differences have arisen and still exist between the parties hereto as to the amount of damage which said city should in justice pay to said Cary as sustained by him by reason of the construction of said highway or boulevard, whether the matter of his said claim for damages be strictly involved in said action above named or not: Now, therefore, it is hereby agreed that all said disputes and differences shall be referred to arbitration.' It then proceeds to appoint arbitrators and to set forth such other matters as may be properly provided for in arbitration agreements in pursuance of section 1283 of the Code of Civil Procedure.

"Upon the execution of this agreement of arbitration the arbitrators named therein duly qualified and proceeded to hear and determine the matters which were by its terms submitted to them, and, having taken a considerable amount of evidence with respect to the asserted claims of said Cary against said city, proceeded to make an award, and in so doing allowed to said Cary the sum of $17,000 as the aggregate amount of his damages, which award was, in accordance with the terms of the arbitration agreement, duly filed with the county clerk of the county of Contra Costa in pursuance of the aforesaid section of the Code of Civil Procedure. Thereafter the city of Richmond, being dissatisfied with the amount of said award, moved the superior court of said county for an order vacating the same, and, after said hearing, being submitted to the judge of said court for decision, was decided against the contention of the said city of Richmond and in favor of said Cary. From the decision thus rendered an appeal was taken to the Supreme Court, which was later, on motion, dismissed, and the judgment of the said arbitrators and the order of the superior court confirming the same thereby became a finality and became in force and effect a final and general judgment in favor of said Carey and against the said city of Richmond, and is still in full force and effect as such. The said judgment not having been paid by said city, and no steps having theretofore been taken looking to the satisfaction thereof, the petitioner herein instituted this proceeding, whereby he seeks by a writ of mandate to compel the properly constituted officials of the city of Richmond to include in their tax levy for the current year an amount sufficient to pay said judgment.

"This action upon the part of said petitioner is predicated upon the provisions of the act of the Legislature approved March 23, 1901, entitled 'An act to provide for the payment of judgments against counties, cities, cities and counties and towns.' Stats. 1901, p. 794.

"The respondents in this proceeding have appeared and filed an answer, setting forth in substance the facts above recited, and also undertaking to set forth certain facts impeaching the good faith and proper conduct of the arbitrators in said arbitration proceeding, and also assailing their award as excessive, unjust, and fraudulent. The said respondents also in their answer assert that the said agreement for arbitration was and is void, for the reason that the making of the same was beyond the power of the city of Richmond or its officials.

[1] "As to these latter contentions, they may be briefly disposed of. With respect to the integrity of the judgment itself, we are of the opinion that the award of the arbitrators, having been duly filed in the superior court of the county of Contra Costa in pursuance of the provisions of the Code of Civil Procedure relating to arbitrations, and having been there assailed by the said municipality upon the various grounds of misconduct, fraud, error, and excess in amount, which are set forth in the answer of the respondents herein, and the said award having upon hearing as to these various matters before said court been sustained, and the decision of said court thereon having become final upon a dismissal of the appeal, the integrity of said award and said decision sustaining the same can no longer be made the subject of assault, and that, therefore, in so far as the portions of the respondents' answer herein, which undertake to assail the same, are concerned, we are not at liberty to consider them.

[2] "As to the contention of the respondents herein that the action of the city of Richmond through its regularly constituted officials in agreeing to submit to arbitration the claim or claims for damages insisted upon by the petitioner herein, and which might otherwise have been the subject of a civil action, was ultra vires, we are of the opinion that a municipal corporation, like an individual, has power to submit to arbitration any controversy which might be the subject of a civil action against it. Section 1281 of the Code of Civil Procedure broadly provides that 'persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them.'

[3] "This brings us to the main contention of the parties to this proceeding. On the part of the petitioner herein it is contended that the claims which he asserted against the city of Richmond, and which were made the subject of arbitration between himself and it, were claims for damages for a tort or series of torts arising by reason of the construction by the city of Richmond of that certain highway which was originally the subject of the condemnation suit, and that the judgment based thereon, having its foundation in tort, is such a judgment as may be enforced through the processes provided by the statute of 1901. On the other hand, it is the contention of the respondents herein that the claims of the petitioner which ripened into said judgment were claims arising solely out of a stipulation entered into in the aforesaid condemnation suit and out of the agreement to arbitrate which was predicated thereon, and hence that the said judgment which the petitioner holds is one having its foundation in contract, and that, this being so, it comes within the inhibition of section 18 of article 11 of the state Constitution, and is therefore a judgment the superior court of Contra Costa county had no power to enter, and one which the petitioner herein has no constitutional right to have enforced, either under the provisions of the statute of 1901 or in any other manner, against the said municipality.

"We are of the opinion that the contention of the petitioner herein must be sustained. In the recent case of Metropolitan Life Ins. Co. v. Deasy, 183 Pac. 243, it was decided by this court that a creditor of a municipality, holding a general judgment against it which was founded upon a claim for damages sustained by said judgment creditor through the construction of a tunnel, which caused certain injuries to his property, was entitled to have the benefit of the provisions of the statute of 1901 for the enforcement and collection of said judgment. This decision by this court was based upon the decision of the Supreme Court in the case of City of Long Beach v. Lisenby, 179 Pac. 198, which deals with the question of the constitutionality of the act of the Legislature in question. While it is true, as the respondents herein contend, that the matter out of which the claims for damages which the petitioner herein asserted against the said municipality had their inception in the institution by the city of Richmond of the condemnation suit above referred to, and that as between the attorneys of record for the respective parties in said action a stipulation was entered into which provided that the amount of damages which should be sustained by the petitioner herein through the taking of the property described and the construction of a highway thereover should be left to determination at the trial of said cause; and it is also true that thereafter the said municipality, the plaintiff in said action, changed the routes of its proposed highway so as to exclude therefrom the property which the petitioner herein held in possession, by which exclusion any amount of damage which he might have suffered through the taking of said property was eliminated; and while it is also the fact that after the completion of said highway along the route of its new alignment, and after said condemnation suit had ceased to be a living litigation, the said petitioner herein was still found to be asserting claims for damages resulting from the construction of said highway, and consisting in the main of elements of damages which would not have been the proper subject of admeasurement or determination in said condemnation proceeding, especially in view of the changed route of said highway; and it is also true that as between the petitioner herein and the said city of Richmond an agreement for the arbitration of said claims was entered into, which agreement contained certain recitals with respect to the institution of said condemnation suit, and with respect also to the said stipulation made between the attorneys of record therein—we are still of the opinion that these facts, engagements, and agreements between the parties did not operate to change the fundamental nature and basis of the petitioner's claim for damages against said municipality which ripened finally in the general judgment which he seeks to have enforced in this proceeding. In so far as the stipulation which was entered into between the attorneys for the respective parties in the condemnation suit is concerned, the only purpose and effect of said stipulation was to postpone the hearing and determination of the question of the amount of damage which the petitioner, Cary, as the defendant in said action, might sustain by the taking of the lands which he held in possession until the trial of said suit. Said stipulation could have had no other or further effect, for the reason that the attorneys of record for the parties to said action had no authority to bind their respective clients further than that which was conferred upon them under the provisions of section 283 of the Code of Civil Procedure. In so far as the agreement for an arbitration is concerned, it cannot be held to have created any new or contractual obligation as between the said municipality and the petitioner herein beyond the obligation and agreement to submit whatever claims for damages the petitioner herein held against said municipality to arbitration. Such an agreement in no respect altered the nature or character of the petitioner's claims against said city. They remained after said agreement—as before it—claims for damages arising out of the construction by said city of a highway in proximity to the business and property of the petitioner, and in respect to claims of this nature we can perceive no difference between them and the claims for damages which were asserted in the case of Metropolitan Life Ins. Co. v. Deasy, supra, which claims we held were in the nature of claims sounding in tort, and hence the proper subject of a general judgment against the municipality. This being so, it is our conclusion that the petitioner in this case, as in that case, is entitled to a writ of mandate compelling the performance on the part of the officials of the city of Richmond who are named as respondents herein of those acts specially enjoined upon them under the provisions of the aforesaid statute of 1901, supra, for the levy and collection of a tax sufficient to pay the amount of the general judgment which the petitioner herein holds against said city."

We are entirely satisfied with this opinion, and adopt the same as part of the opinion of this court.

[4] The transfer to this court was ordered because we were of the opinion that the writ of mandate directed by the judgment of the District Court of Appeal was too broad in its terms, in view of the provisions of the act under which the writ was sought ("An act to provide for the payment of judgments against counties, cities, cities and counties, and towns," approved March 23, 1901 [Stats. 1901, p. 794]). Under these provisions the officers having authority to levy taxes may provide, at their option, for the payment of the judgment in successive years in annual installments, with the proviso that no fractional levy and payment shall be less than one-tenth of the whole amount of the judgment. We see no good reason to doubt the validity of this part of the act. Any writ issued should leave the officers free to exercise this option. The petitioner asked for a writ requiring the inclusion of the whole amount of the judgment in this year's tax levy. The judgment of the District Court of Appeal was that "the writ issue as prayed for."

It is ordered that a peremptory writ of mandate issue, requiring respondents to provide in accord with the provisions of this act for the payment of the judgment referred to, together with interest thereon.

ANGELLOTTI, C. J., and WILBUR, SHAW, OLNEY, LAWLOR, LENNON, and MELVIN, JJ., concur.

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181 Cal. 433

STARR PIANO CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (L. A. 5751.)

(Supreme Court of California. Oct. 11, 1919. Rehearing Denied Nov. 10, 1919.)

1. MASTER AND SERVANT 🔑375(2)—INJURIES BEFORE REACHING WORKSHOP.

To entitle an employé to compensation for injuries, he need not have reached the place of employment and actually begun to render service, but it is sufficient if he has come to the employer's premises and is seeking entrance by a means of access provided by the employer or reasonably used by the employé.

2. MASTER AND SERVANT 🔑375(2)—INJURY ON WAY TO EMPLOYMENT.

If an employé is merely on his way to his employment and is injured, the injury is not one sustained in the course of the employment within Workmen's Compensation Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

3. MASTER AND SERVANT 🔑375(2)—INJURIES TO EMPLOYÉ OF TENANT IN ELEVATOR SHAFT.

A lessee's employé, injured by falling into an elevator shaft in an attempt to use the elevator in going to his work *held* entitled to compensation as injured in the course of his employment, though the elevator was controlled by the owner of the building.

4. MASTER AND SERVANT ⚷405(4)—INJURED EMPLOYÉ ACTING WITHIN AUTHORITY.

In proceedings for compensation for injuries to an employé who fell into the elevator shaft of a building occupied by his employer, evidence *held* to justify the finding that claimant was legitimately seeking to reach his place of work by a reasonable means of access.

Shaw and Melvin, JJ., dissenting.

In Bank.

Proceedings for compensation under the Workmen's Compensation Act by J. W. Steinkamp, opposed by the Starr Piano Company, employer, and the Ocean Accident & Guarantee Corporation, insurer. Compensation was awarded by the Industrial Accident Commission, and the employer and insurer apply for certiorari to annul the award. Award affirmed.

Redman & Alexander, of San Francisco, and Griffith R. Williams, of Oakland, for petitioners.

Christopher M. Bradley and Hugo D. Newhouse, both of San Francisco, for respondents.

OLNEY, J. The petitioners seek the annulment of an award by the Industrial Accident Commission in favor of respondent Steinkamp. Steinkamp was in the employ of the petitioner, Starr Piano Company, which rented space on the fourth floor of the Manufacturers' Exhibition Building in San Francisco. He was hurt by falling into the elevator shaft of the building in an attempt to use the elevator on his way to the fourth floor, there to perform services for his employer. The elevator was one solely under the control of the owner of the building, and maintained and operated for the common use of all the tenants and so used. The only question is as to whether or not the accident by which Steinkamp was injured was one "arising out of and in the course of his employment," as prescribed by the Workmen's Compensation Act (St. 1917, p. 831). Two reasons are advanced by the petitioners why the accident was not of this character.

[1] The first reason is that at the time of the accident Steinkamp had not yet reached his place of employment, but was merely on his way there, and accordingly had not yet entered upon his employment. On the one hand, it is not doubted that it is not necessary, in order to entitle the employé to compensation, that at the time of accident he have reached the place of employment and have actually begun there to render service. It is sufficient if he has come to the employer's premises and is seeking entrance thereto by a means of access provided by the employer or reasonably used by the employé. A typical, if not the leading, case of this character is Moore v. Manchester Liners, Ltd., 3 B. W. C. C. 527, where compensation was allowed for the death of a fireman employed on a steamer, who was drowned while returning to his ship from a personal errand of his own, by falling from a ladder provided for the purpose of access from the quay to the ship.

[2] On the other hand it is not doubted that, if the employé is merely on his way to his employment and is injured, the injury is not one sustained in the course of his employment. A typical case of this sort is Ocean Accident Co. v. Industrial Accident Comn., 173 Cal. 313, 154 Pac. 1041, L. R. A. 1917B, 336, where it was held that compensation could not be awarded for the death of a seaman drowned while seeking to make his way over a wharf and across other vessels to his own ship. In the latter case the authorities dealing with these two classes of cases and making the distinction between them are reviewed at length.

The question here is under which of these rules does an accident come which is suffered by an employé on the way to his employment and when he has reached the building in a part of which his employer's premises, so to speak, are located, and when he is using a means of access, such as stairs or an elevator, supplied by the owner of the building, as distinct from the employer, for the common use of all the tenants of the building, of whom the employer is but one. This question may be solved, we believe, by means of an approach to the facts of the case from the facts of those in which, as we have said, it is undoubted that an award of compensation is proper.

[3] Under the rule first stated, if the employer were the owner of the building and the employé were injured on the elevator or stairs in reaching his place of work on a certain floor, it cannot be doubted that compensation is payable under the statute. The employé has reached the employer's premises and is using a means of access specially provided for that very purpose. It would seem to follow that if the employer did not own the building, but rented it all, compensation would still be payable, even though the employer did not operate or control the elevator, or have the control or care of the stairs, but such operation, control, and care remained with the owner of the building. The operation, control and care of the elevator and stairs in such a case would seem to be a matter wholly between the employer and the owner of the building. It would not enter as between employer and employé and would be entirely extraneous to the employment. As to the employé it would be a matter of indifference whether the elevator or stairs

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

necessary for access to the spot where he is to work are by the employer's lease operated and controlled by the latter or by the owner of the building, provided only that they are in fact furnished so that access by the employé may be had. There would seem to be no reason for allowing compensation where the employer controls the elevator for instance, and refusing it where he does not, when the fact as to who controls it is extraneous to the employment and the theory upon which compensation is now allowed under the Workmen's Compensation Act is not, as before, that the employer, either directly or through some agency or instrumentality under his control, has been guilty of some breach of duty toward the employé. So far as the employé is concerned, the elevator or stairs are a special means of access furnished him to get to his place of work, and, in effect, furnished him by his employer. By the lease the tenant has the right as an appurtenance of the premises leased to the use of the elevator or stairs for the purposes of access, and, so far as the tenant's employés are concerned, the elevator and the stairs are, in effect, a part of the employer's premises. See Judson Iron Works v. Industrial Accident Comn., 184 Pac. 1.

Nor is the situation in this respect changed by the fact that the employer is but one of several tenants, all of whom have the right to the use of the elevator and stairs. The right to their use still remains an appurtenance of the employer's premises, the only difference being that the right is now one enjoyed in common with others instead of exclusively. The essential thing, that the elevator and stairs are in effect a part of the employer's premises covered by his lease, still remains.

A decision directly in point is In re Sundine, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318, where an employé, going from her place of work for lunch, was injured upon the stairs of the building in which the employers leased a floor. Upon the point under discussion the court said:

> "Nor do we regard it as decisive against the petitioner that she was injured while upon stairs of which neither Olsen nor F. L. Dunne & Co. had control, though they and their employés had the right to use them. These stairs were the only means available for going to and from the premises where she was employed, the means which she practically was invited by Olsen and F. L. Dunne & Co. to use. In this respect, the case resembles Moore v. Manchester Liners, ubi supra; and that case, decided under the English act before the passage of our statute, must be regarded as of great weight. McNichol's Case, 215 Mass. 497, 499 [102 N. E. 697, L. R. A. 1916A, 306]. It is true that before the passage of St. 1911, c. 751, the petitioner could not have held her employer for this injury. Hawkes v. Broadwalk Shoe Co., 207 Mass. 117 [92 N. E. 1017]. But that now is not a circumstance of much importance; for one of the purposes of our recent legislation was to increase the right of employés to be compensated for injuries growing out of their employment.
>
> "It was a necessary incident of the employé's employment to use these stairs. We are of opinion that according to the plain and natural meaning of the words an injury that occurred to her while she was so using them arose 'out of and in the course of' her employment."

The present case also comes within the language at least of Nelson, etc., Co. v. Industrial Commission, 286 Ill. 632, 122 N. E. 113, to the effect "that it makes no difference that the injury occurred off the premises of the employer if the employé were using premises which he had a right to use, and which provided the only available way to reach the point to which he was going for lunch."

The language in De Constantin v. Public Service Commission, 75 W. Va. 32, 83 S. E. 88, is too broad if it was intended thereby to include injuries sustained on a public road or way, but the fundamental idea is sound when applied to a private means of access appurtenant, so to speak, to the employer's premises. The language is:

> "Since injury after termination of actual work, while on the premises of the employer and in pursuit of the usual way of leaving the same, is held to be within the course of employment and to have arisen out of the same, it seems clear that an injury to a workman while coming to his place of work on the premises of the employer and by the only way of access, or the one contemplated by the contract of employment, must also be regarded as having been incurred in the course of the employment and to have arisen out of the same. If, in such case, injury does not occur on the premises, but in close proximity to the place of work and on a road or other way intended and contemplated by the contract as being the exclusive means of access to the place of work, the same principle would apply and govern. If the place at which the injury occurred is brought within the contract of employment, by the requirement of its use by the employé, so that he has no discretion or choice as to his mode or manner of coming to work, such place and its use seem logically to become elements or factors in the employment, and the injury thus arises out of the employment and is incurred in the course thereof."

See, also, Nole v. Wadsworth, 6 B. W. C. C. 129.

[4] The second contention of the petitioners is that the injury to Steinkamp did not arise out of his employment because he was injured when by means of a key surreptitiously obtained he had entered the building on a Sunday when it was closed, and was proceeding without authority to run the elevator himself in the absence of an operator. In our former opinion the award was held invalid on this ground. A rehearing was granted, not because of any doubt as to the invalidity of the award upon such a state of facts, but because of doubt as to whether the commission was not justified in finding a differ-

ent state of facts. A re-examination of the evidence has satisfied us that the commission was justified in so finding.

The home office of the Starr Piano Company is in Los Angeles. Steinkamp was employed by it as traveling salesman and its San Francisco representative and to take charge of its exhibit in the building where the accident occurred. He had both the freedom and the responsibility incident to his position as local representative. He was not held to regular hours at a particular place, but was supposed to give as much time as was required to discharge his duties efficiently, and it was expected of him that he would at times work evenings and on Sundays. This, in effect, was testified to by the secretary and treasurer of the piano company. It further appears that at the time when the piano company, through its secretary, was arranging to rent its space in the building, Steinkamp brought up the matter of his being permitted to use the building evenings or Sundays, and the agent of the building told the secretary and Steinkamp that while the building was not ordinarily used evenings or Sundays, it could be arranged that Steinkamp might do so if necessary. Steinkamp did work frequently in the building evenings and Sundays, and the evidence shows that this was known both to his employer and the agents of the building. On the Sunday when he was hurt, he was in the building to attend to some business for the piano company. Being there for that purpose, it follows from the facts just previously stated that he was legitimately there in the course of his employment, although there out of business hours and when the building was closed.

This would hardly be questioned were it not for the manner by which he effected an entrance. He obtained entrance by means of a key which he had had made from one loaned him temporarily by a representative of the building after he had been refused a key by another representative and by the janitor.

But in the first place, assuming that he had the key surreptitiously, the only bearing which that fact would seem to have would be to indicate that he was not in the building legitimately. If he were rightly there, how he got there would seem to be immaterial, since he was not hurt getting there, but afterwards. That he was there legitimately hardly admits of serious question upon the other facts already stated.

In the second place, there was evidence sufficient to justify the conclusion by the commission that, no matter how Steinkamp first obtained his key, his continued possession and use of it was not surreptitious. Numerous other tenants had keys and used them. It was no exceptional thing for a tenant to have a key. Steinkamp himself was frequently in the building out of hours to the knowledge of the agents, and when, if he were supposed not to have a key, the question must have occurred to them as to how he had got in. It also appears that after he had been refused a key by the janitor, the latter observed him in the building out of hours, and reported that fact to one of the responsible agents for the building, but nothing was said or done about it. The whole course of conduct warrants the conclusion that Steinkamp, having in some manner obtained a key, the agents of the building acquiesced in his retaining and using it.

The remaining questions in the case pertain to Steinkamp's attempt to use the elevator in the absence of the operator. He was hurt in an attempt so to use it, and, unless he had authority to do so, he was not using a means of access to his employer's premises then open to him, and was not hurt in the course of his employment. Furthermore, authority so to use an elevator cannot reasonably be presumed, but must affirmatively appear.

There were two elevators in the building, both operated by electric power, one a freight elevator, the other a passenger elevator. No operator was supplied for the freight elevator, and any tenant desiring to use it either applied to the janitor or was at liberty to operate it himself. On the other hand, an operator was supplied for the passenger elevator, and during business hours at least this elevator was operated by no one else. When the operator left, the power was left on. Why this was done does not appear. The agents for the building deny that any one was authorized to use the passenger elevator in the absence of the operator. Whether its method of operation was different from or more difficult than that of the freight elevator, which the tenants were permitted to run, does not appear, but it is a matter of common observation that there are electric elevators which do not require any considerable skill or experience for their operation. As against the general statement of the agents of the building that no one was authorized to use the passenger elevator in the absence of the operator, there is the testimony of Steinkamp that the manager and secretary of the building himself showed Steinkamp how to operate it; that other tenants operated it themselves; that he had operated it himself on several previous occasions, and that no objection to such use had ever been made to his knowledge by the agents of the building. This testimony is corroborated by that of one Nelson, a mechanic employed by the piano company to install some phonographic booths. He testifies that on going to the building he was given a key by the manager and secretary and told to use the elevator; that he did use it a number of times; that on one occasion he found the elevator door open and the elevator not there, it having been taken to a floor above by a tenant, and that he investigated and found the door was apt to rebound on being closed, and reported the matter to the agents of the building. The manager and secretary of the building contradict Steinkamp's testimony that he showed him how to operate the elevator, but, admits that he showed him how to open the door into the elevator compartment. Why he did this, if not in order that Steinkamp might operate the elevator, does not appear.

It is clear that upon the foregoing testimony of Steinkamp and Nelson, taken in conjunction with the other evidence stated, the commission was justified in concluding that, unusual as it might be, Steinkamp and other tenants were in fact permitted to operate the passenger elevator, themselves. In fact, the petitioners hardly contend to the contrary. The point on which they rely in this connection is that while Steinkamp may have been permitted by the owners of the building to run the elevator, this fact and the fact that he was doing so were wholly unknown to Steinkamp's employer, and was not acquiesced in by it. This is true so far as appears. It is likewise true that acquiescence by the owner of the building in some unreasonable and dangerous use of some appurtenance of the building by an employé of a tenant, unknown to the tenant, would not be the equivalent of acquiescence by the tenant in such use by his employé. But in such a case as this, where Steinkamp was largely a free and responsible agent, it must be taken that his employer acquiesced in his use of the building in any reasonable way permitted by the owner of the building. The award of the commission cannot therefore be annulled, unless it appear that Steinkamp's using and operating the elevator himself was unreasonable and dangerous. There is no evidence upon this point; and, while it might be said in the case of some kinds of elevators that their use without a skilled and trained operator was unreasonable and dangerous as a matter of common knowledge, it does not appear that the elevator here involved was of that character. Certainly there are some electric elevators which can be operated with safety by a person without particular experience or skill, and the acquiescence by the owners of the building in the use of this particular elevator by such persons, if the testimony of Steinkamp and Nelson be believed, is some indication that it was of that character.

It follows that the commission was justified in finding that Steinkamp was not injured in endeavoring to reach his employer's premises by an unreasonable and dangerous means of access which he was not authorized to use, but, on the contrary, that he was injured while legitimately seeking to reach his place of work by a means of access appurtenant thereto and which he was justified in using. This being the case, it follows that the finding that his injury arose out of and in the course of his employment must be sustained.

Award affirmed.

We concur: LENNON, J.; WILBUR, J.; LAWLOR, J.

SHAW, J. I dissent for reasons similar to those stated in my dissenting opinion in Judson Mfg. Co. v. Industrial Accident Comn.. S. F. 9039.[1] In my opinion the court in these decisions is creating a liability itself and is imposing on the community and on employers a burden not contemplated or warranted either by the Constitution or by the statute.

I concur: MELVIN, J.

181 Cal. 460

LONDON GUARANTEE & ACCIDENT CO., Limited, v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 9139.)

(Supreme Court of California. Oct. 24, 1919. Rehearing Denied Nov. 21, 1919.)

1. DIVORCE ⟹169 — INTERLOCUTORY JUDGMENT AS "CONTRACT" OR "AGREEMENT."

An interlocutory judgment of divorce, under Civ. Code, § 131, so far as it determines the rights of the parties, is a contract or agreement between them, within section 175, freeing the husband from liability for support when the wife lives separate from him by agreement, and, though temporary and provisional, settles their rights for the time being until some action, proceeding, or motion is begun to change their status, and some order is made thereon having such effect, or until they become reconciled and resume marital relations, restoring their mutual obligations.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Agreement; Contract.]

2. MASTER AND SERVANT ⟹388 — NO PRESUMPTION UNDER COMPENSATION ACT OF DEPENDENCY OF DIVORCED WIFE.

Husband and wife, after interlocutory judgment of divorce for the wife, rendered under Civ. Code, § 131, and making no provision for her support, *held* living separate by agreement not providing for the wife's support, so that, under section 175, the husband was not personally liable for her support, and she was not entitled to the presumption of total dependency created by Workmen's Compensation Act, § 14, subd. a(1).

In Bank.

Proceedings under the Workmen's Compensation Act by Eva Oberg and Mary Oberg, to secure compensation for death of their husband and son, John M. Oberg, the employé. Compensation was awarded, and the London Guarantee & Accident Company, Limited, the insurer, applies for certiorari to review

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] 184 Pac. 2.

the order of the Industrial Accident Commission. Award annulled, and cause remanded.

Walter H. Linforth, of San Francisco, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

SHAW, J. This is an application to review a decision of the Industrial Accident Commission awarding compensation to Eva Oberg and Mary Oberg on account of the death of John M. Oberg, who at the time of his death was the husband of Eva Oberg. Mary Oberg was the mother of said John M. Oberg. It is admitted that the injuries which caused the death of John M. Oberg were caused by accident arising out of and in the course of his employment. The only questions for consideration relate to the amount of compensation to be awarded and the rights of the beneficiaries to receive the same.

The injury occurred on November 30, 1918. Oberg and his wife at that time had not been living together for nearly two years. In December, 1917, Eva Oberg began an action for divorce against John M. Oberg, alleging in the complaint as cause for divorce the willful failure of said Oberg to provide her with the common necessaries of life for more than a year prior to the beginning of the action. The complaint did not ask alimony or other provision for her support or for an award of property. Oberg was a nonresident of the state, and summons was served by publication only. In that action, on April 16, 1918, she obtained an interlocutory judgment of divorce, declaring that she was entitled to a divorce from said John M. Oberg on the ground stated in the complaint. It made no provision whatever for any alimony or maintenance and no reservation of any right or power thereafter to award alimony or maintenance or to entertain any application therefor. This judgment became final, in the sense that no appeal could be taken therefrom, on June 16, 1918. Mary Oberg, the mother of John M. Oberg, had been receiving financial aid from John M. Oberg prior to his death. His contributions to her for the year preceding his death did not exceed $125. The commission found that Eva Oberg was the wife of John M. Oberg at the time of his death, and that he was legally liable for her support; that Mary Oberg was partially dependent on him for support at the time of his death, and thereupon it awarded full death benefits, and, as it is authorized to do by subdivision "e" of section 14 of the Workmen's Compensation Act (Stats. 1917, p. 845), reassigned the same by giving one half of the amount to the mother and the other half to the wife.

It is the contention of the petitioner that said John M. Oberg was not legally liable for the support of said wife at the time of his death, and consequently that full compensation could not be awarded and subsequently reassigned in the manner stated, but that the only allowance that could be made under the provisions of the section was $100 for burial expenses and an additional sum to the mother, as a death benefit, not exceeding three times the annual amount devoted to the support of said mother by said deceased in his lifetime, and not exceeding the equivalent of three times his average annual earnings, as provided in section 9, subdivision "c" (2) of the Workmen's Compensation Act (Stats. 1917, p. 840). This contention would be correct, if the wife be not legally entitled to compensation under the act.

The act provides that if the wife was living with the husband at the time of his death, or if he "was legally liable at the time of his death" for her support, she is "conclusively presumed to be wholly dependent for support" upon her husband, so as to be entitled to compensation under the act as such dependent. Section 14, subd. a(1). The commission was of the opinion that, under the circumstances above narrated, and notwithstanding the entry of the interlocutory decree of divorce between Eva Oberg and her said husband, he was legally liable for her support at the time of his death. The correctness of this conclusion is the question to be considered in the case.

The question depends mainly upon the meaning and effect of sections 131 and 132 of the Civil Code. The provisions of these sections, applicable to this case, are that in an action for divorce, if the court determines that a divorce should be granted, "an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce" (section 131); and that after the lapse of one year from the entry of such interlocutory judgment the court "may enter the final judgment granting the divorce, and such final judgment shall restore them to the status of single persons," and that the court may then give "such other and further relief as may be necessary to complete disposition of the action" (section 132).

The petitioner claims that where the complaint in such action does not ask for alimony, support, or maintenance, nor for any relief regarding property and the interlocutory judgment does not reserve the questions of alimony, support, or disposition of property for further consideration, the right of the wife to demand subsequent support from the husband is terminated by the interlocutory judgment, and that he is thereby relieved from the obligation to support her during the interval between the interlocutory judgment and the final judgment. In support of this claim it cites Howell v. Howell, 104 Cal. 45, 37 Pac. 770, 43 Am. St. Rep. 70, O'Brien v. O'Brien, 124 Cal. 422, 57 Pac. 225, McKay v. McKay, 125 Cal. 68, 57 Pac. 677, O'Brien v. O'Brien, 130 Cal. 409, 62 Pac. 598, and Harlan v. Harlan, 154 Cal. 348, 98 Pac. 32. These decisions all related to the effect of final judgments, which made no provision for future alimony or support and did not reserve that subject for subsequent disposition. They are put upon the ground that, inasmuch as the court in those cases had rendered final judgment without reserving the question of support or alimony for further consideration, and such judgment had become final in that court, it had lost jurisdiction over the action, and that as the final judgment dissolved the marriage absolutely, the woman was no longer his wife, and the personal liability of the husband for her subsequent support had ceased to exist, and that all her former rights to support from him had become merged in the judgment. The interlocutory judgment is provisional or temporary only by the terms of the statute, and does not of itself dissolve the marriage relation, and therefore these reasons do not apply.

We have considered the effect of sections 131 and 132 in Deyoe v. Superior Court, 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73, Periera v. Periera, 156 Cal. 9, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107, Estate of Dargie, 162 Cal. 51, 121 Pac. 320, Estate of Seiler, 164 Cal. 181, 128 Pac. 334, Ann. Cas. 1914B, 1093, Estate of Walker, 169 Cal. 403, 146 Pac. 868, and Brown v. Brown, 170 Cal. 1, 147 Pac. 1168. The principal proposition established by these cases is that the marriage relation is not dissolved by the interlocutory judgment, and that for all the purposes involved in those cases it remained in existence until the final judgment of divorce. Neither the Periera Case nor the Deyoe Case contained anything concerning the liability of the husband for support after the interlocutory judgment. In Estate of Dargie the parties had become reconciled after the interlocutory judgment, and were living together as husband and wife at the death of the husband, but the interlocutory judgment had not been set aside. It was held that the marriage relation was not dissolved, and that she was entitled to the benefit of the provisions of the Code of Civil Procedure declaring a surviving wife entitled to a family allowance out of the estate of the husband. In Estate of Seiler and Estate of Walker it was held that when the husband died after the interlocutory judgment the surviving wife was his widow, and was entitled to administration upon his estate, under the provisions of section 1365, Code of Civil Procedure. In Brown v. Brown, the interlocutory divorce had been granted to the wife on the default of her husband upon a complaint for divorce on the ground of willful neglect, and which alleged that there was no community property at the time the action was begun. During the interval between the interlocutory judgment and the final judgment the husband acquired community property, and after the final judgment the wife began the action to establish her title as tenant in common with him in such property. It was held that the final judgment upon such a complaint and default was a determination that there was no community property in existence at the time the action was begun, but that it did not conclude the wife with respect to the subsequent acquisition of property by the husband, and that she was entitled to show such acquisition and to claim her share thereof after the final judgment had been rendered. The case went upon the theory that the judgment had left the after-acquired community property undisposed of, and that they therefore became tenants in common thereof, each holding a half interest. De Godey v. Godey, 39 Cal. 162. The divorce was not granted upon either the ground of cruelty or adultery. The decision holds that the statute declaring what shall constitute community property continues applicable after the interlocutory judgment and until the final judgment, unless the interlocutory judgment in some manner adjudicates the matter.

[1, 2] These decisions do not reach the point presented in the case now in hand. This case presents the question whether section 155 of the Code, declaring that the husband and wife contract toward each other obligations of mutual support, continues in existence notwithstanding the rendition of an interlocutory judgment rendered upon a complaint by the wife which alleges a cause of divorce against the husband for willful neglect and does not ask alimony or any other provision for her support. Certain other provisions of the Civil Code are important. Section 159 declares that the husband and wife "may agree, in writing, to an immediate separation and may make provision for the support of either of them and of their children during such separation." Section 175 provides that he is not liable for her support if she abandons him without cause, until she offers to return, "nor is he liable for her support when she is living separate from him, by agreement, unless such support is stipulated in the agreement." Here the husband and wife had been living separate and apart for nearly two years prior to his death and for about a year prior to the time when she began the action for divorce. The wife began the action asking for a divorce and seeking no relief whatever from him for her support. This was, in effect, a waiver by her, for the purposes of the action, of her right to support from him, at least until such time as she should apply therein for some order to enforce such obligation. To this complaint he made no answer, and suffered the interlocutory judgment to be taken against him by default. This was equivalent to a consent on his part that she should have the divorce as prayed for upon the allegations of her complaint. It is said that "a judgment is a contract, in the highest sense of the term." Wallace v. Eldredge, 27 Cal. 499. This is

well settled in this state. Stuart v. Lander, 16 Cal. 372, 76 Am. Dec. 538; Bean v. Loryea, 81 Cal. 153, 22 Pac. 513; Dore v. Thornburgh, 90 Cal. 66, 27 Pac. 30, 25 Am. St. Rep. 100; Weaver v. San Francisco, 146 Cal. 732, 81 Pac. 119. An interlocutory judgment of divorce is therefore, so far as it determines the rights of the parties, a contract between them. It is temporary and provisional in its nature, it is true, but it settles the rights of the parties for the time being, and until some action, proceeding, or motion is begun to change the status, and some order is made thereon which has that effect, or until they become reconciled and resume marital relations, in which event their mutual obligations are, for the time being at least, restored. Olson v. Superior Court, 175 Cal. 250, 165 Pac. 706, 1 A. L. R. 1589. The following passage from Brown v. Brown, supra, although it refers to a final judgment, is applicable also to an interlocutory judgment so far as it declares the same to be a contract:

> "Where a defendant is served with a summons and complaint stating the facts upon which he is required to act, and he makes default, he is presumed to admit all the facts which are well pleaded in the complaint. The judgment which follows upon this sort of admission is, in contemplation of law, a complete adjudication of all the rights of the parties embraced in the prayer for relief and arising from the facts stated in the complaint, including the facts in his favor as well as those against him. The defendant here is presumed to have acceded to the proposition embraced in the complaint, and to have consented that plaintiff should obtain the relief therein prayed for, upon the conditions and facts set forth in the complaint. The proceeding is equivalent to a statement by Brown to plaintiff that he did not object to a divorce for the cause alleged, based upon the theory that there was no community property existing at the time the action was begun. When judgment is rendered upon such a complaint and default, it becomes, in effect, a contract between the parties that the judgment shall be final with respect to everything properly embraced within the allegations of the complaint and in the prayer for relief."

So in the present case the interlocutory judgment, although not final, was conclusive between the parties for the purposes of that action during the period elapsing before the final judgment should be entered, unless by some proceeding or agreement it became in some manner modified. Perhaps the wife would have had the right during that interval to apply in that action for further relief in the way of support and maintenance or for alimony, but until she did so the rights of each with respect to the personal marital obligations of the other remained as declared by the interlocutory judgment, and it was binding on each of them. It is true it had no effect on the operation of the statutes which declare her rights in the property of which he dies possessed, nor upon the statutes declaring the status of the property acquired by him during the marriage, because, until the final judgment, the marriage status continues. But the personal obligations between them remain in abeyance until changed by some subsequent action or agreement which is binding upon the husband. They are, by virtue of the interlocutory judgment, living separate by agreement, and if that judgment makes no provision for her support by him, they are living separate by an agreement which does not provide for her support, and under section 175 he is not, during that interval, personally liable for her support. The judgment has the effect of a contract for that purpose. Until that contract is in some manner changed, either in the action or in some independent proceeding, or by a reconciliation, her right to support is suspended. In the present case no change was made in their status up to the time of his death. They were living apart under this contract evidenced by this judgment. He was not at that time legally liable for her support, and, therefore she does not come within the aforesaid provisions of the Workmen's Compensation Act. It follows that the award cannot be sustained. It will be necessary for the commission to readjust the matter under the principles we have stated, giving the wife no compensation whatever and allowing the mother such compensation as the evidence may show she is entitled to under the provisions of the act.

The award is annulled and the cause remanded for further proceedings.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.; MELVIN, J.

181 Cal. 452

In re MATHEWSON'S ESTATE.

WARD v. MATHEWSON.

(L. A. 6162.)

(Supreme Court of California. Oct. 23, 1919.)

1. HUSBAND AND WIFE 🔑151(7)—ALLOWANCE TO HUSBAND AS WIFE'S ADMINISTRATOR OF FUNERAL EXPENSES.

Where husband owned property worth $7,050, and was joint tenant with his deceased wife, whose administrator he was, of property worth $8,000, incumbered to $6,000, which property he held by right of survivorship, the income being sufficient to pay interest and taxes, and not having sufficient income to pay funeral expenses, the court properly allowed him $512.50 for reasonable funeral expenses.

2. EXECUTORS AND ADMINISTRATORS 🔑510(8)—NO REVERSAL FOR IMMATERIAL ERROR.

Order settling final account, and allowing an amount for reasonable funeral expenses, will not be reversed for lack of verification of the inventory; the only omission from the inventory being a small amount of property which was nevertheless duly charged in the account, and all distributed in kind.

Department 1.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

In the matter of the estate of Ada Hays Mathewson, deceased. From an order settling final account of J. Everett Mathewson, as administrator, Margaret Ward appeals. Order affirmed.

E. A. Miller and Stewart & Stewart, all of Los Angeles, for appellant.

James S. Bennett, of Los Angeles, for respondent.

SHAW, J. This case is an appeal from an order settling a final account and allowing the husband, who was the administrator of the estate, the amount of $512.50 for the reasonable funeral expenses of his wife's burial. The only heirs of the decedent were the appellant, who was her mother, and the respondent, who was her husband.

The first point assigned as error is the allowance for funeral expenses. Upon that subject the court found that the husband was the owner of property in his own right of the value of $7,050; that he was a joint tenant with his wife of certain property of the value of $8,000, incumbered to the amount of $6,000, which property he succeeded to and holds by right of survivorship upon the death of his wife; that the income from the property was about sufficient to pay the interest upon said incumbrance and taxes; that he had borrowed money since the wife's death for his necessary living expenses, and did not have sufficient income to pay the funeral expenses; and that $512.50 was "a reasonable and proper sum to be allowed as funeral expenses, in view of her manner of living, her position in society, and the amount of her estate in her lifetime."

[1] In support of the appeal the case of Estate of Weringer, 100 Cal. 345, 34 Pac. 825, is cited. That case, in our opinion, justifies an allowance to the husband, as administrator of the wife's estate, of funeral expenses, if, when the circumstances of the parties, their mode of living, and the amount of the estates of the wife and husband, respectively, are taken into consideration, it is reasonable to do so. This case comes up without the evidence. The findings aforesaid show facts which justified the exercise of the discretion of the court in making the allowance of the funeral expenses.

[2] The other objection urged on the argument is that the inventory was not verified, and therefore that it was improper to take it into account at all. Just what is meant by this objection we do not know. It is not claimed that any property of the estate was not included in the inventory, except a small amount which the court found had been omitted therefrom and which was properly charged in the account. None of the property was sold, and it is all distributed in kind. It is therefore manifest that the fact that the inventory was not verified has not injured any one. The principle that error which does not produce injury does not justify a reversal is well exemplified in this case.

The other objections are too trivial to be worthy of mention.

The order is affirmed.

We concur: LAWLOR, J.; OLNEY, J.

43 Cal. App. 191

CITY OF OAKLAND v. ALBERS BROS.' MILLING CO. (Civ. 2933.)

(District Court of Appeal, First District, Division 1, California. Sept. 5, 1919.)

MUNICIPAL CORPORATIONS 🔑966(1) — IMPROVEMENTS BY CITY'S LESSEE NOT TAXABLE.

A dock and warehouse which by terms of lease, given by city, of public lands granted by state to city in trust for certain purposes under St. 1911, p. 1238, lessee was to construct, and which when so constructed were to become and remain the property of the lessor, are within the express provisions of Const. art. 13, § 1, and Pol. Code, 3607, that property of a municipal corporation is not taxable.

Appeal from Superior Court, Alameda County; Edgar T. Zook, Judge.

Action by the City of Oakland against Albers Bros. Milling Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Ezra W. Decoto, Dist. Atty., J. M. Koford, Asst. Dist. Atty., H. L. Hagan, City Atty., and John J. Earle, Asst. City Atty., all of Oakland, for appellant.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for respondent.

Fitzgerald, Abbott & Beardsley, of Oakland, amici curiæ.

RICHARDS, J. This action was instituted by the city of Oakland to collect from the defendant certain taxes alleged to be due said city. The cause was submitted to the trial court for decision upon an agreed statement of facts which may be summarized as follows: On February 16, 1916, the plaintiff and the defendant entered into a certain written lease of certain lands upon the western water front of the said city of Oakland, the same being a portion of the public lands granted by the state to the city of Oakland in trust for certain purposes under the provisions of an act of Legislature approved May 1, 1911 (Stats. 1911, p. 1258). By the terms of said lease the lessee was to construct certain substantial buildings and improvements consisting of a dock and warehouse, which were to be used by it during its tenancy of the premises, for which the lessee was to be repaid by a system of warehouse and dockage charges as specified in said lease; it being expressly provided therein that—

> "The said dock and warehouse when so constructed shall become and remain the property of the lessor."

It was upon these specific improvements that the tax officials of the city of Oakland undertook during the fiscal year 1917–18 to levy and collect the taxes which are the subject of this suit, and the sole question presented to the trial court and to this court upon appeal is as to whether the said improvements upon the said public property of the plaintiff is subject to taxation. The trial court held that it was not, and rendered its judgment accordingly in the defendant's favor. From such judgment the plaintiff prosecutes this appeal.

The case upon which the appellant chiefly relies to sustain its contention upon this appeal is the case of San Francisco v. McGinn, 67 Cal. 110, 7 Pac. 187. A careful examination of that case convinces us that it has no application to the case at bar, the essential difference between the two cases being that in the former case the court based its ruling that the defendant therein, who had placed the improvements in question upon the lands of the city of San Francisco, was to be held to be their owner for the purposes of taxation; while in the case at bar the improvements in question are expressly made the property of the city of Oakland, and hence the defendant herein could not have for any purpose any ownership in them. Under the express provisions of section 1 of article 13 of the state Constitution, and also of section 3607 of the Political Code, the property of a municipal corporation in this state is not the subject of taxation. In the presence of these constitutional and statutory provisions, it is needless to cite the earlier cases showing that this is and has long been the settled law of this state; but in the recent case of San Pedro, etc., Railroad Co. v. City of Los Angeles, 179 Pac. 393, the Supreme Court declared void an attempted assessment of a breakwater built by a lessee of submerged public lands, as "improvements," holding that while, as conceded by the parties in that case, the breakwater was not an "improvement" within the meaning of section 3617 of the Political Code, even if it were so considered to be, it would be such an improvement as would become fixed to the realty itself, "the fee of which was in the state, and hence not subject to assessment."

Judgment affirmed.

We concur: WASTE, P. J.; BARDIN, Judge pro tem.

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43 Cal. App. 226

CHASE v. PETERS et al. (Civ. 2991.)

(District Court of Appeal, Second District, Division 1, California. Sept. 8, 1919. Rehearing Denied by Supreme Court Nov. 6, 1919.)

LANDLORD AND TENANT 🔑291(17) — TIME WITHIN WHICH TENANT MUST PAY DEFAULTED RENT INTO COURT.

Under Code Civ. Proc. § 1174, in unlawful detainer against a tenant which has defaulted in its payment of rent, if, after judgment for plaintiff landlord, the tenant had desired to retain the premises, it should have tendered into court the rent found due within five days after judgment was entered, and it did not have a continuing right to be restored to possession during the whole of the period consumed by its appeal, which resulted adversely to it, and for five days after return of remittitur.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by Charles A. Chase against Homer H. Peters, Jr., and others. From an order refusing application for an order to restore defendant Peters Investment Company to possession of certain realty, the investment company and its trustees appeal. Order affirmed.

See, also, 174 Pac. 116.

Riley & Heskett and Wright & McKee, all of San Diego, for appellants.

James E. Wadham, of San Diego, James S. Bennett, of Los Angeles, and Frank J. Macomber, of San Diego, for respondent.

JAMES, J. This is an appeal taken by the Peters Investment Company, a corporation, and certain other persons named, who are designated as trustees of said corporation. The appeal is from an order of the superior court refusing an application for an order to restore the Peters Investment Company to the possession of certain real property from which it had been ousted by process authorized under a judgment for unlawful detainer. For convenience, we will designate the appellant in this case under the general name of investment company.

Prior to May, 1917, the investment company held possession of the real property in question under an assignment made by the lessee of the plaintiff. Default had been made in the payment of the rental fixed by the lease, and the lessor had also been compelled to pay certain taxes which under the lease the lessee had agreed to discharge. An action for the unlawful detainer of the property was brought, after a due notice given to the lessee and the investment company to either pay the rental or surrender possession of the premises. In that action there were two counts or causes, in one of which was contained a statement of the several installments of rental which were due and unpaid. In the second cause of action there were detailed various amounts which the lessor had paid on account of the tax charges. The investment company did not deny that the rental charges had accrued as alleged, but insisted that there could be no recovery for taxes paid by the lessor, because that cause of action was improperly joined to the cause of action for the unlawful detainer of the property. The court made findings of fact which separately and distinctly found the various amounts of rental which were due, and separately the items of tax charges that had been paid by the lessor. After the entry of judgment in May, 1917, no stay having been granted, and five days having elapsed from the entry of the judgment, writ of restitution was issued and the lessor was restored to the possession of the premises leased. The investment company appealed, and this court held that there could be no recovery for taxes paid in an action for the unlawful detention of real property. The cause of action under which that recovery was had being separately stated in the complaint, and the findings being complete upon the matter of the rental charges due, the judgment on appeal was to the effect only that the judgment of the lower court be modified by striking therefrom the amount which the superior court had found to be owing to the plaintiff on account of the tax charges. The opinion rendered on that appeal more fully states the facts of the case than we have included in the foregoing statement. See Chase v. Peters et al., 174 Pac. 117. Upon the going down of the remittitur in that case the investment company, within five days after the remittitur had been received in the clerk's office of the county of San Diego, made application to the superior court to be restored to possession of the real property upon payment of the amount of rent which the judgment of the court had fixed. It is from the order denying that application that this appeal is taken.

In section 1174 of the Code of Civil Procedure, which refers to the form and substance of a judgment in an unlawful detainer suit, it is provided:

> "When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant, or any subtenant, or any mortgagee of the term, or any other party interested in its continuance, may pay into court, for the landlord, the amount found due as rent, with interest thereon, and the amount of the damages found by the jury or the court for the unlawful detainer, and the costs of the proceedings, and thereupon the judgment shall be satisfied and the tenant be restored to his estate; but if payment as here provided be not made within the five days, the judgment may be enforced for its full amount, and for the possession of the premises. In all other cases the judgment may be enforced immediately."

It is the contention of the investment company on this appeal that the five days mentioned in the provision quoted did not commence to run as against it, because of the appeal taken, until after remittitur had been returned. Under the facts of the case as they have appeared, we think that the investment company was not entitled to the relief asked and that its application came too late. If it had desired to retain possession of the premises, it should have made tender into court of the amount of rent found due, as the section provides, within the five days after the judgment was entered. There was no order of reversal made as to that judgment. In fact, we have noted that the investment company did not dispute the amount claimed by the lessor on account of rent. The case appears to us to be in all respects the same as though the judgment appealed from in the former suit was a judgment for rent only, and that that judgment had been affirmed upon appeal. In such a case there would seem to be no room to argue that the defaulting tenant was given a continuing right to be restored to possession of the premises from which he had been ousted, all during the period consumed by the appeal and for five days after remittitur had been returned. This was clearly not the intent of the Legislature; such a construction of the statute would work a hardship against a lessor seeking to rid himself of a tenant who would not pay his rent, for it would compel the landlord to hold the property in readiness to be restored during the whole time that was consumed by the taking of the appeal and until the determination thereof. This, to our minds, would be directly contrary to the whole design of the special remedy provided against defaulting tenants of real property.

The order appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

43 Cal. App. 194

McKENZIE v. NICHELINI et al.

(Civ. 2844.)

(District Court of Appeal, First District, Division 1, California. Sept. 5, 1919. Rehearing Denied by Supreme Court Nov. 3, 1919.)

1. BOUNDARIES 🔑8—PROPORTIONAL METHOD RE-ESTABLISHING GOVERNMENT CORNERS NOT CONTROLLING ON STATE COURT.

The rule as to use of the proportional method in re-establishing government corners, as laid down by the Surveyor General of the United States, is for the guidance of United States deputy surveyors in running lines in which the government is interested, and cannot control a state court in its choice of means for establishing such a fact as the point where the government surveyor originally placed a section or quarter section corner, when the question properly arises within its jurisdiction.

2. BOUNDARIES 🔑37(3) — EVIDENCE RELOCATING CORNERS OF GOVERNMENT SURVEY.

In ejectment by the owner of the south half of the northwest quarter and north half of the southwest quarter of a section against claimants of the south half of the southwest quarter, who had taken possession, by virtue of their claim, of land which according to plaintiff constituted part of the north half of the quarter, evidence *held* to have justified the court in locating quarter corners on the west and south sides of the section as it did without resorting to proportional method to re-establish government corners.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Roderick McKenzie against A. Nichelini and others. From judgment for plaintiff, defendants appeal. Affirmed.

Percy S. King, of Napa, and Chas. L. McEnerney and Leo J. McEnerney, both of San Francisco, for appellants.

John T. York, of Napa, for respondent.

RICHARDS, J. The plaintiff, being the owner of the south half of the northwest quarter and the north half of the southwest quarter of section 24, township 8 north, range 4 west, Mt. Diablo base and meridian, brought an action in ejectment against the defendants, who claimed ownership of the south half of the last-named quarter section, but who had entered into possession of land by virtue of such claim which, according to the plaintiff, constituted part of the north half of said southwest quarter.

The court, after a lengthy trial, in which much evidence was taken of surveyors and others as to monuments, witness trees, courses, distances, and topography, found in favor of the plaintiff, and gave judgment accordingly. The defendants appeal; their main contention being that the finding of the court as to the location of the plaintiff's land upon which its judgment is based is wholly unsupported by the evidence and is contrary thereto.

The deciding factor in the case, as admitted by the appellants, is the location of the line dividing the north and south halves of the southwest quarter of section 24 above referred to. According to the contention of the appellants, the true method for locating this line is first to find the legal center of the section—a point, as they remark, which is not set by the government surveyor, but which is found by running a straight line from the quarter section corner on the north boundary of the section to the quarter section corner on the south line thereof, and then by intersecting this line by one drawn from the quarter section corner on the west side of the section to the opposite quarter section corner on the east, the point of intersection of these two lines being the legal center of the section. Having thus obtained the interior boundaries of the four quarters of the section, the north and south halves of the southwest quarter will be found by similarly intersecting that quarter section by an east and west line equidistant from its north and south boundaries, to do which it is, of course, necessary to know in addition to the points already obtained the quarter corner on the south boundary of the section (identical with the southeast corner of the southwest quarter) and the southwest corner of the section (identical with the same corner of the quarter section). It is the appellants' contention that the evidence offered by the plaintiff shows that the lines were not run in this manner, from which they argue that the court's finding as to the location of the line in dispute is not supported by the evidence.

It will be observed, however, that, given a section of land 80 chains square, the southwest quarter thereof will be bounded by four straight lines, each 40 chains in length, one running from the southwest corner to the west quarter corner of the section; a second running from the said southwest corner to the south quarter corner; a third running from the west quarter corner easterly and parallel to the last-mentioned line; and the fourth running from the quarter corner on the south northerly and paralleling the first-mentioned line. The north and south halves of this quarter section will be found by running a line from a point 20 chains north of the southwest corner to a point 20 chains north of the southeast corner thereof. And since the dispute between the parties to this appeal is only as to the location of the line between the north and south halves of the quarter section involved in its relation to north and south, the degree of extension easterly or westerly of this line becomes immaterial; for no right of appellants to land to the or west of this quarter section is in question, and the judgment of the court has not ejected them from any land so located.

Turning now to the evidence upon which the court based its finding as to the relative location of the north and south halves of this quarter section, there is testimony in the record that the entire section is approximately 80 chains from north to south; that the plaintiff's surveyor, for the purpose of locating the plaintiff's land, started at the southwest corner of the section, which corner he had known as the established government corner for many years; from that point he ran north 20 chains, and there located the westerly end of the line dividing said southwest quarter into north and south halves; from there he ran 40 chains north, and there located the westerly end of the line dividing the northwest quarter of the section into north and south halves; to ascertain the precise direction in which he should run the north and south boundaries of plaintiff's land (having ascertained that there were no established government corners on the east side of the section now to be found), he measured the whole township line from south to north between townships 3 and 4, the eastern boundary of section 24 being part of this line, and, finding it 7 chains short of the correct distance, he prorated the deficiency between the six sections on the east side of the township, which gave him as the direction in which the north and south boundaries of section 24 should be run a course north 83 degrees east. He accordingly ran two such lines 40 chains in length for the north and south boundaries of plaintiff's land, and joined the eastern extremities of these lines by a line parallel to the western boundary already described. This direction of north 83 degrees east, however, was not accepted by the court as correctly locating the plaintiff's land. The government field notes of certain lines of the section in question were in evidence, among them the south boundary thereof, which was a line run due east from the southwest corner of the section; and from testimony as to the topography of the land traversed by a line run east from said corner the court concluded that such testimony was sufficient to establish as the true direction of said south boundary a line due east as given in said field notes, and in its findings adopted this direction for the north and south boundaries of plaintiff's land, the latter of which is the dividing line between plaintiff and defendants. It further appears that the northwest corner of this section as established by the government could not be found, but that a line drawn from the corner common to sections 14, 15, 22, and 23 (located one mile west of section 24) to a point on the east line of the township between said section 24 and section 19 in the adjoining township, located with reference to its relation to a known government corner further east, would pass through or very close to a point 80 chains north of the southwest corner of section 24, the distance called for by the field notes for the northwest corner of the section. If we regard the north boundary of the section as being coincident with the eastern half of this line (and it is the only testimony in the record with reference to its location), a line drawn from the quarter corner on the north boundary of the section to the corresponding corner on the south boundary would be somewhat longer than 80 chains. If this excess were divided between the four equal parts of this line, it would place the eastern extremity of the line dividing the north and south halves of the section a trifle to the north of where the court found it to be; but the error is so small that we think it is a case for the application of the legal maxim, "The law disregards trifles" (Civ. Code, § 3533), and not of sufficient magnitude to warrant a reversal of the case.

The appellants' contention that the finding of the trial court as to the location of plaintiff's land is not supported by the evidence is also based upon the assertion that the southeast, northeast, and southwest corners, as also of all the quarter corners of section 24, are lost corners, which should be re-established by the proportional method in order to locate the line in dispute in this action. It is not necessary to agree with the appellants that the re-establishment of all of these lines is necessary in order to correctly locate the line in dispute, but their contention may be considered with reference to those corners which the trial court used in reaching its conclusion and which it found by methods other than that urged by appellants, viz, the quarter corners on the west and south sides of the section, and the section's legal center point.

[1] It may first be said that we think the appellants' contention as to the duty of the trial court to resort to the proportional method in re-establishing government corners is entirely too broad. The rule in this respect as laid down by the Surveyor General of the United States is for the guidance of United States deputy surveyors in running lines in which the government is interested. It cannot control a state court in its choice of means for establishing a fact, to wit, the point where the government surveyor originally placed a section or quarter section corner, when that question properly arises within its jurisdiction. But this rule of the General Land Office is itself but a statement in detail, and perhaps an extension of a rule long followed by the courts of the country generally. In Weaver v. Howatt, 161 Cal. 77, 84, 118 Pac. 519, 522, our own Supreme Court has indicated the extent to which it will follow the rule. It is there said:

> "It is not the province of the court to determine where the corner should have been fixed. This is not an action to vacate the government survey. It must be assumed that the line was measured and the monuments set. Their positions, as set, fix the rights of the parties, re-

gardless of the inaccuracy of the measurements and the errors in distance found in the field notes. The trial court must ascertain, as near as may be, where this monument was set by the government surveyor. If the exact spot cannot be found, it must, if possible, decide from the data appearing in evidence its approximate position, and the proportional method is to be used only when no other reasonable method is possible, and it must be so used that it does not contradict or conflict with the official data that are not impeached, and which, when not impeached, confine the actual position within certain limits. The application of the proportional method must, in that case, be also confined to the same limits."

[2] In the case at bar the trial court was apparently satisfied that the evidence in the case afforded the means of locating the quarter corners on the west and south sides of the section wihout resorting to the proportional method; and a comparison of the government field notes with the testimony of witnesses relative to the topography of the country traversed by the government surveyor in reaching and placing these points does not enable us to say that it was not justified in locating these corners as it did without resorting to the method claimed by the appellants to be compulsory under the circumstances here presented.

The appellants make the further point that the court failed to find upon a material issue, namely, the claim by the plaintiff, denied by the defendants, of ownership of land in the south half of the southwest quarter of the same section; but, as the court granted the plaintiff no relief under this claim, and the point is made by the appellants for the first time in their closing brief filed after the oral argument of the case, we do not feel called upon to give it consideration.

For the reasons stated, the judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

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43 Cal. App. 236

BLACKBURN v. MARPLE. (Civ. 2298.)

(District Court of Appeal, Second District, Division 1, California. Sept. 8, 1919.)

1. HIGHWAYS ⚷184(3) — NEGLIGENCE OF AUTOMOBILE DRIVER A QUESTION OF FACT.

In an action against an automobile driver for injuries to plaintiff in collision between their cars, whether defendant driver was negligent *held* a question of fact for the trial court.

2. HIGHWAYS ⚷183—IN AUTOMOBILE COLLISION SPEED LAW NOT VIOLATED.

The driver of an automobile toward a road intersection, who, just previous to collision, had been traveling about 20 miles an hour, but who, on observing defendant 200 feet away, slowed down his machine so that when it was struck by defendant's it was traveling about 8 miles an hour, did not violate the Motor Vehicle Act of 1913, § 22, subd. (b).

3. HIGHWAYS ⚷183 — DOCTRINE OF LAST CLEAR CHANCE NOT INVOLVED IN AUTOMOBILE COLLISION.

The doctrine of last clear chance *held* applicable to neither party, plaintiff nor defendant, involved in a collision between their automobiles at road intersection.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Oliver V. Blackburn against R. S. Marple. From judgment for plaintiff, defendant appeals. Affirmed.

Tanner, Odell & Taft, of Los Angeles, for appellant.

Porter C. Blackburn, of Los Angeles, for respondent.

JAMES, J. Plaintiff was awarded judgment for the sum of $350 against this appellant on account of damages alleged to have been suffered through the negligent acts of the defendant R. S. Marple. The particular act of negligence alleged was that said defendant so operated an automobile driven by him as to cause it to collide with an automobile which was then being operated by the plaintiff. The appeal is taken from the judgment.

The particular facts upon which the judgment was entered are quite fully embraced in the findings of the trial judge, the most material portions of which we quote:

"That on the 14th day of July, 1915, at or about the hour of 6:30 p. m., while it was still light, the plaintiff was driving a Ford automobile along a public highway known as the state highway, leading from the town of Whittier to the town of Fullerton, in an easterly direction, about 1 mile east of the county line of Los Angeles and Orange counties. That the plaintiff was driving his Ford car at a speed of 20 miles per hour. That the plaintiff was seated in the front seat of his car with a small child on his right side, and that his wife and two small children were seated in the rear seat. That the state highway runs in an easterly and westerly direction at the above-mentioned place, and that there is an intersecting highway that enters the said state highway from the south, known as the La Habra road, and that the said La Habra road intersects the said state highway by two long, sweeping curves, one curve turning into the said state highway to the left and one curve turning into the said state highway to the right as the said La Habra road approaches the intersection with the said state highway. That the said La Habra road does not cross the said state highway. That in the center of the two sweeping curves and at the junction with said state highway there is a triangular piece of ground, which is not paved but subject to travel, being oiled and rolled. That the said state highway and the said La Habra road are about 60 feet wide, with a paved portion in the center of 18 feet, and that said highways are used by the public for travel. That there is a row of electric light poles on the south side of the said state highway near the property line, and a row of orange trees about 4 feet south of the south property line. That the plaintiff, who was driving his Ford car, on approaching the said intersection of the two highways, saw an Overland car, driven by the defendant, approaching the said state highway by the long sweeping curve that branches from the said La Habra to the left as the said state highway is approached from the south. That the plaintiff saw the approaching Overland touring car turning into the said state highway, and immediately turned to his right, and slowed his Ford car down to 8 miles per hour. That the defendant also slowed his car down, but after he had arrived at about the center of the said state highway, and his car was approaching the north side of said state highway, he turned his car abruptly to his left, and continually turned the same to his left, with the same pointed in a southwesterly direction and towards the south side of the said state highway. That the defendant drove his car in such a negligent manner that the same was pointed and directed toward the side of the plaintiff's machine near its front. That the plaintiff kept turning his machine to his right and to the south of the said state highway, whereupon he was forced to turn off the said state highway into an orange orchard, within about 2 feet of an electric light pole, and under the branches of an orange tree, and the plaintiff's machine was struck by the front end of the defendant's machine on the left side and near its front."

[1] Appellant's contentions may be briefly stated under two heads: (1) That under the evidence the court was not justified in making findings against appellant; (2) that, conceding that the evidence showed negligence upon the part of appellant, the evidence also showed contributory negligence upon the part of the plaintiff. There was a conflict in the evidence concerning the manner in which the accident occurred; hence as to findings made under such evidence the conclusions of the trial judge must be here treated as final. Appellant has argued that under all of the evidence it must be concluded that it was impossible that the accident could have happened in the manner described by the plaintiff. After carefully examining the printed transcript of the testimony heard, we cannot agree with this contention. Plaintiff testified that he was traveling easterly along a straight road, and that 200 feet away from where the intersecting road upon which the defendant was traveling emerged he observed the defendant, and immediately slowed down his machine, he then being upon the extreme right of the highway, and that the defendant, instead of keeping to the right and making the turn along the curve of the intersecting road, turned toward the left; that the plaintiff guided his machine off from the highway into the soft dirt on the right-hand side thereof, and that the defendant's car collided with him. The point of collision was not within any part of the intersecting highways, but was about opposite the most westerly point of the intersecting curve. A physician, who was traveling in an automobile immediately behind the plaintiff, testified that the plaintiff was on the right side of the road and that he (the witness) saw the automobile of the defendant emerge from the road intersecting at the right, and that the defendant's vehicle passed across the front of the plaintiff's machine, and appeared in view at the left thereof, and that the collision occurred immediately thereafter. There was testimony of several witnesses that the appellant stated immediately after the accident that he had become confused, and had thought that the plaintiff intended to travel directly eastward, and that he (appellant) turned to the left to allow the machine of the plaintiff to go on at his right. On the evidence the case was peculiarly one which called for the judgment of the trial court upon the question as to the negligent act of appellant, and we find nothing at all appearing in the transcript of the evidence which would justify us in the conclusion that the findings of the trial judge are in any way unsupported by the evidence.

[2, 3] The findings of the trial court further negative the claim of appellant that the plaintiff had been guilty of contributory negligence proximately causing or contributing to cause the accident. Appellant cites us to a provision of the motor vehicle law, found in the Statutes of 1913, at page 649, which requires that the operator of a motor vehicle, where the view is obstructed, upon approaching an intersecting way must not travel at a greater rate of speed than 10 miles an hour. Just previous to the accident plaintiff had been traveling at the rate of about 20 miles per hour. The evidence showed that his machine was under control, and he himself testified that upon observing the appellant 200 feet away, emerging from the intersecting road, he slowed down his machine and kept to the right. When he was struck by appellant's automobile his machine was traveling about 8 miles per hour. At that point, as we have before noted, he had not entered upon the intersecting way. The intent of the law, as we view it, in restricting the speed at which a motor vehicle may travel at such a point, is that it shall be brought to the speed indicated by the time it shall reach the intersecting way in order that it may be fully under control of the operator. It cannot be said under the evidence it was established that the plaintiff violated the provision of the statute cited. The case of Cook v. Miller, 175 Cal. 497, 166 Pac. 316, cited on behalf of appellant, was not the same in its facts as the case here presented. Neither was there anything in

the facts under the evidence which would make the doctrine of the last clear chance applicable to either party.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

43 Cal. App. 141

BLACKBURN v. MARPLE. (Civ. 2988.)

(District Court of Appeal, First District, Division 1, California. Sept. 3, 1919.)

1. HIGHWAYS ⟹184(2) — EVIDENCE SHOWING NEGLIGENCE IN OPERATION OF AUTOMOBILE.

In an action against an automobile driver for injuries to a woman when her husband's car collided with defendant's, evidence *held* to sustain finding that defendant driver was negligent in the operation of his car.

2. HIGHWAYS ⟹184(3)—QUESTION OF FACT AS TO WHEN AUTOMOBILE DRIVER SHOULD REDUCE SPEED AT INTERSECTION.

The question as to what distance away from an intersecting road with an obstructed view a driver on the highway, going at a rate otherwise legal, should reduce his speed to 10 miles an hour, under the Motor Vehicle Act of 1913, § 22, subd. (b), is a question of fact, in each particular case, to be determined in view of the particular circumstances.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Fredericka L. Blackburn against R. S. Marple. From judgment for plaintiff, defendant appeals. Affirmed.

Porter C. Blackburn, of Los Angeles, for appellant.

Tanner, Odell & Taft, of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff in an action for damages for personal injuries suffered by the plaintiff as the result of a collision between two automobiles.

The facts of the case, as summarized from the findings of the trial court, are as follows: On July 14, 1915, at about the hour of 6:30 p. m., the plaintiff was riding in a Ford automobile, being driven by her husband along the state highway leading from Whittier to Fullerton, going in an easterly direction at a speed not in excess of 20 miles per hour, and was approaching the point upon said highway where a public road known as the La Habre road enters it from the south. The state highway and the La Habre road are each about 60 feet wide at this point, each having a paved center of about 18 feet in width. At the point of entrance of the La Habre road the latter makes two long curves, one turning into the highway to the left going west, and the other turning into the highway to the right going east, and the triangle at the point of entrance caused by their separation being unpaved, but oiled and subject to travel. The private property on each side of the La Habre road at its said point of emergence into the highway is well grown up in orange trees standing within 4 feet of the property line, and forming quite an obstruction to the vision either of the highway or of the road by persons approaching the point of contact upon either thoroughfare. There were also some electric light poles at said point further obstructing this line of vision. As the plaintiff's husband, driving the car in which she was seated, approached the said point of emergence of the La Habre road, and was, as is variously stated, at from 150 to 200 feet west of said point, he observed an Overland car, operated by the defendant, turning into the state highway on the westerly curve of the La Habre road, and immediately turned his Ford car to the right of the center of the highway going east, and slowed down his speed to 8 miles an hour. The defendant proceeded on said curve until he had arrived at about the center of the state highway when, instead of proceeding on the course which would have taken his machine to the right of the center of said highway going west, he suddenly turned his car to the left, and without slowing down proceeded to turn directly across the course of the car in which the plaintiff was riding. The plaintiff's husband, seeing this action, turned his car further and further to the right until he was forced off of the paved portion of the highway and onto the dirt strip along it and into the edge of the adjacent orange orchard, where his car was struck by the defendant's car, and badly damaged, and the plaintiff was severely injured by the impact.

The trial court, the cause having been tried without a jury, found from the foregoing facts that the defendant was guilty of negligence in the operation of his car, and that the claim of the defendant that the plaintiff's husband was guilty of contributory negligence could not be sustained, and accordingly rendered judgment in the plaintiff's favor for the sum of $1,000 damages, from which the defendant prosecutes this appeal.

[1, 2] From our examination of the testimony and particularly of the exhibits before us we are entirely satisfied that the findings of the trial court, of which the foregoing is a brief summary, are abundantly supported by the evidence in the case, and that in point of fact the real cause of the collision was that given by the defendant himself to the plaintiff's husband and also to several bystanders immediately after the accident that, "He got rattled and lost control of the machine."

The only contention of the defendant which saves him from the penalty which would otherwise be justly imposed for taking a frivolous appeal is his contention that the plaintiff's husband was guilty of contributory negligence as a matter of law for a violation on his part of the provisions of subdivision (B) of section 22, p. 649, of the Motor Vehicle Act of 1913, in force at the time of said accident, which required that persons operating motor vehicles on the public highways of this state should operate or drive their cars at no greater speed that 1 mile in six minutes, "where the operator's * * * view of the road traffic is obstructed upon approaching an intersecting way." This point made on behalf of the appellant is also devoid of merit for two reasons: First, the question as to the distance away from an intersecting road with an obstructed view when a driver upon the highway, going at an otherwise legal rate of speed, should reduce his speed to 10 miles an hour under the said provisions of said act is necessarily a question of fact, in each individual case to be determined by the trial court according to such particular circumstances, as the kind of car the operator is driving, the speed at which he was previously going, the brake control of the car, the nature of the obstruction to his view of the intersecting road, etc.; and the point is without merit for the second reason, which is that, according to the evidence in the case, which fully sustains the finding of the court, the plaintiff's husband was from 150 to 200 feet west of the point of emergence of the La Habre road, going at a rate of speed not in excess of 20 miles an hour, when he first discovered the defendant's car coming into the highway, and that he immediately reduced his speed to 8 miles an hour, and took a position on the highway which would have led to an entire avoidance of the accident if the defendant had not, to employ his own language, "got rattled and lost control of his car," with the result that he crossed over unexpectedly to the wrong side of the highway. and there ran the plaintiff's conveyance down in spite of the driver's utmost effort to avoid a collision.

Judgment affirmed.

We concur: WASTE, P. J.; BARDIN, Judge pro tem.

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43 Cal. App. 248

PEOPLE v. WAGNER. (Cr. 853.)

(District Court of Appeal, First District, Division 2, California. Sept. 8, 1919. Rehearing Denied by Supreme Court Nov. 6, 1919.)

1. BURGLARY 🔑45—INTENT OF ENTRY JURY QUESTION.

In a prosecution for burglary, the question with what intent defendant entered the premises of another *held* for the jury.

2. BURGLARY 🔑41(3)—EVIDENCE SUFFICIENT TO SUSTAIN CONVICTION.

In a prosecution for burglary, evidence *held* sufficient to sustain the conviction.

3. CRIMINAL LAW 🔑1159(3)—CONVICTION ON CONFLICTING EVIDENCE SUSTAINED.

On appeal from a conviction of burglary, conflicts in the evidence must be resolved against defendant.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

George Wagner was convicted of burglary, and he appeals. Affirmed.

Ralph Starke, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

BRITTAIN, J. The appellant was convicted on an information charging burglary by entering the "house, room, apartment, tenement, shop, warehouse, store, and building" of Michael Logue, in San Francisco. The only question is regarding the sufficiency of the evidence to show burglarious intent.

[1-3] Logue, the complaining witness, operated a saloon. Back of the saloon ran a passageway, on which opened the living apartments he occupied with his wife. From the passageway also opened a washroom, from which there was a door to an alleyway. Evidently there was another door leading either from the passageway or the washroom to an inclosed yard. Shortly before 10 o'clock on the night in question the appellant, a stranger, entered the saloon and was served with liquor. About 10 o'clock the saloon was closed by Logue. He went to his living apartments across the hall, and, after closing the door from the passageway to the living apartments, he retired with his wife. The door was fitted with a Yale spring lock, which, the evidence showed, automatically locked the door when it was tightly closed. Logue testified that he had slammed the door. Shortly before midnight Logue was awakened by his wife, who said something unusual was occurring in the corridor. He arose, and on going to the door leading to the passageway found it open, and saw the appellant standing there. He slammed the door, and he testified the appellant then tried to shove the door in, and that the appellant made some exclamation, which Logue described as a "yell of dissappointment." Logue immediately went into another room, the back one of the living apartments, and saw the appellant trying to get over the fence from the yard. The appellant then ran out of the alleyway. Logue telephoned to the police station, and after a few minutes accompanied an officer to Daly City, where the appellant was arrested, after having been identified by Logue. At that

time the appellant had whitewash on the upper portion of his clothing, which it was claimed was from the fence of the yard. The officer testified that when the appellant was arrested, in response to a statement of the officer that Logue claimed he had committed burglary at his residence, he said, "You have the right man—I am the man."

On behalf of the appellant it is argued that under the presumption of innocence which attends the accused, and in view of the silence of the record as to the appellant leaving the saloon after he was served with drinks, the state failed to show a burglarious intent on the part of the appellant. It is argued that he may have gone into the corridor under the influence of liquor, and on coming to his senses after the saloon was closed he was simply trying to find a way out of the corridor. The appellant relies on the rule announced in People v. Barry, 94 Cal. 484, 29 Pac. 1026, and People v. Brittain, 142 Cal. 10, 75 Pac. 314, 100 Am. St. Rep. 95. The defendant took the stand on his own behalf and testified that on the day in question he had been drinking.

The question of criminal intent is one to be determined by the jury from all the evidence. People v. Swalm, 80 Cal. 46, 22 Pac. 67, 13 Am. St. Rep. 96; People v. Noon, 1 Cal. App. 44, 81 Pac. 746. The evidence that the locked door of the living apartments was opened; that the appellant was discovered at the door, and concerning his statement to the arresting officer, was believed by the jury who heard the testimony. It was sufficient to support the verdict, and any conflict between the evidence of the appellant and that produced on behalf of the state on appeal must be resolved against the appellant. People v. Emerson, 130 Cal. 562, 62 Pac. 1069.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

43 Cal. App. 199

WEST v. BOARD OF EDUCATION OF PASADENA CITY SCHOOL DIST. et al. (Civ. 3101.)

(District Court of Appeal, Second District, Division 1, California. Sept. 6, 1919.)

1. Schools and school districts 🔑80(1)—Offer and acceptance of contract employing school superintendent.

Where the resolution of the board of education of a city appointing a superintendent of schools was sufficient in form to express contractual terms, if accepted, and the employment as offered was promptly accepted, a binding contract arose between the board and the superintendent, unless the board's action was unauthorized in some particular.

2. Schools and school districts 🔑79—Appointment under city charter of superintendent of schools.

Under Pasadena City Charter, art. 16 (as to the department of education) §§ 6, 7, the board of education was authorized to appoint a superintendent of schools, to fix his salary, and to limit his term of office to the four years specified by Pol. Code, § 1793, which the electors, in adopting the charter, and the Legislature, in ratifying it, intended should control as to the term of office.

Petition for writ of mandate by John Franklin West against the Board of Education of the Pasadena City School District, the Pasadena City High School District of Los Angeles County, and George W. Woolley and others, members of and constituting the Board of Education. Peremptory writ directed to be issued.

Woodruff & Shoemaker, of Los Angeles, for petitioner.

James H. Howard, of Pasadena, for respondents.

A. J. Hill, Co. Counsel, of Los Angeles, amicus curiæ.

JAMES, J. Mandate to compel respondents to permit petitioner to exercise the duties of the office of superintendent of schools of the Pasadena city school district and the Pasadena city high school district, and to require respondents to draw a warrant in petitioner's favor for the sum of $375 in payment of his salary as such superintendent for the month of July, 1919.

On the 24th of June, 1919, the board of education of the city of Pasadena held a regular meeting; there being three of the five members constituting the board present. These three members unanimously adopted a resolution or motion for the employment of petitioner to be superintendent of schools for the city of Pasadena for the term of four years, beginning July 1, 1919, at a salary of $4,500 per annum, payable monthly. On July 2d an adjourned meeting of said board was regularly held, the same three members being present, and it evidently being the apprehension that the action on the 24th of June was not expressed with sufficient formality in the resolution then adopted, the board adopted the following further resolution:

"Resolved, that the action of this board on Tuesday, the 24th day of June, 1919, in declaring that the contract of employment then existing between this board and Dr. Jeremiah M. Rhodes expired by its terms on June 30, 1919, and in appointing John Franklin West of San Diego, superintendent of the city schools of the Pasadena city school district and the Pasadena city high school district, for a term of four years, beginning the 1st day of July, 1919, and ending on June 30, 1923, be and the same is hereby ratified and approved; and

"Be it resolved, further, that in event the legality of the action of this board taken on the 24th day of June, 1919, in filling the office of superintendency of schools for the ensuing term, should be questioned upon any ground whatever, then this board will and does here now at this meeting appoint the said John Franklin West as superintendent of the Pasadena city school district and the Pasadena city high school district, for the term of four years, commencing on the 1st day of July, 1919, and ending on the 30th day of June, 1923, at a salary of four thousand five hundred dollars ($4,500) per annum, payable monthly; and

"Be it further resolved, that the vice president and clerk of this board be and they are hereby empowered and directed to enter into a contract of employment with the said John Franklin West in the name and on the behalf of this board, under and in pursuance of these resolutions."

[1, 2] Petitioner having been notified of the action taken by the board at its meeting on the date first mentioned, under date of June 25, 1919, dispatched to the said board a telegram accepting the employment in the words following:

"Accept the appointment as city superintendent of your school, on terms and conditions stated in your telegram."

The office of superintendent of schools had theretofore been filled by Jeremiah M. Rhodes, whose term (being of four years' duration) expired on June 30, 1919. On July 7, 1919, the incoming board of education organized, an election having changed the personnel only as to one member; that one outgoing member being one of those who had participated in the election of petitioner as superintendent. The new board, voting three to two, proceeded to adopt a resolution attempting to rescind all of the action of the preceding board in the matter of the employment of petitioner as superintendent of schools. The petition shows that petitioner has been in attendance, ready and offering to perform the duties of the office of superintendent of schools, and that the board of education has refused him that right and refused to award to him any payment for his services under the alleged contract of employment. That the meeting of the outgoing board of which the resolution employing petitioner was adopted was regular, and that the number attending and voting thereat was sufficient, is not questioned, and indeed could not be. The resolution first adopted was sufficient in form to express contractual terms, if accepted by petitioner. The employment as offered was promptly accepted, and upon acceptance being made a binding contract arose, unless by reason of the law the action taken was in some particular unauthorized.

We do not decide that the action taken before the expiration of the term of the superintendent attempted to be retired was premature. Even though it be conceded that there was no authority in the board to employ petitioner until his predecessor's term had actually expired, it does appear that the board, by the resolution adopted on the 2d of July, made a complete and second resolution wholly covering the same matter. Petitioner, as has been noted, thereafter appeared and tendered his services and offered to fill the position, so that it matters not, in our opinion, whether we say the employment was made under the resolution of June 24th or that of July 2d. The main argument of counsel is directed to the point as to whether in cities operating under freeholders' charters the general laws of the state are applicable and govern in all school matters; or whether the charter provisions affecting such questions govern exclusively. The fact is first pointed to that it is provided in section 1793, Political Code, that:

"City superinendents of public schools, elected by city boards of education, shall be elected for a term of four years. * * *"

Assuming that the general law is applicable, this express provision having been incorporated in the Code relative to the term of the superintendent of schools, petitioner contends that the board had the right to make an engagement for the four years specified. Respondents contend that the charter provisions are exclusively applicable and that those charter provisions do not authorize the board of education to make employment for such a length of time as was attempted to be done. In this connection it is urged that section 1584, Political Code (appropriate action having been taken thereunder), aids in defining the charter provision as being exclusive. It is shown by the agreed statement of facts that such action has been taken as is mentioned in section 1584. That section provides that where there has been an appropriate action in the direction required:

"Then the electors of such school district shall be deemed to have submitted to be governed in all matters relating to the management of public schools within such school district or high school district as fully and to all intents and purposes as though the electors of such school district or high school district had by their votes elected to be governed by the provisions of such charter."

The section in brief provides for the question to be submitted to the electors as to whether the charter provisions shall govern, and provides that where the electors have participated and voted at any school election held subsequent to the adoption of and under the provisions of the charter, the same effect shall follow as though the question had been specially submitted and an affirmative vote made. Petitioner contends that if the section last mentioned purports to disassociate all general statutes from connection with school affairs of a chartered city, then it is unconstitutional, for the reason that the school system is a state system, and not a municipal affair, and is controlled by general laws unless there is an absence of legislation upon the subject—citing Kennedy v. Miller, 97 Cal. 429, 32 Pac. 558. Also, Mahoney v. Board of Education, 12 Cal. App. 293, 107 Pac. 584, and other cases which generally define the school system as being a state matter and not falling within the class of "municipal affairs."

The difficulty we have in following counsel through the various phases of this argument is that it seems to invite unnecessary labor, in that the charter provisions of the city of Pasadena relating to the school department contain nothing by which it may be said the authority of the board of education to employ a superintendent for a fixed term is prohibited. We find upon that subject, under the title of "Department of Education," article 16 of the charter, the following sections:

> "Sec. 6. The board of education may, at its discretion, appoint a superintendent of schools, and prescribe the duties and fix the salary of such superintendent.
>
> "Sec. 7. In all matters not specifically provided for in this charter the board shall be governed by the provisions of the general law relative to such matters."

It then appears that no attempt is made in the charter to limit the term of the superintendent of schools authorized to be elected by the board of education. Acting under the authority alone of the charter provision, and conceding without deciding that it has exclusive effect, we would find no difficulty at all in sustaining the contract made with petitioner for four years' employment. But furthermore, the charter being silent as to the term for which the superintendent should be elected, and its provisions only authorizing the board of education "to appoint a superintendent of schools, and prescribe the duties and fix the salary of such superintendent," it follows as a natural and, we think, necessary deduction that the electors in adopting the charter, and the Legislature in ratifying it, intended that the duration or term of office of the superintendent of schools should be controlled by the general statute, which fixes the term at four years. Looked at from any angle that the argument assumes, we think that the contract of petitioner was made with full authority and must be upheld.

Peremptory writ is ordered to be issued as prayed for; petitioner to have his costs.

We concur: CONREY, P. J.; SHAW, J.

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43 Cal. App. 304

PEOPLE v. SARTORI. (Cr. 862.)

(District Court of Appeal, First District, Division 2, California. Sept. 17, 1919.)

1. ROBBERY 🔑24(1)—EVIDENCE SUFFICIENT TO SUSTAIN CONVICTION.

Evidence *held* sufficient to sustain a conviction of robbery.

2. CRIMINAL LAW 🔑559—CONSPIRACY MAY BE INFERRED FROM FACTS PROVED.

In a criminal case, the fact that a conspiracy existed may be inferred from facts proved, although there is direct uncontradicted testimony that no conspiracy existed.

3. ROBBERY 🔑15—SUFFICIENCY OF EVIDENCE TO SUSTAIN CONVICTION.

In a prosecution for robbery, where defendant was charged as a principal on the theory that, although not present at the time of the robbery, he aided and abetted in its commission, under Pen. Code, § 971, it was not necessary that a detailed plan of the robbery had been arranged among the different parties charged with the crime.

Appeal from Superior Court, Fresno County; M. F. McCormick, Judge.

Richard Sartori was convicted of robbery and appeals. Affirmed.

Frank Curtin, Short & Sutherland, and Carl E. Lindsay, all of Fresno, for appellant.

U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and R. L. Chamberlain, of Sacramento, for the People.

NOURSE, J. Defendant was charged, together with his codefendants Sasselli and Gatti, with the crime of robbery by taking from the possession of one Joe Ponti a certain sum of money by force and fear. Defendants Sasselli and Gatti both entered pleas of guilty. The defendant Sartori stood trial, was convicted by the jury, and prosecutes this appeal. The sole ground for reversal urged in his behalf is that the evidence is insufficient to justify the verdict of conviction.

The undisputed facts are that this defendant first met Ponti in a saloon in Fresno one evening at about 6:30 o'clock; that Ponti had just recently arrived from Stockton; that the two had several drinks together at the bar, where Ponti displayed considerable money; that the other two defendants were in the same saloon drinking at the same bar; that defendant Sartori left Ponti for a short time and went out to the sidewalk, where he met Sasselli, to whom he said:

> He "had a friend inside, from Stockton; he has $80; saw him buy a drink, and he changed a $20 gold piece."

It then appears that after more drinks were had Sartori suggested to Ponti that they go out and have some tamales. As they stepped outside of the saloon, he urged Ponti to get into Sasselli's automobile, which was standing near by, saying he would follow on his bicycle. Ponti, Sasselli, and Gatti drove off in the automobile, and Sartori followed for a few blocks on his bicycle. Sasselli, driving the machine, turned into the country, and when several miles out of town he and Gatti forcibly took Ponti's money from him, put him out of the machine, and turned back to town.

On their way back Gatti gave Sasselli $50, telling him he had taken $75 from Ponti and that $25, half of that given to him, was for Sartori and half for himself. When they reached town, Gatti got out of the machine and Sasselli proceeded a few blocks until he picked up Sartori, to whom he handed $25, telling him that Gatti had taken $75 from Ponti and had given him $50 to be divided between Sartori and himself. Thereafter Sartori went to the saloon where he first met Ponti, and, as he entered, overheard Ponti relating his experiences to the proprietor and accusing "the man with the bicycle." Sartori stepped up, and as to what then occurred the testimony of the proprietor of the saloon shows:

> "Sartori comes in, and he says to Ponti, 'I am the man with the bicycle.' And so Ponti says, 'I will go up to make my own complaint and to fight it out,' and Ponti asked me what place was the police headquarters, and I show him. And Sartori says: 'If you want to go out there, I will show you; I will go with you.' And so when it started that way, and Sartori says, 'If you put me in the complaint, I will fix you,' and Ponti says, 'Never mind,' he says, 'I am going to make my own complaint,' and so Sartori tells him again, 'I will fix you.' At the same time he hit him and he fell on the floor."

[1] It is undisputed that this defendant was not present at the time the crime was committed. To show his participation in the crime the prosecution relies upon the following circumstances: That he endeavored to make himself very agreeable to the complaining witness as soon as he learned that he had money to spend; that he told his codefendant Sasselli that the complaining witness had $80; that he urged the complaining witness to go out to get something to eat and then persuaded him to get into the automobile of Sasselli; that he accepted $25 of the money taken from the complaining witness, which represented one-third of the profits of the robbery; and that, when this defendant re-entered the saloon and heard the complaining witness telling of the robbery and placing the blame on the man with the bicycle, he immediately asserted his innocence, although still retaining his share of the spoils, and attacked the complaining witness when he learned that a criminal charge was to be laid against him. This defendant attempts to explain the receipt of the money from Sasselli by saying that Gatti owed him money, but his testimony was far from convincing, and, like the rest of his story, came from a man showing a guilty knowledge of the entire affair. After a careful examination of the entire record, it is difficult to see how the jury could have reached any other verdict than that returned.

[2] Appellant, attacking the verdict, insists that, as the prosecution failed to prove a conspiracy through the testimony of Sasselli and Gatti, the jury was not justified in drawing an inference of guilt under the circumstances which occurred. The argument is that, where direct uncontradicted evidence is introduced to show that no conspiracy existed, the jury is not warranted in drawing the inference of the existence of such conspiracy from the facts proved, citing Maupin v. Solomon, 183 Pac. 198. But if the rule of that decision is as stated by appellant, then it cannot be the rule in criminal cases. If it were, there could be no conviction on circumstantial evidence if the defendant or any one in his behalf took the stand and directly denied the commission of the crime.

[3] In the instant case the defendant is charged as a principal on the theory that, although not present at the time of the robbery, he did aid and abet in its commission. Pen. Code, § 971. It is not necessary for the prosecution to prove that a detailed plan of the robbery had been arranged among the three parties. No conversation may have been necessary between Sartori and Sasselli or between Sartori and Gatti. Sartori gave the information regarding Ponti's possession of the money, and urged him to get into Sasselli's automobile with Gatti on the representation that they were going to have something to eat.

All of the circumstances lead inevitably to the conclusion that the defendant participated in the fruits of the crime with guilty knowledge and criminal intent. The jury chose to follow the only inference that could be reasonably drawn from these circumstances rather than the denials made by those jointly charged with the crime.

The evidence as outlined is sufficient to support the verdict, and the judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

43 Cal. App. 251

PEOPLE v. RAZO. (Cr. 864.)

(District Court of Appeal, First District, Division 2, California. Sept. 11, 1919. Rehearing Denied by Supreme Court Nov. 10, 1919.)

1. WITNESSES 🔑282½ — REPETITION OF CROSS-EXAMINATION PROPERLY DENIED.

Where cross-examination of complaining witness had been very complete and comprehensive, court's refusal to permit further examination, as to matters which had been covered several times in the course of the cross-examination, was proper, under Code Civ. Proc. § 2044, giving the trial court power to exercise a reasonable control over the cross-examination of a witness.

2. CRIMINAL LAW 🔑719(3) — ARGUMENT OF PROSECUTING ATTORNEY PROPER SUMMING UP OF EVIDENCE.

Where complaining witness had testified on cross-examination that he had not discussed case with deputy district attorney, and that he had visited the office of such attorney, but had left without discussing case, because attorney was busy, deputy district attorney's statement in argument to jury that complaining witness' testimony was that "he had not discussed the case over with me at all; he came to my room intending to talk it over with me, but I was busy, and did not talk it over with him"—*held* a proper summing up of testimony as against objection that the deputy district attorney was stating his own knowledge of the subject.

3. CRIMINAL LAW 🔑1171(3)—STATEMENT OF FACT IN ARGUMENT TO JURY HARMLESS ERROR.

Where complaining witness unequivocally stated during cross-examination that he had not discussed case with deputy district attorney, deputy district attorney's statement in argument to jury that the testimony of complaining witness was that "he had not talked the case over with me at all; he came to my room intending to talk it over with me, but I was busy and did not talk it over with him"—if improper as statement of deputy district attorney's own knowledge, was harmless.

4. CRIMINAL LAW 🔑323—TRUTH OF TESTIMONY WILL BE PRESUMED.

The testimony of every witness will be presumed to be truthful.

5. CRIMINAL LAW 🔑1206(1) — INDETERMINATE SENTENCE LAW CONSTITUTIONAL.

Indeterminate Sentence Law (Pen. Code, § 1168; St. 1917, p. 665), *held* constitutional as to offenses committed after its enactment.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Ramon Razo was convicted of robbery, and he appeals. Affirmed.

M. W. Sevier, of San Francisco, and George M. Naus, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal by the defendant from a judgment of conviction of the crime of robbery. The appellant presents three points upon the appeal. We shall discuss them in the order in which they are urged. The first is that the cross-examination of the complaining witness Scott upon a vital fact was improperly and unnecessarily limited by the trial court. Scott testified that on November 14, 1918, at about 10 o'clock in the evening, he was walking along the street in Oakland when he was attacked by the defendant and another person; that the defendant knocked him down and cut him with a knife and the other person searched his pockets and took from them two coins, a five and ten cent piece. Appellant argues that, as it was necessary for the state to prove that the defendant actually took some property from Scott, therefore the question of whether Scott actually had the coins becomes decisive. He urges that the excluded questions were directed toward this matter and should have been allowed. But this matter was testified to repeatedly by Scott upon his cross-examination. He said he had a Canadian dime and a nickel in his pocket when he left his home, a few moments before the attack; that he looked at the coins before leaving home, and he knew they were there; that he had his hand in his pocket and felt such coins as he was walking on the street and up to the moment of the attack; that his pockets were good; and that the money could not have rolled out in the struggle on the sidewalk. Scott was a negro Pullman porter. It is true that he did not always answer questions as directly as might have been desired; but his examination discloses no effort to evade, but merely the difficulties which come from a lack of precision in speech and in thought, the natural consequences of lack of training. It is evident that he had difficulty in comprehending the exact meaning of many of the questions, and this in itself made it necessary for many questions to be asked a number of times. The court permitted this, and it seems to us that the cross-examination is very complete and comprehensive.

[1] Appellant contends that he should have been allowed to ask five certain questions. It is not necessary to discuss the relevancy of each of these questions here. In so far as they were relevant and proper cross-examination, their substance was covered several times in the course of the cross-examination. It appears that the direct examination of Scott covers 7 typewritten pages in the record, while the cross-examination covers over 50 pages. The trial court has the power to

exercise a reasonable control over the cross-examination of a witness (section 2044, Code Civ. Proc.), and we think that was all that was done in this case.

The second point urged by appellant is that the deputy district attorney was guilty of misconduct in his argument to the jury. The facts relating to the incident complained of are that the attorney for the defendant upon cross-examination asked the complaining witness several times if he had talked the case over with the deputy district attorney, to which he replied that he had not. In reply to further questions, Scott stated that he had gone to the office of the deputy district attorney at the close of the trial on the first day and had remained there a short time, but they had not talked about the case; that, during the three or four minutes that he remained in the office of the deputy district attorney, said deputy was talking to some one else, and he (Scott) was waiting for him to finish talking. In his argument to the jury, the deputy district attorney referred to the attempts of counsel for the defendant to impute to him improper practices in the preparation of his witnesses for the trial; he admitted that he had talked with all the witnesses in the case with whom he had had an opportunity to talk, as a regular and customary part of his duty. He continued as follows:

> "I say, frankly, and very gladly, that every witness that I could get my hands on, who was going on the stand, told me definitely what his testimony was going to be, because I wanted to know what the testimony was going to be."

At this point he was interrupted by the counsel for the defendant, who objected to these remarks for the alleged reason that they contradicted the testimony of the witness Scott, who had testified that he did not talk with the deputy district attorney. The deputy district attorney then, in reply to this objection, explained his remark to the jury by saying:

> "I said every witness that I could get my hands on; I could not get my hands on Mr. Scott."

Attorney for the defendant then called attention to the testimony of Mr. Scott, saying:

> "And Mr. Scott's further testimony was that he was in Mr. Agnew's room, with the door closed."

To which the deputy district attorney answered:

> "The testimony of Mr. Scott was that he had not talked the case over with me at all; he came to my room intending to talk it over with me, but I was busy and did not talk it over with him."

Appellant contends that this statement of the deputy district attorney, explaining why he did not talk to Scott, was outside of the record and corroborated the witness, and was therefore improper. As the statement appears in the record, it is susceptible of being construed as a statement of the testimony of Mr. Scott, and as such it is sustained by the record, for we find upon cross-examination that Scott testified as follows:

> "Q. Where did you go with him, after you went through that door? A. Out in his office. Q. Into his office. A. Yes, sir. Q. What did he talk about in there—the weather? What did he talk about? A. Talked about nothing. Q. Didn't talk about anything. How long were you in the room with him? A. About three or four minutes. Q. What did he do during the time you were in his office three or four minutes? A. He was talking to some one else."

And again:

> "Q. What were you doing during the three or four minutes, or whatever time it was, that you were in Mr. Agnew's office yesterday evening? A. I was waiting for him to get through talking."

Scott also testified that he went to the office of the deputy district attorney for the purpose of discussing the case.

[2, 3] It does not seem to be an improper summing up of this testimony to say that—

> "The testimony of Mr. Scott was that he had not talked the case over with me at all; he came to my room intending to talk it over with me, but I was busy and did not talk it over with him."

However, let us assume that the appellant's construction of this remark is correct and that the deputy district attorney was not referring in the latter part of the sentence to the testimony of Scott on the stand, but was stating his own knowledge of the subject. While clearly this would be misconduct upon his part, yet such misconduct, we think, under the special circumstances of this case, would not be such prejudicial error as to warrant a reversal. Appellant's argument is based upon an insistence that the fact of whether or not the witness Scott talked with the deputy district attorney was important to the defendant's case. But we have the repeated, unequivocal statement of Scott that he did not talk to him.

[4] There is a presumption that follows the testimony of every witness that such witness speaks the truth, and this witness remains uncontradicted on this point. Both Scott and the deputy district attorney admitted that they wished to talk to one another about the case. Scott testified that he went to the office of said deputy for the purpose of talking about the case, and the deputy district attorney stated in his argument to the jury that he talked with every witness in the case that he could "lay his hands on," and would have talked with Scott if he had had the opportunity. The reason why this avowed intention and desire on the part of both was

not carried out cannot have any bearing upon the matter one way or the other.

[5] The last point made by the appellant is that the judgment is erroneous because the Indeterminate Sentence Law (section 1168, Pen. Code; St. 1917, p. 665), under which it is imposed, is unconstitutional. It is necessary for us to discuss this question, because it has been passed upon in Re Lee, 177 Cal. 690, 171 Pac. 958, which upholds the validity of this section as to offenses committed after its enactment.

The judgment is affirmed.

We concur: NOURSE, J.; BRITTAIN, J.

(43 Cal. App. 158)

FINDLEY et al. v. LINDSAY. (Civ. 2980.)

(District Court of Appeal, First District, Division 1, California. Sept. 4, 1919.)

1. PLEADING 🔑263 — REFUSAL OF AMENDMENT TO ANSWER NOT ABUSE OF DISCRETION.

Where an action on a note was set for trial, though the answer of defendant did not deny his default, and merely denied on information and belief that the instrument had been transferred to plaintiffs, refusal to permit an insufficient amended answer, during the progress of the trial, after defendant's vain attempt to secure postponements, was not an abuse of discretion.

2. COSTS 🔑260(4)—GRANTED ON FRIVOLOUS APPEAL.

Where the whole progress of the trial showed an attempt on the part of defendant to secure a delay, though there was no defense and it appeared that defendant appealed on wholly frivolous grounds, a penalty will be imposed upon the judgment being affirmed.

Appeal from Superior Court, Los Angeles County; L. R. Hewitt, Judge.

Action by M. W. Findley and others against Lycurgus Lindsay. From a judgment for plaintiffs, defendant appeals. Affirmed, with penalty for the taking and prosecution of a frivolous appeal.

A. L. Abrahams, C. W. Fricke, and W. I. Gilbert, all of Los Angeles, for appellant.

E. A. Meserve and S. E. Meserve, both of Los Angeles, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff in an action to recover the sum of $15,000 with interest, attorneys' fees, and costs, alleged to be due upon a promissory note of the defendant.

The only question presented upon this appeal is as to whether the trial court erred in denying the defendant's application to amend his answer at the time of the trial of the case.

That this is one of the most flagrant instances of abuse of the processes of justice for purposes of delay and of a frivolous appeal which has come within our purview the following undisputed facts will show: The plaintiffs commenced this action on May 13, 1916, by filing their complaint upon a promissory note and contract, which were set forth therein and which called for the payment to the plaintiffs of the sum of $15,000 by the defendant as the purchase price of 1,287½ shares of the capital stock of the Independent Sewer Pipe Company and 4 shares of the capital stock of the Pacific Tile & Terra Cotta Company. On June 26, 1916, the defendant filed his answer herein, admitting all of the allegations of the complaint with respect to the purchase of the said stock and the execution of the note and contract, but denying for want of information and belief an averment in the complaint to the effect that the trustee mentioned in the contract had assigned and transferred to the plaintiffs the note in question after the maker's default according to the terms and requirements of said contract, which assignment and transfer it was the duty of the said trustee pro forma to make upon the plaintiffs' demand after such default, according to the express agreement of the defendant in said contract. As the defendant's default was not denied it would seem that this sole denial of the defendant for want of information and belief did not present a material issue. The plaintiffs, nevertheless, moved the court on July 3, 1916, to set the cause for trial. The defendant appeared in opposition to said motion by one of his attorneys of record, who announced in court that he intended to file an amended answer, setting up fraud in the obtaining of said note. The court set the cause for trial on October 25, 1916, in order to allow the defendant ample time to prepare, serve, and file said amended answer if he so desired. A few days before the said date of trial an assistant in the office of an attorney, who was not one of the attorneys of record for said defendant, made an effort to have the trial of the cause further postponed on the ground that his principal expected to be employed to try the cause on behalf of the defendant. This effort was unsuccessful. On the morning of October 25, 1916, when the cause was called for trial one of the attorneys of record for the defendant appeared to suggest that another of his attorneys of record could not be present, but had arranged with the above-mentioned attorney who was not of record to try the cause, and the latter could not do so because he was engaged in a trial in another court. The court's attention was then called to the fact that said last-named absent attorney was not an attorney of record in the case, and furthermore that no amended answer had ever been served or filed. The attorney of record for the defendant, who was then present in court, and who had previously announced the defendant's purpose to present such an amended answer, made no statement or offer indicating that the defendant intended or desired to amend his pleading, whereupon the court set the cause peremptorily for trial for the hour of 1 o'clock p. m. of said day. At said hour the aforesaid attorney not of record for the defendant was present to ask a further postponement of the case, which request the court refused to grant. The trial then proceeded, and after a witness for the plaintiff had been sworn one of the attorneys of record appeared with an affidavit and amended answer of the defendant which he then asked leave to file. The affidavit presents no sufficient reason whatever as an excuse for the defendant's delay in presenting his amended answer, and the amended answer presents no sufficient averments of fraud in respect to the transaction in the course of which said note was executed by the defendant to constitute a defense thereto. The court, after an examination of said affidavit and answer, refused permission to the defendant to file the same, and ordered the trial to proceed. The defendant presented no evidence upon the further hearing of the case, and judgment accordingly went for the plaintiff for the recovery of the full amount due upon the note, with counsel fees and costs. The defendant appealed to the Supreme Court, the notice of appeal being filed on November 15, 1916. The appellant's opening brief was filed February 16, 1917. The respondents' brief, filed March 19, 1917, directed attention to the foregoing facts as disclosed by this record, and urged that the appeal was frivolous and taken for delay. No reply brief on behalf of the appellant has ever been filed. The cause was transferred to this court for hearing on May 19, 1919, and was set for argument on August 11, 1919. No appearance was made by appellant on said date, and the cause was submitted without argument for decision.

[1, 2] As to the merits of the case it is obvious that the trial court committed no error or abuse of discretion in refusing defendant leave to file his belated and insufficient amended answer; and it appears to us equally obvious that the whole procedure of the defendant herein from the time of his first appearance in the case down to the present moment has been marked with a deliberate design to delay the operations of justice in respect to the enforcement of his just and legal obligation, and to persist in and consummate such purpose by the taking and prosecution of a frivolous appeal.

The judgment is affirmed, with the added penalty of $500 hereby imposed upon the appellant for the taking and prosecution of a frivolous appeal.

We concur: WASTE, P. J.; BARDIN, Judge pro tem.

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43 Cal. App. 259

EADES v. LOS ANGELES RY. CORPORATION et al. (Civ. 3031.)

(District Court of Appeal, First District, Division 2, California. Sept. 15, 1919.)

1. COSTS ⚷154—ITEMS OF DISBURSEMENT FOR TAKING DEPOSITIONS IN COST BILL.

Items for taking depositions are proper disbursements to be put into a cost bill, unless they were unnecessary, or for some special reason should not be allowed.

2. COSTS ⚷154—ITEM FOR EXPENSE OF TAKING NECESSARY DEPOSITION OF PLAINTIFF.

Where the taking of the deposition of plaintiff was regular in all particulars, as provided by Code Civ. Proc. § 2021, subd. 1, and there was no contradiction of the allegations of defendant that the deposition was necessary for the trial, the expense of taking it was a proper item on defendant's cost bill.

3. COSTS ⚷154—EXPENSE OF DEPOSITION NOT CHARGEABLE AGAINST PARTY WITHOUT NOTICE OF TAKING.

Where no notice was given to plaintiff of taking of deposition of one of the three defendants, under Code Civ. Proc. §§ 2031, 2032, it was not entitled to be admitted in evidence against plaintiff, and he may not be charged with it as costs.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Herbert Eades, a minor, by his guardian ad litem, Walter L. Eades, against the Los Angeles Railway Corporation, a corporation, Maude Funk, and another, resulting in judgment for defendant Railway Corporation. From an order after judgment, granting plaintiff's motion to retax costs, and strike items from the Railway's cost bill, it appeals. Order modified and affirmed.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal from an order of the superior court, made after judgment in favor of the defendant Los Angeles Railway Corporation, the appellant here, which order granted the motion of plaintiff to retax costs and struck from the cost bill of said defendant an item of $8.50 for the taking and transcribing of the deposition of plaintiff, and an item of $17 for the taking and transcribing of the deposition of F. C. Funk, one of the defendants. The motion to retax costs was made upon the

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

grounds that the items were not taxable under the law and that the deposition of F. C. Funk was taken without the notice or knowledge of the plaintiff.

Upon the hearing of the motion the parties stipulated as to all material facts, from which stipulation it appears that the deposition of plaintiff was taken by the defendant and appellant under and by virtue of the provisions of subdivision 1 of section 2021, Code of Civil Procedure, said deposition having been taken upon stipulation of all of the parties to the said action. It also appears that the deposition of F. C. Funk was taken upon a stipulation entered into between counsel for defendant Funk and counsel for defendant Los Angeles Railway Corporation, the appellant, but that the counsel for plaintiff did not sign said stipulation and had no notice of the taking of said deposition, and plaintiff was not represented at the taking thereof. In addition to the stipulations regarding these facts, upon the hearing of said motion, the appellant filed an affidavit of its counsel to the effect that both depositions were necessary to the preparation and trial of its case. No evidence was offered by the plaintiff to contradict this affidavit, and the motion to retax costs was not made upon the ground that the depositions were not necessary.

[1, 2] It is stated to be the rule that items for taking depositions are proper disbursements to put into a cost bill, unless they are unnecessary or for some special reason should not be allowed. Lindy v. McChesney, 141 Cal. 351, 353, 74 Pac. 1034; Cal., etc., Co. v. Schiappa-Pietra, 151 Cal. 732, 745, 91 Pac. 593. The taking of the deposition of the plaintiff, being regular in all particulars, as provided by the Code of Civil Procedure, and there being no contradiction of the allegations in the affidavit that this deposition was necessary for the trial of the action, the expense of taking the same was a proper item upon the cost bill and should have been allowed.

[3] As to the expense of the deposition of the defendant Funk, we think the action of the trial court was proper. It is true that section 2021, Code of Civil Procedure, provides for the taking of a deposition of a party to an action. However, section 2031, Code of Civil Procedure, provides how such depositions may be taken "on serving upon the adverse party previous notice of the time and place of examination," together with a copy of an affidavit showing that the case is within the provisions of section 2021. Section 2032, Code of Civil Procedure, provides that, when a deposition is regularly taken in the manner provided therein, it may be used by either party upon the trial or other proceeding against any party giving or receiving the notice. It being admitted that no notice was given to the plaintiff of the taking of this deposition, such deposition was not entitled to be admitted in evidence as against him. It is stated in the affidavit of the appellant that at the trial the plaintiff objected to the introduction of the deposition upon this ground. As this deposition was not regularly taken so as to make it admissible in evidence against the plaintiff, it would seem to follow that plaintiff may not be charged with it as costs.

The order appealed from is modified by allowing the item of $8.50, the expense of taking the deposition of plaintiff, thus increasing the amount of costs allowed to appellant from $47.70 to $56.20. As modified, the order appealed from is affirmed, the appellant to pay its own costs.

We concur: BRITTAIN, J.; NOURSE, J.

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43 Cal. App. 279

CARL v. McDOUGALL. (Civ. 3039.)

(District Court of Appeal, First District, Division 2, California. Sept. 16, 1919.)

1. FORGERY ⚷5, 27 — INTENT TO DEFRAUD ESSENTIAL TO CRIME.

In a prosecution for forgery, the intent to defraud is not only an essential element of the crime, but is essential to every indictment for the offense.

2. LIBEL AND SLANDER ⚷2—INTENT IMMATERIAL EXCEPT AS TO EXEMPLARY DAMAGES.

If defendant's words were slanderous as to plaintiff, the intention with which they were used is immaterial, except possibly on the question of exemplary damages.

3. LIBEL AND SLANDER ⚷7(12)—CHARGE OF FORGERY INCLUDES ALL ELEMENTS OF OFFENSE.

Defendant's charge that plaintiff was a forger, and had forged defendant's name to a check, necessarily included all elements of the crime of forgery, including the element of intent to defraud, and charged a felony.

4. LIBEL AND SLANDER ⚷124(1)—INSTRUCTION DEFINING OFFENSE IN ACTION FOR CALLING PLAINTIFF FORGER PROPER.

In an action for slander by having called defendant a forger, the court properly instructed that, to enable the jury to determine whether the language used by defendant amounted to an accusation of the crime of forgery, he would define the offense, and that Pen. Code, § 470, provided that every person who with intent to defraud signed the name of another or of a fictitious person, knowing he had no authority to do so, to a check, committed forgery.

5. LIBEL AND SLANDER ⚷7(12)—CHARGE OF FORGERY SLANDEROUS.

If defendant charged plaintiff with the crime of having forged defendant's name to a check, such charge was slanderous.

6. Libel and slander ⚷100(8)—No variance between pleading and proof.

In an action for slander, testimony that defendant said of plaintiff, "He forged a check on me," and, "He had a check which he forged his name to it," *held* not a fatal variance from plaintiff's allegation that defendant said, "Mr. Carl (plaintiff) is a forger," for, though plaintiff must prove the use of the particular slanderous words, it is sufficient if enough of the words alleged are substantially proved to constitute the sting of the charge.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Suit by Marcel Carl against D. McDougall, administrator of the estate of Theodore Wiesendanger, deceased. From judgment for plaintiff, defendant appeals. Affirmed.

F. F. Oster and Peyton H. Moore, both of Los Angeles, for appellant.

W. C. Shelton, of Los Angeles, for respondent.

BRITTAIN, J. In a suit against Theodore Wiesendanger, the plaintiff, Marcel Carl, was awarded a verdict for $300 actual and $700 punitive damages for slander. Wiesendanger appealed from the judgment entered upon the verdict. After the death of the appellant, upon suggestion, the administrator of his estate was substituted.

The complaint was in two counts, and in it the plaintiff in substance alleged the defendant had to two different persons, then the employers of the plaintiff, on the same day but at different times, accused the plaintiff of having forged the defendant's name as the indorser of a certain check. The appellant makes six specifications of error, which may best be discussed in what appears to be their logical order. They are closely related and all refer to the allegation that the defendant said:

> "Mr. Carl is a forger. He has forged my name to a check, and I have a lithographed copy of the check in my office."

[1-3] In criminal prosecutions for forgery, the intent to defraud is not only an essential element of the crime of forgery, but is an essential element to every indictment for forgery. People v. Turner, 113 Cal. 278, 45 Pac. 331; People v. Smith, 103 Cal. 563, 37 Pac. 516. In reliance upon this strict rule of criminal pleading, the appellant contends the complaint in the present case was fatally defective, in that it contained no allegation that the slanderous words were used with the intention of charging that the plaintiff had forged the indorsement intending thereby to defraud. If the words were slanderous, the intention with which they were used is immaterial, except, possibly, upon the question of exemplary damages. The rule relied upon by the appellant binds him. The charge of forgery necessarily includles all the elements of the crime. If the defendant accused the plaintiff of forgery or said the plaintiff had forged a check, he accused the plaintiff of a felony. It is not necessary that the language used should be chosen with the technical nicety required in an indictment. Mitchell v. Sharon (C. C.) 51 Fed. 424, 425. Under the contention of the appellant none but those trained to observe the technicalities of criminal procedure would be able to slander their neighbors, and they would know how to limit their statements so they might do the wrong and avoid its consequences. Where one accuses another of having forged his name to a check, the language can mean nothing other than that the person accused has been guilty of a felony.

[4, 5] The appellant contends the court erred in instructing the jury that, in order to enable them to determine whether the language used by the defendant amounted to an accusation of the crime of forgery, he would define for their purposes the offense of forgery, and in further instructing them that—

> "Section 470 of the Penal Code provides in effect that every person who with intent to defraud signs the name of another person or of a fictitious person, knowing that he has no authority so to do, to a check, commits a forgery."

The appellant argues that there was no allegation in the complaint that the language used was to be construed in any other manner than according to its plain and literal meaning, and that it was the duty of the trial court to construe the language. This the court did in defining forgery. He had previously properly instructed the jury that they must determine whether or not the defendant charged the plaintiff with the crime of forging his name to a check. If such a charge was made it was slanderous. Childers v. San Jose Mercury, 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40; Smullen v. Phillips, 92 Cal. 408, 28 Pac. 442.

[6] The appellant contends there was a fatal variance between the words alleged and those proved. Neither of the two witnesses to whom the statement was made testified that the defendant said, "Mr. Carl is a forger," but one testified the defendant said of Carl, "He forged a check on me," and the other, that the defendant said, "He had a check which he forged his name to it." The appellant relies on those cases which hold that in a civil suit for slander the plaintiff must prove the use of the slanderous words, and that it is unavailing that the jury imputes a slanderous meaning to other words. Fleet v. Tichenor, 156 Cal. 343, 104 Pac. 458, 34 L. R. A. (N. S.) 323; Haub v. Friermuth, 1 Cal. App. 556, 82 Pac. 571. The rule is unquestionable and was properly applied in those cases. In the Fleet Case the charge

was that the defendant had said the plaintiff "stole" certain jewelry. The evidence was that the defendant said the plaintiff had "taken" the jewelry. The word "taken" does not imply the commission of a crime. The statement that a man has forged a check can imply nothing else. The appellant testified he had not made the statement. The jury believed the other witnesses. The statements of the plaintiff's witnesses were within the rule that slander is established if enough of the words alleged are substantially proved as constitute the sting of the charge and contain the poison to the character. Fleet v. Tichenor, 156 Cal. 346, 104 Pac. 458, 34 L. R. A. (N. S.) 323; Smith v. Hollister, 32 Vt. 708; Lewis v. McDaniel, 82 Mo. 577; Merrill v. Peaslee, 17 N. H. 540; Zimmerman v. McMakin, 22 S. C. 372, 53 Am. Rep. 7.

The appellant claims the court erred in refusing to give two requested instructions and in giving another. His argument on those points is based upon the same grounds and the same rules and authorities which have been discussed. An examination of the record and all the instructions leads to the conclusion that the instructions given were fair to the defendant, complete, and in accord with the law that in such actions enough of the words alleged must be proved to contain the sting of the charge and that all the words charged need not be proved.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

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43 Cal. App. 229

WHITCOMB v. GIANNINI et al.
(Civ. 2313.)

(District Court of Appeal, Second District, Division 1, California. Sept. 8, 1919.)

1. Appeal and Error ⚿110—No appeal from order denying new trial.

An order denying motion for new trial is not appealable, and an attempted appeal therefrom should be dismissed.

2. Evidence ⚿73—Presumption in favor of regularity of corporate proceedings.

Where no showing is made that a regular directors' meeting of a certain date was illegally called, assembled, or held, if notice of the meeting was required to be given each director, it must be presumed, in the absence of contrary showing, that such notice was given.

3. Corporations ⚿298(3)—Notice to directors of adjourned meeting unnecessary.

Where a directors' meeting of a certain date was regularly held, and a majority of the directors were present, and action to adjourn to a later date was regularly taken, no notice to directors of the adjourned date was necessary.

4. Corporations ⚿298(4) — Directors' meeting not irregular because held three hours later.

The fact that the minutes of a directors' meeting showed that the directors assembled at 1 p. m., instead of 10 a. m., as ordered by the resolution of adjournment previously made at a regular meeting, is not material on the regularity or irregularity of the meeting, as it may be presumed the directors met as soon as a quorum assembled after 10 a. m., particularly in the absence of showing that the single absent director appeared after 10 and failed to remain because of lack of a quorum.

5. Corporations ⚿93—Stockholder must sue within six months after sale to set aside assessment.

Where an assessment on corporate stock levied by directors was not invalid, and the stockholders had notice of their delinquencies, the irregularity that requisite notices to directors were not given of the meeting when resolution was passed postponing a previously fixed date of sale of delinquent stock was included within Civ. Code, § 347, providing a stockholder in such case must bring his action within six months after the date of sale.

6. Corporations ⚿89(2) — Notice of assessment to one, notice to both joint stockholders.

If plaintiff was a stockholder in defendant company of whom it was bound to take notice as such, his interest in his 10 shares of stock being a joint interest with the original owner of such shares, notice to the original owner of an assessment was notice to him.

7. Corporations ⚿89(2)—Notice to company of interest of one not appearing on books.

A corporation was not compelled to take notice of the interest in 10 shares of stock of one who had acquired a joint interest therein with the original owner, and had merely had his name written on the original certificate with that of the owner, but no transfer made on the books of the company, so that the only notice the company was required expressly to give of the levying of an assessment on the stock was notice to the original owner.

8. Corporations ⚿93—Purchase of stock by director at sale for assessment.

A director in the company when an assessment was levied and sale of delinquent stock made *held* not ineligible and disqualified by any confidential relationship to the stockholder from bidding at the sale or purchasing the stock sold.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by C. S. Whitcomb against Frank Giannini and the Tulare County Power Company, a corporation. From judgment for plaintiff, and from an order denying their motion for a new trial, defendants appeal. Appeal from order denying motion for new trial dismissed; judgment reversed.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

E. I. Feemster and Middlecoff & Feemster, all of Visalia, for appellants.

Ward Chapman, of Los Angeles, and Bradley & Bradley, of Visalia, for respondent.

JAMES, J. [1] This action was brought to recover ten shares of corporate stock, or the value thereof, which plaintiff alleged had been made illegally the subject of a sale for delinquent assessment. Plaintiff had judgment, from which the defendants appeal. There was also an appeal attempted to be taken from an order denying to defendants a new trial; but, as that order was not appealable, the appeal therefrom should be dismissed.

[2-4] The contentions of the plaintiff, which were upheld by the trial court, were: First, that the meeting of the directors at which the assessment was levied was not legally called, in that the directors were not given written notice of the time and place of hearing; second, that a subsequent meeting of the directors, at which a resolution was adopted postponing the sale of stock upon which the assessment had become delinquent, was illegally held, in that the directors were not given written notice of the time and place of hearing; third, that the plaintiff as a stockholder never received a notice, nor was any sent to him, advising him of the delinquency; fourth, that defendant Giannini, who was the purchaser of the stock at the delinquency sale, being a director of the corporation, the stock of which was then being sold, was ineligible and disqualified to bid at such sale. It appeared in evidence that the 4th of August, 1914, was the day regularly set by the by-laws of defendant corporation for the holding of the regular monthly directors' meeting. There were seven directors, all of whom were present except one on the day of this regular meeting. The directors present, after the meeting was convened, adjourned the regular meeting to August 11th, at 10 a. m. The minutes of the meeting of the directors, held on the 11th day of August, showed that the meeting convened at 1 p. m., instead of 10 a. m., and that all directors again were present except one. The secretary of the corporation testified that he had given written notice by letter to this director and that he had received a telephonic communication from the director stating that he would be unable to attend the meeting. There was no evidence offered to contradict this latter showing as to the notice having been given in writing to the absent director of the meeting of August 11th. No showing was made on the part of the plaintiff that the regular meeting of August 4th was illegally called or assembled or held, and, if notice of that meeting was required to be given, it must be presumed in the absence of a contrary showing that such notice was given. Sferlazzo v. Oliphant, 24 Cal. App. 81, at page 86, 140 Pac. 289. The meeting of August 4th being regularly held and a majority of the directors being present and the action to adjourn to the later date of August 11th having been regularly taken, no notice to directors of the adjourned date was necessary. See Seal of Gold Mining Co. v. Slater, 161 Cal. 621, 120 Pac. 15, where it is said:

> "A director receiving notice of a meeting was bound to know that a quorum might adjourn, and that business might be transacted at the adjourned meeting. And this is in accordance with the general rule, which is that no notice of adjournment of a meeting regularly called need be given"—citing authorities.

Hence, not only was no notice required to be given to any director of the time and place for the holding of the adjourned directors' meeting, but the evidence without dispute shows that the only director absent on August 11th was notified in writing. The fact that the minutes of the meeting showed that the directors assembled at 1 p. m., instead of 10 a. m., as ordered by the resolution of adjournment, previously made, seems to us not to be material, for the reason that, in the absence of evidence to the contrary, it may be presumed that the directors met as soon as a quorum had assembled after the hour of 10 a. m., and especially in view, too, of the fact that no showing was made that the absent director appeared at 10 o'clock and failed to remain because of the lack of a quorum. He had previously notified the secretary that he would not appear. The directors' meeting of August 11th, at which the resolution was adopted levying the assessment against the stock of the defendant corporation, was therefore duly held and legally noticed and called. That the resolution levying the assessment was sufficient in form and substance is not disputed. In this resolution it was declared that the assessment levied thereunder should become delinquent on the 16th day of September, 1914, and that all delinquent stock on which the assessment had not been paid should be sold on the 5th day of October, 1914, at 2 o'clock p. m. On the first Tuesday in September, that being the time fixed by the by-laws for the holding of the regular monthly directors' meeting, a quorum was not present. Minority directors attempted to adjourn until September 2d. On September 2d a quorum was present and an adjournment was taken to September 17th. Five directors were present at the meeting of September 17th and an adjournment was again taken to October 3d. At the meeting of September 17th, at which there were present all but two directors, a resolution was adopted providing for the publication of a notice giving the names of those delinquent and the stock held by them, and giving notice of sale which was to take place on the 5th of October, 1914, as previously determined in the resolution levying the assessment. At the October 3d meeting, at which all directors were present except one, the absent director being the director who is defendant here, Giannini, a resolution was adopted postponing the date of sale from October 5th to November 4th, and providing for a publication of notice of such extension or postponement. We have already concluded that the proceedings up to and including the levying of the assessment were regularly taken and had, and the record further shows that subsequent proceedings up to and including the date of delinquency as fixed in the resolution last referred to, were all completed as required by law. The resolution ordering the assessment contained complete direction for the publication of the necessary notice of sale for delinquencies (Civ. Code, § 337), and the publication of that notice, it is admitted, was had in accordance with the direction of the resolution.

[5] The question as to whether the meeting of October 3d was regularly called and held, that being the meeting at which the resolution was passed postponing the date of sale to November 4th, is next entitled to consideration. If all of the directors had been present at that meeting, there would have been no question as to the legality of the action taken, regardless of the matter of notice having been given to any of them. Civ. Code, § 320a. It may be assumed that the court was correct in finding, as it inferentially did, that the requisite notices were not given of the meeting of October 3d. The assessment, as has been noted, was not invalid; the stockholders had notice of their delinquencies. Hence we think that the irregularity, if such it be, was one included within the provisions of section 347, Civil Code, which provides that a stockholder must in such case bring his action within six months after the date of sale. This action was commenced by the filing of a complaint on February 21, 1916; the sale of the stock was made in November, 1914. Assuming that the plaintiff as stockholder received all the necessary notices and that, as we have already decided, the levying of the assessment was regularly done, plaintiff's action would be too late.

[6-8] There is next to be considered the question as to whether at the times material to the levying of the assessment and making of the sale plaintiff was in fact a stockholder in defendant corporation and, if so, whether he was charged with notice. It is admitted by the defendants that no special notice was given to the plaintiff of the levying of the assessment, as required by section 336, Civil Code; that is, no notice was given to him other than such notice as might be imparted by that published in the newspaper. Admittedly the giving of notice by publication alone under the section of the Code cited would not be sufficient. The ten shares of stock referred to in this controversy were originally issued to one Hall and had never been transferred from Hall to any person upon the books of the corporation up to and including the date of sale as made under the assessment. It seems that the defendant corporation was engaged in the business of furnishing a certain form of power to its stockholders. After Hall secured his stock, he parted with some interest in land, which was affected by the stock, to this plaintiff, and the certificate of stock was taken to the office of defendant corporation and the person in charge notified of the fact that Whitcomb had become the owner of an undivided interest in the stock. There was testimony that the secretary of the corporation took the original certificate and, after the name of Hall, appearing therein, wrote the name of this plaintiff. Plaintiff testified that he was the joint owner with Hall of the stock up to the time that Hall transferred his entire interest to the plaintiff. Under the issues made by the pleadings, we must assume that this latter transfer was made after the sale for delinquent assessment. We have noted that the stock was never transferred upon the books of the corporation. It is shown that notice of the assessment was given to Hall, the record owner, and that none was given to the plaintiff. As far as can be gathered from the record the interest acquired by Whitcomb, the plaintiff, both in the property of Hall and in the stock of defendant corporation, which was useful principally in connection with that property, was in the nature of a partnership interest. Plaintiff in his testimony insisted that the interest was a joint interest, and if we are to assume that the corporation, because of the fact, as it appeared, that it had knowledge that both Whitcomb and Hall were being dealt with in connection with the power furnished to the land, is estopped from denying that plaintiff held a stockholder's interest in the corporation, then we think that it is logically to be concluded that notice to Hall was notice to Whitcomb. We are strongly inclined to the conclusion that as the stock had never been transferred on the books of the corporation the latter was not bound to recognize Whitcomb as a stockholder when it gave notice of the assessment levied. While it is true that Whitcomb stated in his testimony that he asked the secretary to see that the books were changed, he made no request at any time to have any specific number of shares of stock assigned to him, or for any new certificate to be issued to him, but went away content with the writing in of his name after Hall's on the original certificate, after stating to the secretary that he had become "jointly" interested in the stock with Hall. Section 324 of the Civil Code provides that stock may be transferred upon the books of the corporation, and provides that "until the same is so entered upon the books of the corporation as to show the names of the parties by whom

and to whom transferred, the number of the certificate, the number or designation of the shares, and the date of the transfer," such transfer, except as between the parties, should not be valid. Under the facts shown we conclude: First, that assuming the plaintiff to have been a stockholder of defendant corporation and of whom defendant corporation was bound to take notice, the interest in the stock being a joint interest, notice to Hall of the delinquent assessment was notice to him. Secondly, that it is not correct to assume the corporation was compelled to take notice of the interest in the stock of the plaintiff, but that relying upon its records, there appearing not to have been a transfer made from Hall to plaintiff, the only notice that was required to be expressly given of the levying of the assessment was the notice to Hall. The claim made and to which countenance was given by the trial judge, that Giannini, being a director at the time of the levying of the assessment and the sale made, was ineligible and disqualified from bidding at the sale or of purchasing stock sold thereat, we are not prepared to sustain. The facts shown in no way illustrate a case where the relation of the director to the stockholder was of such a confidential character as to make it a breach of faith or trust should he be permitted to purchase the stock.

In our opinion, the trial judge was in error in the making up of his conclusions as to the rights of the plaintiff.

The appeal from the order denying defendants' motion for a new trial is dismissed. The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

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DE BOCK v. DE BOCK et al. (Civ. 1896.)

(District Court of Appeal, Third District, California. Sept. 17, 1919. Rehearing Denied by Supreme Court Nov. 14, 1919.)

1. APPEAL AND ERROR 🔑757(3)—UNNECESSARY TO PRINT ALL TESTIMONY IN BRIEF.

The Legislature did not intend, by the enactment of Code Civ. Proc. § 953c, that appellant should be required to print in his brief all the testimony appearing in the record, or even all the testimony relating to the points urged by him for reversal.

2. HUSBAND AND WIFE 🔑332—COMPLAINT BY WIFE STATING CAUSE OF ACTION FOR ALIENATION.

In a wife's action for alienation of her husband's affections, complaint *held* sufficient to state a cause of action.

3. ESTOPPEL 🔑3(2)—JUDGMENT 🔑632—ESTOPPEL OF WIFE SUING FOR ALIENATION BY PREVIOUS ALLEGATIONS WHEN SUING FOR DIVORCE.

Wife *held* not estopped, in her action for alienation of her husband's affections, from denying certain facts alleged by her in her complaint in suit for divorce against the husband, defendants' attempt being to invoke an estoppel by judgment in effect, while such an estoppel can only arise and be invoked where the subject-matter of the litigation and the parties are the same.

4. EVIDENCE 🔑265(8)—PLEADING IN PRIOR SUIT REBUTTABLE AS ADMISSION AGAINST INTEREST.

In a wife's suit for alienation of her husband's affections, complaint in her prior divorce action against him can perform no other office than that of evidence of an admission on plaintiff's part that the material facts stated in her divorce complaint, which was verified, are true, not being conclusive, but rebuttable as an admission against interest.

5. HUSBAND AND WIFE 🔑333(9)—SUFFICIENCY OF EVIDENCE TO SHOW ALIENATION OF HUSBAND'S AFFECTIONS.

In an action by a wife for alienation of her husband's affections against the husband's brother, his sister-in-law, and the woman alleged to have exercised the improper influence over the husband, evidence *held* insufficient to justify verdict against such woman, but sufficient to support verdict against the brother and sister-in-law.

6. HUSBAND AND WIFE 🔑333(3)—EVIDENCE OF CONVERSATIONS IN SUIT FOR ALIENATION.

In an action for alienation of a husband's affections, evidence by plaintiff wife of conversations between herself and husband was admissible to indicate their feelings towards each other.

7. APPEAL AND ERROR 🔑237(2)—TIMELY OBJECTION TO INADMISSIBLE EVIDENCE.

Where it is not apparent from the question itself that the response will on any theory of the case be inadmissible, an objection alone to the question will be of no avail, but the party, when the inadmissible evidence is for the first time disclosed by the answer, must move to have it stricken out, and, failing to do so, cannot predicate error on the question.

8. TRIAL 🔑98—STRIKING OF INADMISSIBLE EVIDENCE.

In a wife's action for alienation of her husband's affections, testimony of a witness that the husband told her he had received two letters from a certain woman *held* effectually stricken on motion of defendants by the trial court.

9. APPEAL AND ERROR 🔑1050(1)—ADMISSION OF EVIDENCE OF FACT OTHERWISE SHOWN HARMLESS.

The improper admission of evidence was harmless to appellants, where the same fact was otherwise shown on trial without objection from them.

10. TRIAL ⊂⇒45(1)—EXCLUSION OF QUESTION TO COURT INSTEAD OF WITNESS NOT SUBJECT OF REVIEW.

In a wife's action for alienation of her husband's affections, where defendants' attorney asked the court whether he might ask plaintiff a question regarding a conversation with her husband along the lines as that with a third person, the inquiry was not sufficiently precise.

11. TRIAL ⊂⇒29(3) — OBJECTION BY TRIAL COURT TO CROSS-EXAMINATION.

The action of the trial judge in objecting to a question to plaintiff on cross-examination, and in then sustaining his own objection, is not ordinarily to be commended.

12. APPEAL AND ERROR ⊂⇒930(2)—ASSUMPTION JURY FOLLOWED INSTRUCTIONS.

Where the trial court's stricture on one of the witnesses and counsel for defendants should not have been indulged in, but the jury was fully and clearly instructed to disregard everything said by the court along that line, the appellate court must assume the instruction was followed.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Catherine M. De Bock for alienation of her husband's affections against August De Bock and others. From judgment for plaintiff, defendants appeal. Reversed in part; affirmed in part.

Jay L. Henry, E. S. Wachhorst, and C. E. McLaughlin, all of Sacramento, for appellants.

P. H. Johnson and Irving D. Gibson, both of Sacramento, for respondent.

PER CURIAM. We adopt the following portion of our opinion on the former hearing of this cause:

"The appeal is prosecuted by defendants, under the alternative method, from a judgment against them in the sum of $5,000.

"It is stated in appellants' opening brief that the action was brought 'to recover damages from defendants, for enticing, inducing, and persuading plaintiff's husband to desert and abandon her,' while respondent maintains that the cause of action is 'for the alienation of the affections of Louis De Bock, husband of respondent.'

[1] "Preliminarily, respondent contends that this court is precluded from considering the points urged for reversal for the reason that appellants have failed to comply with the provision of section 953c of the Code of Civil Procedure, which provides that 'the parties must print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court.' The trial of this case occupied six days, and the reporter's transcript contains 752 typewritten pages. Appellants' opening brief consists of 125 printed pages, practically one-half of which are devoted to a reproduction of the testimony which they claim is sufficient fairly and lucidly to present to this court the points upon which they rely, and we think their briefs sufficiently comply with the terms of the section to compel our consideration of the points raised on the appeal. That the Legislature did not intend, by the enactment of said section, that the appellant in a case should be required to print in his brief all the testimony appearing in the record, or even all the testimony relating to the points urged by him for a reversal, is indubitably shown by the use of the phrase, 'such portions of the record.'

"The points first urged for a reversal by the appellants concern the complaint and the effect of certain allegations of the complaint in an action for divorce instituted by the plaintiff against Louis De Bock and determined prior to the time at which the present action was commenced, and they are: (1) That the complaint fails to state a cause of action; (2) that there is a variance between the facts alleged in the complaint in the divorce action and those set forth in the complaint in this action with respect to the cause or causes culminating in the separation of and estrangement between the plaintiff and her former spouse; that the plaintiff is concluded by the facts alleged in her divorce action, and is therefore estopped from contradicting them in this action. In other words, the contention is that the plaintiff, having charged certain specified misconduct against her former husband in her divorce complaint, is conclusively bound by the averments so made, and therefore will not be permitted to say in the complaint in this action that the charge so made was not true.

"The decision of these points will require, of course, a consideration of the complaint in this action and (as to the asserted estoppel) also a consideration of the complaint in the action by the plaintiff against the said Louis De Bock for a divorce.

"The complaint herein alleges: That plaintiff and Louis De Bock intermarried at Sacramento 'on the 25th day of January, 1905, and ever since have been and now are husband and wife, and up to about the month of June or July of the year 1914, lived happily together as such husband and wife. That the conjugal affection, support, protection, care, comfort, and consortium of the plaintiff's said husband was and is a valuable property right' to which plaintiff is entitled. 'That said Louis De Bock, on or about the first day of August, 1914, with the intent at such time to desert and abandon this plaintiff, wrongfully, willfully, and voluntarily separated from plaintiff and then and there deserted and abandoned this plaintiff,' by reason of which plaintiff is now living separate and apart from her husband. That, by reason of said alleged wrongful acts, which are reproduced, plaintiff was compelled to bring an action for divorce against her husband which resulted in an interlocutory decree of divorce being entered on September 12, 1914. 'That some time about the month of June, 1914, and prior to the day of the said desertion and abandonment of plaintiff by her husband, the said defendants willfully, wrongfully, wickedly, maliciously, and injuriously combined, conspired, confederated, and agreed and contrived, in-

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tending thereby to injure this plaintiff and to deprive her of the affection, support,' etc., of her husband, and 'said defendants by reason of said agreement and conspiracy, wrongfully, maliciously, willfully, and wickedly behaved and conducted themselves continuously ever since said time, towards this plaintiff in an unkind, inconsiderate, unsociable, cruel, and inhuman manner, thereby gradually undermining and wholly destroying this plaintiff's happiness, peace of mind, and greatly injuring and impairing her health; said conduct * * * continually growing worse and more cruel, until by reason thereof, and in conjunction with the conduct of her husband, * * * plaintiff suffered great and grievous mental anguish and pain' and she became sick and confined to her bed. That in execution of said conspiracy said defendants wrongfully, etc., continuously until about the first day of August, 1914, 'enticed, induced, begged, persuaded and urged' her husband 'to deprive this defendant of all the things which it was the duty of said Louis De Bock to furnish this plaintiff as his wife, and to abandon and desert her and live separate and apart from her, and to refuse to live with her and to neglect her and keep her away from his said home and the home of these defendants, and for himself to remain and live with the defendants, August De Bock and his said wife, Ella De Bock, where defendant Millie Fisher was, and is, a frequent visitor.' That said Louis De Bock did, on or about August 1, 1914, 'by reason of, and on account of, and as a result of the arts, wiles, designs, blandishment, machinations and persuasion, in pursuance of said agreement and conspiracy * * * entirely desert and abandon this plaintiff, and ever since said time has continued to desert and abandon her, and has during all of said times persistently and continuously neglected and refused to furnish this plaintiff all the things which' it was his duty to furnish her. That said defendants, 'combining, conspiring, confederating, and agreeing, and willfully, wickedly,' etc., 'intending then and there to injure this plaintiff, to reduce her to penury, and deprive her of the affection, support,' etc., of her husband, about the months of June, July, and August, 1914, 'absolutely and entirely alienated, estranged, and destroyed the affection of' her husband for her 'and alienated the affections of said Louis De Bock from plaintiff, and did illegally persuade, entice, and abduct said Louis De Bock from plaintiff, whereby the plaintiff has wholly lost and been deprived of the assistance, comfort,' etc., of her husband, to which plaintiff was entitled and otherwise would have had 'but for the illegal persuasion, conversation, and the said enticement, abduction and doings and actions of the said defendants.' It was alleged that plaintiff had thereby been damaged in the sum of $15,000, and judgment was prayed for that amount.

"There was introduced in evidence the judgment roll in the case of Catherine M. De Bock v. Louis De Bock, being the action for divorce referred to in the complaint. It appears therefrom that on September 12, 1914, the complaint in said divorce action was filed in the superior court of the county of Placer, in which county the parties resided; that the answer of the defendant was filed, a trial of the action was had, and findings and an interlocutory decree of divorce on the ground of cruelty were entered on the same day, the decree also providing for alimony to be paid the plaintiff and for a division between the parties of certain real and personal property. A final decree of divorce was entered in the action on September 28, 1915.

[2] "There was no demurrer to the complaint in this action, but even in the face of a general demurrer we would hold the foregoing allegations sufficient in the statement of a cause of action in a case of this character. The eighth paragraph in very plain and direct language charges the formation of a conspiracy by the defendants having for its object the alienation from the plaintiff of the affections of her former husband and thereby to deprive her of his protection, assistance, and consortium, that such conspiracy was actually executed or carried out by the defendants, and that by reason of the wrongful acts of the latter the plaintiff lost the love and the affection and the consortium of her said former husband. A complaint in substantially the same language was held good in Humphrey v. Pope, 122 Cal. 253, 54 Pac. 847. It is true that the complaint contains some matters which are wholly immaterial to and have no necessary connection with the cause of action pleaded, unless they may be regarded as explanatory by way of inducement of the cause stated; but where, as here, the complaint contains averments which do state a cause of action, it cannot be held bad even under a demurrer, albeit it does also contain matters having no connection with or in no way tending to explain the facts constituting the cause of action or how or in what manner such facts came into existence. If the matters referred to are nonessential or redundant, they could have been stricken from the complaint on motion, in which case the complaint would, as stated, still state a cause of action against the defendants for the alienation of the affections of plaintiff's husband.

[3, 4] "Nor is there any merit in the contention that the plaintiff is estopped in this action from denying certain facts alleged in her complaint in the suit for divorce against Louis De Bock. This contention arises from the fact that the plaintiff in the complaint in the divorce action charged that her then husband treated her in a cruel and inhuman manner for a period of more than one year 'next immediately preceding the commencement' of the action for divorce, particularizing therein certain occasions upon which acts of cruelty were practiced upon her by said Louis De Bock and specifically describing the nature thereof, some of which facts (it was alleged) having been committed in the month of August immediately preceding the month in which the action for divorce was instituted, whereas, in the present action, the plaintiff alleges in her complaint that she and her former husband 'up to about the month of June or July, 1914, lived happily together as husband and wife.'

"It is, of course, elementary that estoppels bind only parties and privies. An estoppel by judgment can only arise and be invoked where the subject-matter of the litigation and the parties are the same. Strangers to the suit or those not privies in law to the parties thereto are not precluded under the doctrine of estoppel from setting up rights which, as to them, have not been adjudicated in the action. While the estoppel sought to be invoked here is said to be an estoppel arising upon and in the pleadings, yet, if this were true, we can perceive no logical reason for holding that in effect the attempt here is not to invoke an estoppel by judgment, since the findings of the court in the divorce action are in strict accord with the facts stated in the complaint therein, and certainly, if the plaintiff is upon the doctrine of estoppel foreclosed the right to deny in this action the truth of the facts alleged in her divorce complaint, a fortiori, should she be likewise handicapped by the judgment in the divorce action, which involves a definitive and conclusive adjudication of the facts as pleaded by her, so far as is concerned the cause of action so stated as against her former husband. But be that as it may, it is very clear that, since the parties to the present action were not parties to the divorce action and the subject-matter of the two actions is entirely and wholly different, the principle that an estoppel will not lie in such circumstances is equally applicable whether the claimed estoppel arises in the pleadings or by virtue of the judgment. It follows that the complaint in the divorce action can perform no other office in this action than that of evidence of an admission upon the part of the plaintiff that the material facts stated in her divorce complaint, which was verified, are true. It is not, of course, conclusive evidence of the truth of the facts so stated and may be rebutted, but it constitutes an admission against interest which may and should be considered in the determination of the issues of fact in the subsequent action. 'A verified petition filed in one case by a party is competent evidence against such party on the trial of another case as a statement or admission, but is not conclusive and carries nothing of estoppel.' Solomon R. Co. v. Jones, 30 Kan. 601, 2 Pac. 657. See, also, Parsons v. Copeland, 33 Me. 370, 54 Am. Dec. 628; Murphy v. Hindman, 58 Kan. 184, 48 Pac. 850; Warfield v. Lindell, 30 Mo. 272, 77 Am. Dec. 614; Clemens v. Clemens, 28 Wis. 637, 9 Am. Rep. 520; 16 Cyc. 1050; Freeman on Judgments, § 417a; Black Judgm. § 608; Dahlman v. Forster, 55 Wis. 382, 13 N. W. 264.

"The remaining and by far the more important problems submitted for solution here involve the question whether the verdict derives sufficient support from the evidence and the further question whether certain rulings upon the evidence were erroneous and, if erroneous, whether prejudicial in their effect upon the substantial rights of the defendants.

"Although, as seen, the briefs contain portions of the testimony, the writer has performed the decidedly operose task of reading all the testimony, which comprises approximately seven hundred pages of typewritten matter. This burden was assumed because of the claim that the evidence is wholly insufficient to support the verdict, and that a number of errors in the admission and exclusion of certain evidence was committed at the trial, and because, if they were errors, we are required to determine whether or not a miscarriage of justice has followed from those errors (article 6, § 4½, Const.)—a question which can be determined in this case only after an examination of the evidence.

"It is, of course, entirely out of the question to essay a reproduction herein, even in substance, of all the testimony which was received and presented to the jury. All that can be done or which, in our opinion, it is necessary to do, is to state in a concise form all of what may be termed the controlling facts; that is, all those facts which, in any view or under any possible interpretation, may be said to afford or tend to afford support to the cause of action stated in the complaint. This we will now proceed to do.

"The defendant August De Bock, spoken of as 'Gus,' is a brother of Louis De Bock, and defendant Clara E. De Bock, referred to in the record as 'Ella,' is the wife of August. Defendant Millie Fisher for many years had been an intimate friend of her codefendants. She first met Louis De Bock and the plaintiff in 1912, when she visited their house in company with Ella De Bock. Louis De Bock was an engineer in the employ of the Southern Pacific Company.

"There was testimony tending to show that plaintiff and her husband lived happily together for a period of over nine years, from their marriage in 1905 until the spring of 1914. They lived mostly at Roseville and Blue Canyon, in Placer county. During the period above mentioned Louis De Bock treated his wife in a kind and affectionate manner. He would kiss both her and her mother, who lived with her part of the time, when he left the house to go on his run. Plaintiff testified that in about March, 1914, her husband became cool and indifferent towards her; that in June, 1914, he went to Colfax to work, leaving her at Blue Canyon; and that about the first of August he deserted her. She also said that defendants had always been friendly towards her and had visited her frequently until in the summer of 1914, when they ceased visiting her and became very indifferent and cool toward her. Some time in the month of August, 1914, plaintiff and her mother visited Ella De Bock and Millie Fisher at the house of said Ella in Blue Canyon and had a conversation with them. Plaintiff spoke of a letter written by Ella De Bock and asked why she had written it. Defendant Ella said that she had written, saying that plaintiff and her husband were having trouble. Plaintiff testified: 'She started in about my husband, and she said that I was a fool to put up with him the way he was carrying on, and that he was low and dissipated, and she was sure he was running around with fast women, and she said that I was a superior woman to him; she said: "The only thing left for you to do is to get a divorce; if I were you I would go away off to Los Angeles, where I would never come in contact with him again. You could take him to the desert of Sahara, and he would never be any different."' Asked by plaintiff if she was sure her husband was running around with fast women, defendant Ella said that 'she didn't know it for a fact, but was sure of it. * * * She said: "I would take my maiden name back."' Plaintiff testified that defendant Fisher spoke up and said that she admired Ella for the way that she took the thing; that when she first met my husband she thought he was a pretty good looking fellow; but she said, '"Now he is low and dissipated, degraded looking," and she said: "Kate, you are a fool to put up with anybody like that; there is too many men in the world." And she says: "I could get one any time, but no man for me. I advise you to get a divorce."' Plaintiff said that in July, 1914, at the house of Ella De Bock, in Roseville, she had a conversation with her husband in which she asked him: 'What is the matter with you, Lou, anyway? Why are you treating me this way?' to which he replied, 'Kate, the only way for you and I to get along is for me to quit my job, and for us to go off where my folks will never know where we are.' Plaintiff said: 'Why do you talk that way? * * * My folks aren't trying to separate us.' At about the same time, at Roseville, plaintiff's husband told her he was not going to live with her any more, and said, 'If you don't think you have got grounds enough to get a divorce, I will get a woman and let you catch me with her,' and plaintiff said he told her 'he had been running around with fast women, and all that sort of thing; he wouldn't live with me any longer.' She said that she had tried to get him to come back to her, even after she had filed her complaint for divorce, but that he said: 'It has gone this far, let it go through.' Plaintiff said that when she would go to the train to see her husband, if Gus and Ella De Bock were there he would hardly speak to her, but that when she would go the next day, if he was alone, he would get off the engine and kiss her and be himself again.

"Mrs. Rose Gray testified that very often she and Ella De Bock discussed the plaintiff, and that on one occasion said Ella stated that 'the only way Lou could get rid of her was to take her meal ticket away from her.' It appeared that plaintiff had a painting which she had taken to Sacramento to have valued, and Ella said to the witness that 'she didn't care if she got a hundred thousand dollars for the picture, just so she got out of the family, and left the De Bocks alone; that Gus said he would give her five dollars if she would take her maiden name back'; that plaintiff's influence was so strong over her husband 'that they would have to move away until this thing was put through.' At one time, speaking of the Caminetti case, Ella said to witness 'that she didn't blame Drew Caminetti at all, if he was in love with the girl, and that his own father upheld him, and that if she were in Lou's shoes, she would do the same.'

"Louis De Bock first met defendant Fisher in 1912, when she, with Ella De Bock, visited the home of himself and wife at Blue Canyon and remained there about eight or nine days. They made them another visit of two or three days' length in 1913. In the same year, Ella De Bock had a cottage at Truckee, where Miss Fisher was her guest. Louis De Bock visited them every Saturday night for about two months. He testified that in 1914 he saw Miss Fisher one evening in Oakland at his sister's house, and later the same year he met her again in Oakland.

"During the month of July, 1914, Mrs. Ella De Bock wrote to Mrs. Rose Gray, who lived at Blue Canyon, requesting her to secure a house for her at the canyon during the summer months and not to let plaintiff know of it. Mrs. Gray secured a house, and Mrs. Ella De Bock and Miss Fisher occupied it from the middle or latter part of July. Miss Fisher testified she had always been friendly with plaintiff and had visited at her house until the summer of 1914, but that at that time 'we were requested by Mrs. Gus De Bock to stay away from there, not mix in our family affairs. At about this time, Ella De Bock and Miss Fisher kept their clothes on most of one night without retiring in order to be sure of meeting the respondent's husband as he passed through on his run at 4 o'clock in the morning. He dismounted from the engine and hugged and kissed both of them. On one occasion Clara E. De Bock met Louis De Bock at a train and 'patted him on the face in an affectionate way.' From June 15 to July 5, 1914, Louis De Bock roomed at the house of Mrs. Jessie M. Wales, at Colfax. Louis was then the fireman on the locomotive engine of which Mrs. Wales' husband was the engineer. While stopping at the Wales', Louis received one or more letters from the defendant Fisher, signed 'Millie,' and he spoke of her on those occasions as 'My Mill,' and called her his 'pal' and friend. On one occasion Louis showed Mrs. Wales some samples which he said were samples of Millie's dresses and that she (Millie) had sent them to him.

"In August, 1914, defendant Gus De Bock went to plaintiff's house to get Louis De Bock's hunting clothes. She said he told her that four men, including himself and her husband, were going on a hunting trip; that no women were going along. The three defendants went by train to Reno and were there met by Louis De Bock. From Reno the four of them, with a man named Judd, started in an automobile belonging to Gus De Bock and drove to Sacramento. The party stayed two days in Sacramento, Louis De Bock stopping at a hotel and the defendants going to the home of the mother of Mrs. Ella De Bock. The defendants and Louis De Bock then went in the automobile to Nelson, Chico, Oroville, and Lincoln, remaining one night in each place. They had a camping outfit with them, but the testimony was that they did not camp out at any time. The auto trip consumed about a week.

"We have now presented herein the salient facts brought out by the testimony. There are many other facts in the record of the same general character of those embraced in the foregoing statement to which we have not considered it necessary to make specific reference herein for the purpose for which the evidence is to be considered here.

"It must, of course, be conceded, in view of the verdict, that, notwithstanding that the plaintiff in her divorce complaint under oath declared that 'for more than one year next immediately preceding the commencement of the foregoing action, defendant has treated plaintiff in a cruel and inhuman manner,' etc., specifying times and places when and where such acts of cruelty were committed, she and her former husband, down to a few weeks prior to the commencement of said divorce suit, lived amicably and happily together, never prior thereto having had anything more than those inconsequential misunderstandings which are common among married people and which are mere temporary outbursts, generally not followed by serious results. These further facts are, from the verdict, to be conceded as having been established: That from the date of the intermarriage of Louis De Bock and the plaintiff, in the year 1905, down to about a year prior to the date of their separation by divorce, the defendants Gus and Clara E. De Bock were on uniformly friendly terms with the plaintiff; that at about the time indicated they turned against the plaintiff, the defendant Gus De Bock having developed a feeling of intense hatred for her; that both Gus and Clara E. De Bock were at the least agreeable to if not anxious for a permanent separation of the plaintiff and Louis De Bock; that Gus and Clara De Bock, as well as Louis De Bock, were very much attached to Millie Fisher and that the latter reciprocated that sentiment as to all those three persons; that both Gus and Louis De Bock almost invariably, upon returning from their runs (Gus being also a locomotive engineer in the employ of the S. P. Co.), greeted both Clara E. De Bock and Millie Fisher, upon meeting them on those occasions, in a very affectionate manner, often kissing the women; that Gus De Bock, Clara E. De Bock, Millie Fisher, and Louis De Bock, between themselves arranged the outing in the automobile, mentioned above, and that (it may reasonably be inferred) it was the purpose of all of them to make the plaintiff believe that the party constituting the 'outing party' was to consist entirely of men—that no females were to be members thereof. It is further to be conceded that it is fairly and reasonably inferable from the evidence that Gus and Clara E. De Bock had discussed with Louis De Bock the proposition of a permanent legal separation between himself and the plaintiff. In a word, it is the duty of this court to assume that every word of the evidence as to the acts and conduct of the defendants in connection with the plaintiff and Louis De Bock is absolute verity," and so viewing the record, what shall we conclude as to the sufficiency of the evidence to support the verdict?

"Unquestionably, the theory upon which the complaint proceeds is that there existed between Louis De Bock and Millie Fisher a mutual sentiment of love and affection; that Louis, having transferred his affections from the plaintiff to Miss Fisher, desired to be freed from the then insuperable legal obstacle in the way of making that young woman his wife; that Gus and Clara De Bock, being greatly attached to Miss Fisher and having conceived a deep feeling of animosity against the plaintiff, joined Miss Fisher (and perhaps Louis De Bock) in a scheme the consummation of which would be the divorcement of the plaintiff and Louis and the subsequent intermarriage in due legal time of the latter and Miss Fisher. At the time of the trial of this case—over two years after the plaintiff was divorced from her former husband—Louis De Bock and Millie Fisher had not intermarried. There is no direct evidence that they ever intended to intermarry or that they were more than good friends. There is no evidence that they ever maintained improper relations with each other, unless it is to be declared that the fact that he, as did Gus De Bock, in the presence of his wife, often kissed her when he met her affords an inference of meretricious relations between them, a proposition abhorrent to decent and right thinking. But let it be assumed that Louis De Bock was 'in love' with Millie Fisher, that she loved him, and that as a consequence Louis lost all love and affection for his wife; yet the truth remains that there is no direct evidence that that condition was not brought about wholly and solely through the conduct and acts of Louis himself. In other words, if it be true that there was generated and developed in the hearts of Louis De Bock and Miss Fisher a mutual sentiment of love and affection sufficient to overcome and destroy the love and affection which Louis once had for the plaintiff, the evidence, while perhaps having a tendency to do so, does not clearly show but that Louis himself was the wooer and not the wooed, and that he himself took the initiative in bringing about that state of feeling or sentiment between them. In short, the record discloses very slight evidence, the effect of which is to negative the proposition that Louis De Dock's whole conduct towards Millie Fisher was his own voluntary act, uninfluenced by any active interference on her part. Buchanan v. Foster, 23 App. Div. 542, 48 N. Y. Supp. 732, 735."

[5] Upon further consideration we have reached the conclusion that not only is the evidence against Millie Fisher very slight, but that it is not legally sufficient to justify a verdict against her.

"The evidence is obviously stronger against the De Bock defendants than it is against Miss Fisher. But the evidence against all the defendants is entirely of circumstances. There is no direct evidence that the conduct and acts of any of the defendants constituted the cause of the abandonment by Louis De Bock of his wife or his loss of affection for her." But, considering all the circumstances disclosed by the record, we think it cannot be said that the verdict as to the De Bocks is unwarranted.

In cases like this, depending for their support entirely upon circumstantial evidence, the task of the reviewing court is more difficult than in those instances wherein the verdict rests, in part at least, upon the direct testimony of witnesses. This circumstance furnishes an additional reason why we have given this record such deliberate consideration, devoting especially close attention to the questions whether the verdict is supported, and whether any prejudicial error was committed by the trial court in its rulings upon the admissibility of evidence.

As to the sufficiency of the showing to support a rational inference in favor of plaintiff we have already declared our judgment. It remains to notice the other specifications of alleged error, and of these only five are regarded of sufficient gravity to require specific attention.

[6, 7] 1. The record shows the following proceedings while the plaintiff was on the stand:

"Mr. Johnson: Q. In July, 1914, when you were visiting Ella De Bock at Roseville, did you have a conversation with your husband at that time? A. Yes. Q. Well, what was it? A. Well, I asked him what was the matter with him, and he told me—we had, we took a walk—he had not been treating me right for quite a while, and we took a walk and Ella De Bock, she went out some place, and him and I took a walk, and I asked him: 'What is the matter with you, Lou anyway? Why are you treating me this way?' And he said, 'Kate, the only way for me to get along'— Mr. Wachhorst (interrupting): 'We object to that as irrelevant, incompetent, and immaterial.' The Court: 'It will be admitted for the purpose of showing the relations existing between the witness and her husband; not for the purpose of binding the defendants, except as it would show the relations. Go on.' A. Well, we took a walk, and I asked him what was the matter with him that he was treating me the way he was, and he said: 'Kate, the only way for you and I to get along is for me to quit my job, and for us to go off where my folks will never know where we are—never find out where we are.' I said: 'Why do you talk that way? My folks aren't trying to make trouble with me.' I asked it of him, and I said, 'You do not want to quit your position,' and I said to him, 'If you feel that way, why don't you quit?' and he said: 'No, I will take a lay-off.' And I said, 'My folks aren't trying to separate us.' He said: 'That is just the way it stands.'"

The point of the objection is that—

> "The defendants could not be prejudiced by any declaration, act or omission of plaintiff or her husband not made in their presence." Code Civ. Proc. § 1848; Humphrey v. Pope, 1 Cal. App. 376, 82 Pac. 223; Bashore v. Parker, 146 Cal. 529, 80 Pac. 707.

It is quite obvious, however, that the only portion of the answer that could possibly prejudice the defendants was the statement in reference to their going away "where my folks will never know where we are." But a sufficient answer to appellants' criticism of this is that no motion was made to strike it out. The question itself was concededly proper, as evidence of conversations between the husband and wife was admissible to indicate their feelings towards each other. Hence, any objection to the question would have been properly overruled. But, if it may be said that the objection of appellants made in the midst of the answer can be considered as a motion to strike out, then it is quite apparent that the motion was properly denied, since she had up to that time said nothing whatever to connect appellants in the slightest degree with any trouble between herself and her husband. The proper practice in such cases is well settled, and it is sufficient to refer to the decision of the Supreme Court in the case of People v. Lawrence, 143 Cal. 148, 70 Pac. 893, 68 L. R. A. 193. Therein it is said:

> "Under such circumstances, where it is not apparent from the question itself that the response thereto will, upon any theory of the case, be inadmissible, an objection alone to the question will be of no avail, but the party must, when the inadmissible evidence is for the first time disclosed by the answer, move to have it stricken out. This is the proper and only remedy, and the appellant here, having failed to avail himself of such a motion, is not in a position to predicate error merely upon a question which, upon its face, did not show that the testimony to be given in response to it would necessarily be inadmissible."

Moreover, the court in its ruling limited the consideration of the evidence to the single purpose of indicating the relation of the parties, and we must presume on appeal that it was considered by the jury only for that purpose.

[8, 9] 2. Complaint is made of the testimony of a Mrs. Wales that Louis De Bock told her either in June or July, 1914, that he had received two letters from the defendant Fisher. But the court struck out this evidence in the following language:

> "As to the letters which Lou De Bock told her he received from Millie Fisher, why the motion will be granted. It is hearsay, anything that is told her, and her only information is what he told her—is hearsay."

Furthermore:

> "The court instructs the jury that as the court has granted the motion to strike out that portion of the witness' testimony wherein she stated what Louis De Bock had told her concerning letters, and what he told her concerning whom the letter was from; but as to the letters which she saw herself and read, and the testimony will be one letter; that stands, and is not stricken out."

Appellants contend that there is some uncertainty as to this ruling. But it is clear that everything that was said by Louis De Bock was stricken out. There was nothing left of any importance in the answer to the question, to which an objection had been made. The one letter to which the court refers was undoubtedly the one concerning which she testified without objection when she was asked the question: "Did Lou De Bock ever give you any letters to mail to Millie?" and she answered, "One." Furthermore, "What did you do with it?" and she answered, "I burned it." But, if we concede that the court did not fully strike out the testimony to which an objection was made, it is quite apparent that it resulted in no prejudice to appellants, since the same fact was shown without objection. Fernandez v. Watt, 26 Cal. App. 86, 146 Pac. 47; 3 Corpus Juris, 815.

3. The situation is similar in reference to the ruling of the court as to a conversation between plaintiff and one Bob Wales as to said correspondence. If error was committed, it was clearly without prejudice for the reason already stated.

Besides, the contents of the letters were not shown, and it cannot be assumed that there was anything therein of a compromising or improper character, or that the jury was influenced against any of the defendants by the mere circumstance that Lou De Bock had corresponded with Miss Fisher.

[10] 4. It is urged that the court erred in refusing a request of appellants to cross-examine the plaintiff in reference to a conversation with her husband. The request itself was somewhat indefinite, being in the following language:

> "Well, now, your honor, in regard to Ben Smith, may I ask the question regarding a conversation along the same lines with her husband?"

The reference to "Ben Smith" may be understood when we recall that appellants had unsuccessfully attempted to question the witness about a conversation with said Ben Smith. If appellants desired to interrogate plaintiff concerning a conversation with her husband, they should have put the inquiry in more precise terms. It does, indeed, appear that the court did not so understand the question. Again, they should have asked the question of the witness directly to make it the proper subject of review. Moreover, the question does not purport to be in reference to any quarrel, disagreement, or dissension between her and her husband. If such was the purpose of the question, it should have been disclosed to the court. In County of Sonoma v. Hall, 129 Cal. 659, 62 Pac. 213, objections were sustained to certain questions upon cross-examination. It was contended on appeal that the questions should have been allowed for a certain purpose, not evident on the trial; but the Supreme Court said:

> "If such was the purpose of the questions, a direct question should have been asked in such manner as to show the aim of counsel."

Again, assuming that counsel desired to ask the witness concerning a controversy about her having been in a hospital at Sacramento, it may be said that the husband testified fully as to the conversation, and it thus appears that the conversation did not amount to a quarrel and the fact that they lived together for six years thereafter is quite satisfactory evidence that said conversation did not cause their separation.

[11] 5. Plaintiff was asked on cross-examination concerning a "disagreeable conversation" with her husband about one Schultz. The trial judge made an objection to the question and then sustained his own objection. Such procedure is not to be commended except in unusual cases. Counsel for respondent seem to have been amply able to fully protect the interests of their client and they should have been permitted to make whatever objection they deemed advisable. But what has been said in reference to the preceding matter will apply to this question which related to an occasion of six years prior to the separation of the parties. And whatever discord was thereby created was clearly condoned and forgotten in the subsequent six years of felicitous marital relation.

[12] Some complaint is made of certain criticism made by the trial judge of one of the witnesses and of the counsel for appellant. It may be admitted that the stricture should not have been indulged in; but the jury was fully and clearly instructed to disregard everything said by the court along that line, and we must assume that the instruction was followed.

The judgment as to Millie Fisher is reversed, and as to the other defendants it is affirmed.

HART, J. (concurring). As the writer of the former opinion filed in this cause, and in view of the fact that we have reached a different conclusion from that arrived at on the former consideration of the case, I deem it proper to explain that in the original consideration I was misled by the lack of clearness of the record as to the action of the court with respect to certain evidence to which objections were, in my opinion, well taken, and which I conceived to be, in view of the slightness of the proof against the defendants, sufficiently prejudicial to require a reversal of the judgment as to all the defendants. Upon a reconsideration of the rulings upon which the reversal by the former opinion was ordered, however, I find, as the present opinion shows, that the court struck out all the damaging portions of certain testimony to which objection was made, and that, as to other testimony, which I held to be erroneous and prejudicial, no motion was made to strike it out after it had been given, although there was an objection made to it after it got into the record. As the main opinion shows, in such circumstances—that is, where a proper question elicits from a witness improper testimony—the remedy is by a motion to strike out such testimony, a mere objection to it not being sufficient to preserve the right of the objecting party to have the questions so raised reviewed. Other rulings as to other testimony which appeared to my mind to be prejudicially erroneous are disposed of satisfactorily to me in the present opinion of the court.

I desire further to add that, after a fuller consideration of the case, I have become convinced that the judgment should not stand against the defendant Fisher. While it appears that the three defendants were close friends and companions, and that Louis De Bock was also very friendly with Miss Fisher, it was not made to appear that the latter did or said anything calculated to cause an estrangement between the plaintiff and her husband, or that she had or entertained any feeling of animosity or unkindness toward the plaintiff. There is no evidence tending to show that Miss Fisher ever attempted to persuade Louis to desert his wife or ever said anything to Louis or any other person in the least derogatory of the personal character of the plaintiff. There is, in short, nothing in the evidence tending in the slightest degree to connect Miss Fisher with a conspiracy to which the defendants De Bock might have been parties, the object of which was to cause a separation and divorce between the plaintiff and Louis De Bock. The fact that Miss Fisher was on intimate terms of friendship with her codefendants and Louis De Bock is without special significance in the absence of proof that she had committed acts or uttered words calculated to influence Louis against the plaintiff, and which were designed by her to cause the alienation from plaintiff of Louis' love and affection. There are, it is true, some circumstances from which the conclusion might justly follow that Louis De Bock and Miss Fisher were "in love with each other"; but, conceding that to have been the case, there is no evidence showing or tending to show that Miss Fisher was responsible for that state of the affairs between them. In other words, putting it in the language of the main opinion, it was not made to appear but that Louis himself "was the wooer and not the wooed," and that but for what might have been, so far as the record discloses, his undue attentions to her, wholly initiated and persistently prosecuted by him, she would not have given him any serious thought as an unholy suitor for her affections. These observations are, of course, based upon the assumption that a reciprocal sentiment of love had developed between Louis and Miss Fisher, a fact as to which the evidence is by no means clear and convincing, since, after all, the evidence as to the relations between Louis and Miss Fisher and the sentiments they entertained for and toward each other is justly capable of the interpretation that their relations at all times were only those which commonly exist and are entertained between mere friends or between persons entertaining no thought of each other beyond that which is motived by a mere ordinary sentiment of friendship.

But it is not necessary to discuss this matter further. I am satisfied, from a thorough examination of the record, that no case was made against Miss Fisher, and for the reasons stated in the main opinion I concur in the reversal of the judgment as to the defendant Fisher, and in its affirmance as to the defendants De Bock.

43 Cal. App. 218

HEGEL v. HANNAS et al. (Civ. 3059.)

(District Court of Appeal, Second District, Division 1, California. Sept. 8, 1919. Rehearing Denied by Supreme Court Nov. 6, 1919.)

1. CONTRACTS ⚷265—PROVISIONS OF STATUTE AS TO RESTORATION OF RIGHTS CONSTRUED TOGETHER.

Civ. Code, §§ 1691, 3407, and 3408, relating to restoration of status quo on rescission, must be construed together, for they are not mere statutory laws, but are declarations of well-understood principles of equity.

2. CONTRACTS ⚷265—RELIEF FOR FRAUD BY CANCELLATION.

If equity can be done between the parties, the courts will grant relief to the defrauded party, by way of cancellation of a contract, even though the parties cannot be placed exactly in statu quo.

3. EXCHANGE OF PROPERTY ⚷5 — RESCISSION OF EXCHANGE OF LAND FOR FRAUD.

Where defendants were guilty of fraud in effecting an exchange of land, plaintiff may obtain rescission of the contract, even though she had, before discovery of the fraud, entered into a cropping contract; judgment that defendant shall receive the share of the crops which plaintiff would otherwise have received being a sufficient provision for restoration.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Kate Hegel against Grace B. Hannas and another. From a judgment for plaintiff and an order denying their motion for an order vacating the judgment, etc., defendants appeal. Judgment and order affirmed.

R. T. Quinn, of Los Angeles, for appellants.

Charles J. Kelly and D. A. Stuart, both of Los Angeles, for respondent.

CONREY, P. J. The defendants appeal from the judgment and from an order denying their motion for an order vacating the judgment and for an order to amend and correct the conclusions of law and to enter a judgment for the defendants instead of the judgment rendered in favor of the plaintiff.

Both appeals raise the same question. The action was brought to rescind an exchange of real property between the plaintiff and the defendants. Upon evidence the sufficiency of which is not disputed, the court found that the transaction was tainted by fraud on the part of the defendants, and that the plaintiff is entitled to rescind. Finding 11 reads as follows:

"That after the plaintiff obtained possession of the land described in Exhibit C, and before she knew that the representations made to her by said Heber, which are hereinbefore found to be untrue, were in fact untrue, she made a cropping contract of said land for cropping purposes for the period of one year from the 11th day of January, 1918, to and with one Manuel Dueso, and by the terms of this cropping contract said Manuel Dueso has the right to go upon said land for the purpose of raising crops thereon until January 11, 1919. That under the terms of said cropping contract said Manuel Dueso has raised a crop of barley hay, and has now growing on said land a crop of beans. That one of the conditions of said cropping contract is that the plaintiff is to receive one-fourth of each of these crops, but has not yet received any part of either of them, but one-fourth of said hay crop is on said land ready for delivery by said Manuel Dueso. That said land has no buildings or improvements thereon, and is only adapted to agricultural purposes, such as provided for in said cropping contract. That said cropping contract was an ordinary and proper use thereof. That otherwise than as provided by said cropping contract the plaintiff is able to surrender full possession of said land to the defendants. That the defendants are entitled to the one-fourth part of said crops that would have gone to the plaintiff under said cropping contract. That the making of said cropping contract, and the keeping of the land in cultivation thereunder, was beneficial to said land, otherwise it would be in an uncultivated condition and weeds would have grown thereon and reduced the value of said land. Said cropping contract has increased the value of said land, and therefore the defendants are not entitled to any other compensation on account of the right outstanding in said Manuel Dueso to go upon and use said land up to January 11, 1919, than said one-fourth of said crop."

The court ordered that the property conveyed by the plaintiff to the defendants be reconveyed to the plaintiff. It ordered that upon that reconveyance the plaintiff deliver to the defendants a reconveyance of the property conveyed by the defendants to the plaintiff, and that the plaintiff also deliver to the defendants an assignment in writing conveying to the defendants all her rights and interest in and under the Dueso lease, and also to all crops raised on said land under said lease.

[1-3] Section 1691 of the Civil Code provides that the party rescinding a transaction "must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so." Sections 3407 and 3408 of the Civil Code are as follows:

"Sec. 3407. Rescission cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made.

"Sec. 3408. On adjudging the rescission of a contract, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require."

Appellants contend for a strict application of the foregoing provisions of section 1691, and claim that the subsequent provisions above quoted cannot be applied until it is first shown that the plaintiff has fully and absolutely complied with section 1691. We do not agree with this contention. The three sections must be construed together. They are not mere statutory law, but are declaratory of well-understood principles of equity. "It is not an invariable rule that the rescission of a contract obtained by fraud will be denied merely upon the ground that the parties cannot be placed in statu quo. If equity can still be done between the parties, courts will grant relief to the defrauded party." Green v. Duvergey, 146 Cal. 379, 389, 80 Pac. 234, 238. It is our opinion that the provisions as made in the decree in this case are sufficient to restore the defendants to substantially the same position in which they would have been if the rescinded conveyances had not been made. The Dueso lease was made for such a short time and upon such terms that the existence of such lease does not prevent the plaintiff and the court acting in this matter from doing substantial justice to the defendants, while at the same time the plaintiff's undoubted right to a rescission is enforced.

The judgment and order are affirmed.

We concur: SHAW, J.; JAMES, J.

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43 Cal. App. 241

SAN JOAQUIN LIGHT & POWER CO. v. BARLOW. (Civ. 2294.)

(District Court of Appeal, Second District, Division 1, California. Sept. 8, 1919. Rehearing Denied Sept. 30, 1919.)

1. Assumpsit, action of ⚷23—Contract price admissible under common count to prove value.

Though letters from plaintiff, power company, to defendant, consumer, proved a contract price for current furnished, by virtue of such fact they were also admissible under a common count to prove that the rate charged was reasonable.

2. Appeal and error ⚷277—Ruling on and exception to exclusion of evidence.

In an action by a power company against a customer to recover for current furnished, conduct of the customer's attorney in refraining from cross-examination of the power company's witness as to the reasonableness of its rate, the court having announced that the only issue was whether the power company had furnished the amount for which it was charged, *held* equivalent to formal ruling not permitting any further cross-examination, and exception thereto.

3. Witnesses ⚷268(1) — Curtailment of cross-examination.

In a power company's action against its customer to recover for current furnished, the trial court erred in cutting off, substantially at its beginning, the cross-examination of the company's clerk by the customer on the subject of the reasonable value of the electricity furnished, where the action was upon a common count and not on express contract, although letters in evidence proved a contract price; he being the only witness on the subject produced by the company, and his evidence having an important bearing on the fact.

4. Appeal and error ⚷110—No appeal from orders denying new trial.

Code Civ. Proc. § 963, as amended (St. 1917, p. 624), takes away the right to appeal from orders denying motions for new trial.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by the San Joaquin Light & Power Company, a corporation, against C. H. Barlow. From judgment for plaintiff, defendant appeals. Reversed.

Frank P. Doherty, of Los Angeles, for appellant.

Stuart M. Salisbury, of Los Angeles, and Borton & Theile, of Bakersfield, for respondent.

CONREY, P. J. In this action the plaintiff seeks to recover the sum of $655.20 upon a common count for the alleged reasonable value of electric current delivered by plaintiff to the defendant. From a judgment awarding the demanded sum of money the defendant appeals.

The plaintiff introduced in evidence certain correspondence between the parties, constituting a contract which authorized the plaintiff to deliver electricity and to charge therefor at a stated rate. The evidence further shows that a stated quantity of electric current was delivered, and that the amount due therefor, when computed in the manner and at the rate named in the contract, is the sum demanded in this action. Simpson, a clerk whose duty it was to compute charges from meter readings brought into plaintiff's office, testified for the plaintiff, and stated that the several charges made were reasonable charges for the service rendered.

The errors claimed and relied upon, as we glean them from the briefs of appellant's counsel, are as follows: (1) That the letters were not admissible to prove a contract price, because the plaintiff's complaint counts upon reasonable value and not upon a contract price; (2) that the court erred in preventing cross-examination of Simpson for the purpose of testing his qualifications as a witness on the question of reasonable value, and for the purpose of showing that the charge was not reasonable.

[1] 1. Although the letters received in evidence proved a contract price, they by virtue of that fact were also evidence tending to prove that the rate charged was reasonable. "A promise to pay a specific sum is some evidence of value." Steward v. Hinkel, 72 Cal. 187, 191, 13 Pac. 494, 495. "Where an express contract has been fully performed by plaintiff and nothing remains to be done under the contract but the payment of money by defendant, and plaintiff sues on indebitatus assumpsit instead of on an express contract, the contract is admissible as evidence of the amount due, and it is the best evidence of such amount, and prima facie establishes it." 5 Corp. Jur. 1409.

2. On cross-examination of Simpson, after some questions had been asked and answered, relating to the conditions under which the service was to be rendered, and for the stated purpose of reaching the question of what was a reasonable rate, counsel for plaintiff objected that defendant could not go into these matters, on the ground that defendant, by entering into the contract, was estopped to question the reasonableness of the rate. After discussion, the court announced that—

> "The only issue here is of them furnishing the amount for which they are charging."
>
> Mr. Doherty: "You mean no further testimony allowed on the proposition of whether or not the rate fixed by them was a reasonable rate under the issue of their pleadings?"
>
> The Court: "I don't see that there is any open question there."

On the ruling thus made, defendant's counsel refrained from further cross-examination on the reasonableness of the rate. To the statement made by the court, and without any direct exception, counsel responded, "Well, on the ruling of the court, then, I will not ask any further questions on cross-examination as to the reasonableness of the rate." [1]

[2] Although no question was formally propounded, with a ruling thereon from which under the statute an exception would be implied, the record made, as above stated, was equivalent to such formal ruling and exception. Pastene v. Pardini, 135 Cal. 431, 67 Pac. 681.

[3] The court erred in thus cutting off, substantially at its beginning, the cross-examination of Simpson on the subject of reasonable value of the electricity furnished to defendant. The effect of the ruling was to leave his testimony, as given on direct examination, unaffected by any additional statements by which it might have been modified on the cross-examination. No other witness on the subject was produced by plaintiff, and this evidence had such an important bearing on the fact at issue that the defendant was seriously prejudiced by the court's refusal to allow the cross-examination to proceed as indicated.

[4] As the court's order denying defendant's motion for a new trial was made after the right of appeal from such orders had been taken away by amendment of the statute (Code Civ. Proc. § 963; St. 1917, p. 624), the appeal from that order is dismissed.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] This sentence added by amendment on denial of rehearing.

43 Cal. App. 149

BISHOP v. BARNDT et al. (Civ. 2982.)

(District Court of Appeal, First District, Division 1, California. Sept. 4, 1919.)

1. VENDOR AND PURCHASER 🔑95(2), 101 — RESTORATION OF VENDOR'S RIGHT AFTER SUSPENSION BY WAIVER.

Where time is made of the essence of a contract for the payment of money, as a land sale contract, and the covenant has been waived by acceptance of installments overdue, with knowledge of the facts, such conduct will be regarded as creating only a temporary suspension of the right of forfeiture, which may be restored by giving specific notice of intention to enforce it.

2. ESTOPPEL 🔑72—ESTOPPEL TO DENY VALIDITY OF ASSIGNMENT TO AGENT.

Where an assignment was signed in blank with the knowledge of the real party in interest, who in turn delivered to his agent, whose name was written into the assignment with the knowledge and consent of the real party in interest, the latter is estopped to deny that the assignment as delivered to his agent was valid, duly executed, and binding on him, and one not a party to the assignment cannot complain.

3. VENDOR AND PURCHASER 🔑207—NO PRIVITY BETWEEN VENDOR AND THIRD PERSON WITHOUT ASSIGNMENT OF CONTRACT.

The assignee of a contract to convey by contracting to sell to a third person could not create a privity of contract or estate between her and the vendor without assigning his interest in whole or in part under the original contract, and without such assignment and notice of it the vendor was entitled to stand upon the contract with the vendee regardless of any subcontract the latter might make.

4. QUIETING TITLE 🔑7(1) — VENDOR AND PURCHASER 🔑214(1) — THIRD PERSON WITHOUT RIGHTS BECAUSE NOT ASSIGNEE OF CONTRACT.

Where, by contract with the assignee of a contract to convey, a third person assumed no obligations towards the vendor so as to bring herself into privity with the vendor, she acquired no rights under her contract, which did not operate as an assignment, and, having no rights, there was nothing for her to forfeit to the vendor, who was entitled, however, to have removed, in an action to quiet title, her claim operating as a cloud on title.

5. VENDOR AND PURCHASER 🔑101—REVIVAL OF RIGHT OF FORFEITURE BY VENDOR'S NOTICE.

Notice, served by the vendor of land by contract to convey on the real party in interest, several installments being in default, to the effect that the vendor would insist on the forfeiture clause unless payment was made promptly, *held* sufficient to revive all the vendor's rights under the contract, entitling her subsequently to stand strictly on its terms, and to have decree of forfeiture against the buyer and various assignees on their failure to pay within a reasonable time.

6. SPECIFIC PERFORMANCE 🔑114(2)—NECESSARY TO PLEAD AND PROVE CONTRACT JUST AND CONSIDERATION ADEQUATE.

A decree for specific performance of a contract to sell and convey land cannot be supported under Civ. Code, § 3391, in the absence of allegation and finding the contract was just and reasonable, and the consideration adequate.

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by Ada M. Bishop against Elizabeth J. Barndt and others. From judgment for defendants, plaintiff appeals. Reversed.

Hartley Shaw, of Los Angeles, for appellant.

G. P. Adams and John C. Stick, both of Los Angeles, for respondents.

WASTE, P. J. This, in form an action to quiet title, is, in effect, one to declare a forfeiture of the rights of all the defendants in and to the real property in question. The facts of the case appear from the findings, fully supported by the testimony.

By an agreement of sale, made on February 6, 1913, the plaintiff agreed to sell, and the defendant Elizabeth J. Barndt agreed to buy, the land in question for the sum of $1,300, payable $100 upon the execution of the agreement, $400 on March 1, 1914, $400 on March 1, 1915, and $400 on March 1, 1916, with interest at the rate of 7 per cent. per annum, payable semiannually; the buyer to pay all taxes after March 1, 1913. This contract, almost immediately after its execution, was assigned and transferred to defendant Stick, and, together with said assignment on the back thereof, was recorded in the office of the county recorder of Orange county, but not until May 29, 1915, just before this action was commenced. Time is the essence of the contract.

On August 14, 1913, defendant Stick sold the property under another contract to defendant Beulah B. Coward for the sum of $2,400, on account of which defendant Coward had paid the sum of $1,863.81 before trial of the action.

The initial payment of $100, due under plaintiff's contract, was paid at the time of the execution of the agreement. The $400 installment on account of principal, due March 1, 1914, and the various payments on account of interest, falling due prior to February 6, 1915, were paid by defendant Stick. None of these payments were made when due, but at various dates thereafter, and each was received and accepted by the plaintiff without any objection on her part. At the time the suit was commenced—July 23, 1915—the payment of interest due on February 6, 1915, and the $400 installment on account of principal, due March 1, 1915, had not been paid to plaintiff. Plaintiff had also paid certain taxes, assessed against the property, which had not been repaid.

Prior to the bringing of the action, no notice of any delinquency of any payment, or demand for the payment of the same, was made, or served, upon defendants Stick or Coward. Plaintiff never gave to the said defendants, or either of them, any notice that she would, or did, insist upon the provisions of the agreement between herself and Barndt, as to time being the essence of the agreement, or that she would declare a forfeiture of her contract with defendant Barndt, although she became aware of the existence of the agreement between defendants Stick and Coward in June, 1915, about one month before bringing this action.

The court found that defendants Stick and Coward were ready, willing, and able to pay to the plaintiff all money due under the contract between herself and the defendant Barndt. Those defendants, in open court, in keeping with this finding, offered to pay the amount, together with all taxes paid by plaintiff, and costs of suit, upon the condition that plaintiff convey the title to the premises to either of them, and deliver to the grantee a certificate of title, as provided in the original contract. Defendant Stick, by stipulation filed in the action, consented to the transfer being made directly to the defendant Beulah Coward. Plaintiff declined to accept the tender and convey the property. Counsel for the respective parties, by stipulation, then agreed that the amount due upon principal and interest, under the contract between plaintiff and defendant Barndt, provided the same was then in force, amounted at that time to $901.87; that the taxes paid by plaintiff on said premises, including interest, amounted to $13.20; and that plaintiff's costs amounted to $19.95—making the total of principal, interest, taxes, and costs the sum of $935.02. The defendants Stick and Coward then made tender of that amount in open court to the plaintiff, and the tender was refused. In lieu of the payment of the money into court, pending the final determination of the action, it was stipulated that the amount be deposited with a trustee, to hold the same, with proper instructions as to its disposition.

As its conclusion of law from the foregoing facts, the court found that plaintiff was entitled to recover of and from the defendants John C. Stick and Beulah Coward the above amount, upon her executing and delivering a proper deed and certificate of title, and, also, that the defendants in the action were entitled to a judgment and decree that plaintiff execute such conveyance to defendant Coward, and furnish proper certificate of title. Judgment and decree was entered in accordance with the findings. It was further decreed that, in the event said plaintiff refused to make such deed of conveyance and furnish such certificate of title within 40 days from the date of the judgment, the clerk of the court make, execute, and deliver to the defendant Coward such conveyance for and on behalf of plaintiff, and obtain and turn over the certificate of title, as directed. Plaintiff has appealed.

The judgment and decree of the lower court, if it is to be upheld, must rest upon the legal effect of its findings that all of the payments on the contract between plaintiff and defendant Beulah Coward, other than the initial payment of $100, were made at various dates after the same became due, according to the terms of the contract, and were received and accepted by plaintiff without objection upon her part. From this conduct on the part of plaintiff, the trial court apparently reached the conclusion that plaintiff had waived the default, and failure to comply strictly and punctually with the conditions of the agreement to such an extent that plaintiff had induced the purchaser and assigns, in reliance thereon, to alter their course as to strict and punctual compliance with the contract. There is no finding to this effect.

In addition to the facts, outlined above, as found by the trial court, it appears from the evidence that Gail E. Moon, who was made a defendant, and answered generally, denying the allegations of the complaint, was the real vendee in interest in the contract between plaintiff and defendant Barndt. On May 18, 1915, and before she knew of the claim of defendant Coward to an interest in the property in litigation, plaintiff directed her attorney to send a letter to Moon. In this communication, after calling attention, by apt reference, to the contract between plaintiff and Mrs. Barndt, counsel said:

> "I understand that you are the present owner of this contract, and this is to notify you that the sum of $400 due under the terms of said contract March 1, 1915, has not been paid, and that the interest has not been paid beyond August 6, 1914.
>
> "You are hereby notified that, unless the sums due under this contract are paid within 15 days from date hereof, Mrs. Bishop will exercise the rights conferred upon her by the contract, which recites that time is the essence thereof, and will declare all your rights under said contract to be forfeited, and will not recognize herself as being under any further obligation to perform said contract."

No attention was paid by defendants to this notice, and the amounts due were not tendered or paid to plaintiff. After waiting two months plaintiff commenced her action to quiet title.

Upon the foregoing admitted facts, the first question that arises is as to what were the rights of the respective parties on May 18, 1915, the date of plaintiff's letter to defendant Moon. On that date the defendants were more than three months in default in respect to the semiannual installment of interest due under the contract, for the six preceding months, and nearly three months in default as to the payment of the installment on principal due March 1, 1915. According to the strict letter of the agreement, making time the essence thereof, the vendees under the contract were then subject to the penalty of having their contracts canceled and of a forfeiture of the payments which they had theretofore made, unless, as contended by defendants, the plaintiff, by receiving without objection the several payments which the defendants had tardily made, can be held, by her action in so doing, to have waived her right to insist upon the strict letter of the contract. Defendants claim that plaintiff is no longer entitled to take advantage of their past delinquencies, so as to either declare the contract canceled because of them, or to claim a forfeiture of such payments as she had theretofore received without objection, when they were not made on the dates fixed by the contract. In urging this contention they rely, among many others, upon Pearson v. Brown, 27 Cal. App. 125, 129, 148 Pac. 956; Boone v. Templeman, 158 Cal. 290, 295, 110 Pac. 947, 139 Am. St. Rep. 126; Stevinson v. Joy, 164 Cal. 279, 285, 128 Pac. 751; Sausalito Bay Land Co. v. Sausalito Improvement Co., 166 Cal. 302, 307, 136 Pac. 57.

[1] These cases support respondent's contention, as being the correct rule under proper circumstances. Our attention has not been called, however, to any cases holding that the vendor may not by proper steps revive such right of forfeiture after default. On the contrary, it is the law that where time is made the essence of the contract for the payment of money, and this covenant has been waived by acceptance of the installments after they were due, and, with knowledge of the facts, such conduct will be regarded as creating only a temporary suspension of the right of forfeiture, which may be restored by giving a definite and specific notice of an intention to enforce it. Stevinson v. Joy, supra; Boone v. Templeman, supra. As was said in the latter case:

> "The simple act of receiving a payment after the date when the payee was bound to accept it, without more, is no excuse for laches as to future payments. The effect of the acceptance is exhausted upon the payment made, and, as to those following, the provisions of the contract are left to operate with unimpaired force."

This court, in Pearson v. Brown, supra, took note of this power, resting in a vendor to revive and restore the right to a forfeiture under contracts wherein time is made the essence thereof. In speaking of the notice given in that case the court said:

> "The utmost effect, under the foregoing rule [relating to waiver by accepting past due payments], which would be given to it, would be that of a notification to the vendees that the vendor intended thereafter to insist upon a strict compliance upon the terms of the contract; and, that unless within a reasonable time the vendees paid up their deficiencies, and thereafter made their payments strictly in accordance with the time conditions of their contract, the forfeiture clause would be enforced."

[2] Appellant contends that she has complied with all the requirements of the rules laid down by the cases we have cited, in that ample notice of default and forfeiture was in fact given. She relies upon the notice contained in the letter of May 18th, sent by her attorney to the defendant Moon. This letter, as will be noted, was sent after the assignment from Barndt to Stick, and the execution of the separate contract between Stick and Miss Coward, and before plaintiff had knowledge of the latter's claim to an interest in the property. Appellant's first contention in this regard is that Moon was still the owner and holder of all the rights under the original contract, and that servvice of the notice upon him was sufficient within the application of the established rule. In making this contention she relies, first, upon the fact that the assignment by Mrs. Barndt was executed and delivered in blank, the name of John C. Stick, as assignee, having been inserted thereafter, and, for the law to sustain the proposition, cites Arguello v. Bours, 67 Cal. 447, 8 Pac. 49. In that case it was held that a deed, in which the name of the grantee was left blank by the grantor at the time of its execution and afterwards inserted without his authority, did not convey any interest, nor become sufficient to pass title because the grantee entered into possession and paid the purchase price. We have no such state of facts in the present case. Mrs. Barndt signed the assignment in blank, with the knowledge of the defendant Moon, the real party in interest, and he, in turn, delivered the contract to defendant Stick, who appears to have at all times conducted the entire transaction for and on his behalf. Thereafter, the name of Stick was written into the assignment with Moon's knowledge and consent, and apparently for the purpose of carrying out some arrangement between the two. Moon was estopped to deny that the assignment, as delivered to Stick, was valid, duly executed, and binding upon him (Dolbeer v. Livingston, 100 Cal. 617, 621, 35 Pac. 328), and appellant, who was not a party to the assignment, cannot complain.

Appellant's second point in support of her contention that the notice given to Moon was amply sufficient to revive her right of forfeiture is that, notwithstanding the assignment by the latter to Stick, Moon was in reality the owner of all the rights conferred by the contract. This suggestion is entitled to more serious consideration. The testimony bearing on this subject is neither full nor elucidating, and some of it is hearsay. But the only inference which can safely be drawn from the evidence is that appellant is correct in her contention. There is absolutely no showing to the contrary. Notwithstanding that the trial court found that defendants Barndt and Moon had no right or interest in the real property, we are fully satisfied from the statements made by Stick to plaintiff and the admissions contained in his letters to her and from the testimony of Moon that Stick and Moon were one in interest in the contract. Moon testified that Stick acted as his representative in dealing with Miss Coward.

[3, 4] Appellant's contract bound her, on receiving the payments at the time and manner therein mentioned, to deliver a certificate of title showing the property free from incumbrances, and execute and deliver to the buyer or her assigns a good and sufficient deed thereof. She contends, however, that defendant Coward was not an assignee of the contract, and in no way party thereto; that there was no privity between plaintiff and her; and that Miss Coward was not entitled to the notice to perform, and is not now in position to enforce the contract. Appellant is correct in this contention. While defendant Stick had an ostensible equitable interest in the land acquired by the assignment of the Barndt contract, which he had the right to contract to convey to Miss Coward (Rogers Dev. Co. v. Southern California, etc., Inv. Co., 159 Cal. 735, 739, 115 Pac. 934, 35 L. R. A. [N. S.] 543), she was a stranger to the plaintiff. Her agreement with Stick was a separate and independent contract, without any reference to the contract between plaintiff and Barndt, and plaintiff was not required to take any notice of it. Stick, by contracting to sell to Miss Coward, could not create a privity of contract or estate between her and plaintiff without assigning his interest, in whole or in part, under the original contract. Plaintiff, without such assignment, and notice of it, was entitled to stand upon her contract with her vendee regardless of any subcontract the latter might make. The contract between defendant Stick and Miss Coward did not operate as an assignment of the contract between plaintiff and Barndt. Miss Coward assumed no obligations under that agreement towards plaintiff so as to bring herself into privity with her. This being so, she acquired no rights under the contract, and, having no rights, consequently there was nothing to forfeit. Her claim, however, operrated as a cloud upon the title of plaintiff which she was entitled to have removed in this form of action. Stratton v. Cal. Land, etc., Co., 86 Cal. 353, 360, 24 Pac. 1065.

[5] The notice served by plaintiff on defendant Moon was, in our opinion, under the disclosed facts of this case, sufficient to revive and restore all plaintiff's rights under her contract, and she is now entitled to stand upon its terms. When she gave the defaulting vendees a reasonable time within which to pay the money due thereunder, they should have met the requirements of the notice. When they did not they forfeited all rights under the contract. Plaintiff is doing no more than to insist that under the terms of the contract defendants have no further rights thereunder, but have forfeited all such. Her action to quiet title amounted to no more than the calling of the defaulting vendees into court to show why it should not be decreed that, under the terms of the contract, all their rights thereunder were at an end. In the absence of some sufficient equitable showing to excuse their failure to comply with the terms of the contract, which defendants failed to make, the plaintiff was entitled to such decree. Oursler v. Thatcher, 152 Cal. 739, 745, 93 Pac. 1007. Defendants were not entitled to the finding made by the trial court that the contract between plaintiff and Mrs. Barndt was still in force and effect. It is a finding against fact. The finding that the contract made between defendants Stick and Miss Coward was still in force and effect is a finding on an immaterial issue.

[6] Specific performance in this case was decreed upon the answer of defendant Coward. Even though she were in position to seek such relief, her answer does not state sufficient facts, for it is not alleged therein that the consideration to be paid plaintiff for the land is adequate, or that the Barndt contract is just and reasonable. White v. Sage, 149 Cal. 613, 614, 87 Pac. 193. No evidence was received upon this subject, and there is no finding in regard to it. A decree for specific performance cannot be supported in the absence of allegation and finding that the contract was just and reasonable, and the consideration adequate. Civ. Code, § 3391; Gibbons v. Yosemite Lumber Co., 172 Cal. 714, 716, 158 Pac. 196.

The judgment is reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

181 Cal. 468

CHING WING v. SOUTHERN PAC. CO. et al. (L. A. 5274.)

(Supreme Court of California. Oct. 25, 1919.)

1. APPEAL AND ERROR ⚷979(2)—REVIEW OF ORDER GRANTING NEW TRIAL.

In an action against a railroad for the death of one lying on the track, where he had been thrown by an automobile, an order setting aside verdict for defendant and granting a new trial to plaintiff cannot be interfered with on appeal, where the record shows ample evidence to indicate that the engineer, if he had exercised due care, could have seen the deceased in ample time to have stopped the train.

2. RAILROADS ⚷312(4)—LIABLE FOR INJURIES TO PERSON ON TRACK UNDER LAST CLEAR CHANCE DOCTRINE.

Where one was thrown onto a railroad track by an automobile at a crossing, and the engineer, if he had exercised due care, could have seen him in time to have stopped the train, but failed to do so, the railroad was liable for running over him.

Department 1.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Ching Wing, as administrator of the estate of Wong On King, deceased, against the Southern Pacific Company, E. C.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Jordan, and Warren M. Thorne. From an order setting aside a verdict in favor of defendants, and granting a new trial, defendants appeal. Affirmed.

Henry T. Gage and W. I. Gilbert, both of Los Angeles, for appellants.

Harry M. Irwin and Waldo M. York, both of Los Angeles, for respondent.

At the conclusion of the oral argument, SHAW, J., delivered the opinion of the court; LAWLOR, J., and OLNEY, J., concurring:

This is an action for damages for the death of decedent, Wong On King, alleged to have been caused by the conduct of the defendant in negligently propelling its engine along Alameda street in the city of Los Angeles, at a street crossing, over his body then lying on the railroad track, where he had been thrown by a passing automobile. A verdict was given for the defendant, and the court below granted a new trial.

[1, 2] The only point assigned for reversal is that the evidence did not justify the order granting a new trial; that is, that on the evidence, as given, the verdict should have been for the defendant as matter of law. The record shows ample evidence to indicate that the engineer in charge of the train, if he had exercised due care, could have seen the deceased lying on the track in ample time to have stopped the train. Under these circumstances we cannot disturb the order of the court granting a new trial.

The order is affirmed.

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181 Cal. 469

In re HARTLEY'S ESTATE. (L. A. 6252.)

(Supreme Court of California. Oct. 27, 1919.)

1. Wills 🔑288(3)—Burden to prove invalidity of clause of olographic will.

Where an olographic will was admitted to probate with a separate residuary clause as part of it, on subsequent contest the burden rested on contestants to show the residuary clause objected to was not a valid testamentary disposition by testator because not dated; the original order of probate creating a prima facie presumption that the will, residuary clause and all, was a single instrument covered by the single date.

2. Wills 🔑130—Residuary clause of olographic will covered by date of main instrument.

If the separate residuary clause of an olographic will was written by testator when he wrote the body of the instrument as part of the same testamentary act, the instrument as a whole was a single instrument, and the date at the beginning covered both portions of it.

Department 1.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

In the matter of the estate of Frank J. Hartley, deceased. From an order revoking probate of a portion of decedent's will, an appeal was taken. Order reversed.

E. E. Rogers, of Los Angeles (L. V. Silverstein, of Los Angeles, of counsel), for appellants.

Clyde C. Shoemaker, George H. Woodruff, and Woodruff & Shoemaker, all of Los Angeles, for respondents.

At the conclusion of the oral argument OLNEY, J., delivered the opinion of the court, SHAW, J., and LAWLOR, J., concurring:

In this case a document entirely written, dated and signed in the hand of the testator, was admitted to probate. The entire document reads as follows:

"Los Angeles, Cal., Aug. 15th, 1917.

"My Last Will.

"Frank J. Hartley—being of sound and disposing mind—as follows—I bequeath,

To my daughter Lillian M. Murphey..	500.00
To my daughter Edith F. Haney.......	$500.00
To my son Francis C. Hartley.......	$500.00
To my daughter Loretta T. Hartley...	$500.00
To my son Sylvester B. Hartley......	$500.00
To my son Lawrence F. Hartley.....	$500.00
To my son Herbert J. Hartley........	$500.00
To my wife Ida S. Hartley..........	$100.00

and no more as property settlement has long been made, same is of record. And I herein name my son Francis C. Hartley to act as administrator of my estate, and in case of his death my daughter Edith F. Haney to act as my administratrix.

"[Signed] Frank J. Hartley.

"Residue to be divided equally between my daughter Lillian, my daughter Edith and my son Francis C. Hartley.

"[Signed] Frank J. Hartley.

"Funeral expenses to be paid first out of money on hand or life insurance money.

"F. J. H."

After the will had been admitted to probate a contest was inaugurated by certain of the heirs against the portion of the instrument following the first signature of the testator and by which the residue of the testator's estate was given to three of his children.

The point made on the contest is that this portion of the will is a codicil, and, not being separately dated, is void. The question is identical with that presented in the case of La Grave v. Merle, 5 La. Ann. 278, 52 Am. Dec. 589, and is there put in this language:

"Where an olographic testament contains several dispositions, of which the first one, at the same time dated and signed, and the second are only signed by the testator, are the latter null for want of date? They are; provided that from the manner those clauses are conceived and placed, they cannot be considered to have been written immediately after the first, and on the same date that the first was written. But if, according to the contents or position of the second clauses, it appears that they could have been written on the same day with the first, we ought to presume that they were so in effect, consider them as forming but one and the same testament, and apply to the whole, which is composed of different clauses, the general principle that it is sufficient for the validity of the olographic will that it be dated in the context, without its having a date at the end."

[1, 2] It is not necessary in this case to go quite as far as was done in the Louisiana decision, for it appears here that in the first instance the instrument was admitted to probate as the decedent's will with this residuary clause as a part of it, with the result that upon this contest subsequently instituted the burden rests upon the contestants to show that the portion objected to was not a valid testamentary disposition by the testator. If, as a matter of fact, the residuary clause was written by the testator at the same time with his writing the body of the instrument and as a part of one and the same testamentary act, there can be no reasonable question but that the instrument as a whole is a single instrument, and the date at the beginning covers both portions of the instrument. The original order of probate creates a prima facie presumption that this was the fact. There is nothing in the instrument to indicate the contrary, and thereby overcome the presumption, and no evidence was offered to overcome it. Nor does the contest filed contain any allegation to the effect that this portion of the will was executed at a time and as a part of a testamentary act different from the time and act at and by which the main body of the instrument was executed. This being the situation, the presumption arising from the original probate is not overcome, and it must be taken that both portions of the instrument were executed at the same time and as part of the same testamentary act, so that the one date covers both.

It follows that the order of the probate court revoking the probate of this portion of the will should be reversed; and it is so ordered.

43 Cal. App. 255

BAYSIDE LAND CO. v. PHILLIPS et al.
(Civ. 3042.)

(District Court of Appeal, First District, Division 2, California. Sept. 12, 1919.)

1. VENDOR AND PURCHASER 🔑104—BURDEN ON VENDOR TO SHOW REVIVAL OF CONTRACT.

In an action to quiet title, where defense was that defendant was entitled to possession under contract of sale, the burden was on the plaintiff, having conceded a waiver of the right of forfeiture of the contract for delay in payments, to show a revival of the terms of the contract by proof of a definite and specific notice of an intention to enforce it.

2. APPEAL AND ERROR 🔑1011(1)—REVIEW OF FINDINGS OF FACT ON CONFLICTING EVIDENCE.

Finding of trial court that vendor did not give notice of an intention to enforce a contract of sale after having waived forfeiture will not be interfered with, where the evidence as to such notice was evasive, indefinite, and conflicting.

3. APPEAL AND ERROR 🔑1071(6)—FAILURE TO FIND ON ALL ISSUES HARMLESS.

Where a finding on one issue is sufficient alone to support judgment, failure to find on other issues is immaterial.

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by the Bayside Land Company against Mrs. Eva Phillips and Mrs. F. M. Harmer. Judgment for defendants, and plaintiff appeals. Affirmed.

Bordwell & Mathews, of Los Angeles, for appellant.

Evans, Abbott & Pearce, of Los Angeles, for respondents.

NOURSE, J. Action to quiet title to real property, in which defendants claim an interest by reason of a written contract, entered into between the parties hereto, by which plaintiff agreed to sell and defendants agreed to buy said property. The trial court rendered judgment in favor of defendants, from which plaintiff appeals.

Said contract was found by the court to have been executed on or about August 28, 1913. The provisions material to this appeal are as follows:

"Said lot being sold for the sum of seven hundred ($700) dollars gold coin of the United States, and the said parties of the second part, in consideration of the premises, agree to pay to the said party of the first part the said sum of seven hundred ($700) dollars, as follows, to wit: The sum of seventy ($70) dollars, cash, receipt whereof is hereby acknowledged; the further sum of ten ($10) or more dollars on or before the 28th day of each and every month hereafter until the full amount of principal with interest on deferred payments has been fully paid; all to bear interest from date until paid at the rate of six (6) per cent. per annum, payable and compounded semiannually. And the said parties of the second part agree to pay all state and county taxes, and assessments of whatsoever nature, which may become due on the premises above described. It is further agreed that time is of the essence of this contract, and in the event of a failure to comply with the terms hereof, by the said parties of the second part, said party of the first part shall be released from all obligations in law or equity to convey said property, and the said parties of the second part shall forfeit all right thereto."

Appellant contends that defendants' interest in said contract, and in the land therein involved, terminated on the 27th day of November, 1915, by reason of the exercise of the forfeiture clause therein contained. Defendants, on the other hand, deny plaintiff's right to exercise such forfeiture by reason of the waiver of that provision of the agreement.

It appears from the record that on November 27, 1915, the total amount paid on said contract was $177.43, principal and interest; that on said date there was a total delinquency of $231.15, made up as follows: Nineteen principal payments, amounting to $190; accumulated interest, amounting to $35.18; delinquent taxes, covering a period of two years, amounting to $5.97. It also appears that the last payment on the contract, amounting to $7.50, was made July 30, 1915; that some time subsequent to that date (the time is not otherwise fixed by any evidence) Mrs. Harmer, one of the defendants, attempted to make a further payment of $5, but that plaintiff refused to accept it, stating that the contract had been canceled November 27, 1915; that on March 20, 1916, defendants offered plaintiff a check for $290, the full amount then delinquent, but that plaintiff refused to accept the same.

[1, 2] Appellant concedes that—

> "Defendants did not make payments punctually, and plaintiff for nearly two years indulged them in this, and accepted payments from time to time of less than the whole amount due at the time of such payments."

Plaintiff likewise concedes that such conduct operated as a waiver of that clause of the agreement making time the essence thereof, and created "such a temporary suspension of the right of forfeiture as could only be restored by giving definite and specific notice of an intention to enforce it." Stevinson v. Joy, 164 Cal. 279, 285, 128 Pac. 751; Myers v. Williams, 173 Cal. 301, 304, 159 Pac. 982; Burmester v. Horn, 35 Cal. App. 549, 552, 170 Pac. 674; Boone v. Templeman, 158 Cal. 290, 297, 110 Pac. 947, 139 Am. St. Rep. 126. Plaintiff, however, insists that such notice was given to defendants, and that the provision making time the essence of the contract was thereby revived. Defendants deny the receipt of such notice, and contend that the contract was still in force March 20, 1916, when plaintiff refused to accept the amount due thereunder. The trial court found that the "plaintiff corporation has never given notice of cancellation or voidance of said contract."

Having conceded the waiver of the right of forfeiture, the burden was on the appellant to show a revival of the terms of the contract by proof of a definite and specific notice of the intention to enforce it. As to this the evidence was evasive, indefinite, and conflicting, and the trial court was justified in making the finding above noted.

[3] Having thus waived the right of forfeiture and failed to prove the revival of that right, the failure of the court to find on other issues becomes immaterial on this appeal. Hertel v. Emireck, 174 Pac. 30; Smith v. Smith, 173 Cal. 725, 161 Pac. 495. A finding favorable to appellant on each of these issues would not support a judgment in its favor in view of the general finding of want of notice. A finding on this issue alone, taken with the concessions of appellant, is sufficient to support the judgment.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

43 Cal. App. 221

BARBER v. SUPERIOR COURT OF CALIFORNIA IN AND FOR SAN DIEGO COUNTY et al. (Civ. 2993.)

(District Court of Appeal, Second District, Division 1, California. Sept. 8, 1919. Rehearing Denied by Supreme Court Nov. 6, 1919.)

1. Equity 🔑39(1)—Grant of complete relief.

Where equity has acquired jurisdiction for one purpose, it will retain that jurisdiction to the final adjustment of all differences between the parties arising from the cause of action presented.

2. Courts 🔑475(2, 3) — Executors and administrators 🔑516(4)—Equity jurisdiction of accounting by administrator.

Until a decree settling an administrator's account and distributing the estate is made final by expiration of time for appeal, the court of probate has exclusive jurisdiction over all matters of accounting, but after that time has expired, if the decree was fraudulently obtained, equity has jurisdiction of an action to set it aside, and in order to afford complete relief may require an accounting by the administrator in such action, unless the usual chancery powers are curtailed by some peculiar limitation in the nature of the case.

3. Executors and administrators 🔑516(4)—Necessary parties in proceeding in equity for accounting.

Where, in an administratrix's suit in equity against a former administrator of the estate, the decree of settlement and distribution is set aside for fraud, an accounting by the administrator may be made in such suit, instead of in the probate court, though new claimants, not before the court, might assert claims, since, in view of Code Civ. Proc. §§ 369, 1586, the administratrix represents all possible claimants and is the only necessary plaintiff, and payment to plaintiff of the amount found due will protect the administrator.

Petition by E. M. Barber against the Superior Court of San Diego County and C. N. Andrews, Judge of said Court, for writ of prohibition to prevent setting aside of a decree of settlement of account and distribution in probate, to which petition respondents demurred. Writ denied, and proceeding dismissed.

Thomas, Beedy & Lanagan, of San Francisco, and Patterson Sprigg, of San Diego, for petitioner.

Bischoff & Thompson, of Escondido, for respondents.

CONREY, P. J. The petitioner applied for a writ of prohibition commanding respondents to refrain from certain threatened proceedings in an action numbered 26366 and entitled "Ostergard, Administratrix, et al. v. E. M. Barber and United States Fidelity & Guaranty Company." An alternative writ was issued. Respondents' return is in the form of a demurrer, which rests upon the ground that the facts alleged are not sufficient to entitle petitioner to the demanded relief.

Barber was administrator of the estate of James Ostergard, deceased. His final account and petition for settlement and distribution of that estate were filed on the 10th day of September, 1914, in the superior court of San Diego county. On the 29th day of that month the account was approved by order of court, and a decree of final distribution followed in due course. On the 6th day of July, 1916, the letters of administration of Barber were revoked. On the 8th day of July, 1916, Ingina Ostergard was appointed administratrix of said estate.

Thereafter Ingina Ostergard, as administratrix, together with Victoria Jensen, Mary Larsen, and Ingina Ostergard, claiming to be the only heirs at law of James Ostergard, deceased, and claiming to be the only persons interested in his estate, commenced said action No. 26366. In that action facts were alleged showing that said final account of Barber as administrator was false and fraudulent, and that in fact he failed to account for a large amount of the assets of the estate, and falsely credited himself with sundry sums for which in fact he was not entitled to receive credit; that the time within which an appeal might have been taken, or any application for relief made, as against said order and decree in the probate proceeding, had expired before the alleged fraudulent acts of Barber were discovered by the plaintiffs. Plaintiffs demanded that said order and decree be vacated; that a true account be made; and prayed for such other and further relief as is agreeable to equity.

The petition herein shows that on the 22d day of March, 1919, in said action No. 26366, findings of fact were entered, and conclusions of law thereon, which were in favor of the plaintiffs; that the court proposes, not only to set aside said order and decree in the probate proceeding, but also has made an order fixing a certain date for an accounting to be made by said Barber, before the court in said action No. 26366.

By his petition herein said E. M. Barber seeks to prevent respondent from proceeding with such proposed accounting, in that action. His contention is that the settlement of such an account is within the exclusive jurisdiction of the superior court as a probate court, exercisable solely by a proceeding in the matter of the estate of James Ostergard, deceased, and that, therefore, the court in the equity case having set aside the order and decree formerly made, its sole further jurisdiction will be limited to the power to decree that a further accounting be made in the probate proceeding. This contention presents the only question now before us.

[1] 1. It is an established rule that—

> "Where equity has acquired jurisdiction for one purpose, it will retain that jurisdiction to the final adjustment of all differences between the parties arising from the cause of action presented. It is, indeed, the duty of a court of equity, when all the parties to the controversy are before it, to adjust the rights of all and leave nothing open for further litigation." Swan v. Talbot, 152 Cal. 142, 94 Pac. 238, 17 L. R. A. (N. S.) 1066.

[2] 2. Let it be assumed that until the decree settling the final account of Barber as administrator and distributing the estate had been made, and until that decree had become final by expiration of the time within which an appeal therefrom might have been taken, the court in probate had exclusive jurisdiction over all matters of accounting by the administrator. But when that time had expired, and no opportunity remained by appeal or motion to obtain any relief against such decree, the powers of a court of equity were at once available, if the decree had been fraudulently obtained; and those powers became active, instead of latent, for the very reason that then the ordinary course of procedure within the limits of probate jurisdiction could not be used to afford the demanded relief. At the time when action No. 26366 was instituted, the court acquired jurisdiction over the subject-matter thereof. Unless there is some peculiar limitation in the nature of the case, whereby the usual chancery powers are curtailed, we are certain that an accounting may be made in that action, and a decree entered granting complete relief between the parties before the court.

[3] 3. Petitioner contends that there is a reason why the accounting must be had in the probate court, in this, that the proposed decree will necessarily reopen the administration of the estate, by setting aside the decree of settlement of account and final distribution; that a new decree, based upon a new report, notice, and hearing, will be required in that proceeding; that, perchance, additional claimants to some interest in the estate will be unearthed; that such additional claimants being not before the court in the action in which it is now proposed to take an account-

ing, Mr. Barber will thus be exposed to two several attacks upon his administration where only one should be required. Counsel for petitioner say:

> "If the present case proceeds to a judgment, Mr. Barber will have to pay to the plaintiffs the amount found due from him on an accounting. This will not protect him, because the probate court has not determined to whom the estate of James Ostergard is to go."

This contention is not sound. Barber can satisfy any decree entered against him by paying the required sum into the hands of the administratrix, who is a plaintiff in the action, and as such administratrix will be responsible for the money so received. The court in its findings has declared, presumably upon sufficient evidence, that the plaintiffs are the only heirs at law, persons, and parties interested in the estate. With all his years of acquaintance with this estate and its affairs, petitioner does not anywhere suggest a claim that this finding is untrue. He rests upon the bare possibility that some new claimant might appear when the administration of the estate is about to be closed, and so raises this cloud, less substantial than ether, as a wall to limit the jurisdiction of a court of equity. If there be some remaining unknown claimant, he has been represented by the administratrix as plaintiff in action No. 26366. If section 369 of the Code of Civil Procedure applies to such an action—and we think that it does—she was the only necessary plaintiff in that action.

> "An administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain actions on the bond of an executor, or of any former administrator of the same estate." Code Civ. Proc. § 1586.

There appears to be no good reason why the administrator may not, with like effect, under appropriate circumstances, maintain a suit for an accounting, against a former administrator.

For the foregoing reasons, an order has been entered denying the application for a peremptory writ, and directing that this proceeding be dismissed.

We concur: SHAW, J.; JAMES, J.

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43 Cal. App. 244

STANDING v. MOROSCO. (Civ. 1879.)

(District Court of Appeal, Second District, Division 1, California. Sept. 8, 1919. Rehearing Denied by Supreme Court Nov. 6, 1919.)

1. Frauds, statute of ⇨119(1), 126 — Estoppel to plead.

Every person being advised of the requirement of Civ. Code, § 1624, subd. 1, as to contracts not to be performed within a year, the mere omission to insist that a writing be made, or reliance only on the unfulfilled promise of the other party to put the agreement in writing, is not sufficient to protect the party insisting on fulfillment of the contract, but he must be misled by the other to his prejudice through representation, by words or conduct, of lack of intention to resort to plea of the statute.

2. Frauds, statute of ⇨129(2) — Injury an element of estoppel to plead.

A party seeking to enforce a contract not to be performed within a year, and against whom the statute of frauds, Civ. Code, § 1624, is set up because the contract is not in writing, must show, in order to avail himself of the principle of part performance, not only that he was misled by the other party's implied or express representation that he would not rely on the statute, but also that plaintiff has altered his position, so that he will be made to suffer loss or unconscionable injury, if the plea of the statute is allowed to prevail.

3. Master and servant ⇨8(1)—Hiring of servant from week to week.

Where the compensation of an actor was to be paid at a weekly rate, the term of employment should be construed as being from week to week, even without reference to Civ. Code, § 2010, imposing such rule of construction on contracts for the employment of a "servant," defined by section 2009 to be one employed to render personal service otherwise than in the pursuit of an independent calling.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Servant.]

4. Frauds, statute of ⇨129(2)—Void contract not enforceable on ground of estoppel.

Actor, suing manager on contract of employment for a year, void under Civ. Code, § 1624, subd. 1, because not to be performed within a year and not in writing, on the facts alleged in the complaint, *held* not entitled to enforce such contract against the manager on any ground of estoppel through detriment to him (the actor) by removal of himself and family from New York to Los Angeles.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Herbert Standing against Oliver Morosco. From judgment of dismissal, plaintiff appeals. Affirmed.

Paul W. Schenck and Joseph Citron, both of Los Angeles, for appellant.

Scarborough & Bowen, of Los Angeles, for respondent.

JAMES, J. The demurrer of defendant on general and special grounds was sustained to the third amended complaint of the plaintiff, and leave to further amend was denied. Judgment of dismissal followed, from which plaintiff appealed.

[1-3] The cause of action attempted to be alleged was one for damages sustained by the

plaintiff through the refusal of the defendant to use and pay for the services of the plaintiff after having employed him as an actor to appear in plays produced by the defendant in his theater at Los Angeles. Plaintiff alleged that the engagement was for a period of one year. It is respondent's contention that the complaint in its allegations showed a case falling within the statute of frauds, and that plaintiff could not recover because the term of employment was not fixed in any writing. An agreement which is not to be performed within one year from the making thereof, in order to be valid, must be expressed in writing. Section 1624, Civ. Code, subd. 1. In order to avoid the effect of the statute, it is appellant's position that there was such part performance of the contract shown as to raise an estoppel against respondent, preventing him from questioning the validity of the contract or its enforceability. The rule referred to is an equitable one, which holds it to be a fraud under some circumstances to permit a party to make the defense that a contract is void or unenforceable because not in writing. Every person is advised of the plain requirement of the statute, and the mere omission to insist that a writing be made, or reliance only upon the unfulfilled promise of the other to put the agreement in writing, is not sufficient to protect the party insisting upon the fulfillment of the alleged contractual obligation. He must be misled by the other to his prejudice; not only must sufficient facts appear to show a representation (by words or conduct) on the part of the defendant that he did not intend to resort to a plea of the statute, but the other party must have so altered his position as that he would be made to suffer loss or unconscionable injury. If no such injury or loss is shown, the reason for the rule of estoppel fails and the excepted case is not established. See Browne on Statute of Frauds (5th Ed.) § 457; Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418—both cited in Seymour v. Oelrichs, 156 Cal. 782, 106 Pac. 88, 134 Am. St. Rep. 154.

The complaint of plaintiff shows: That in December, 1912, plaintiff was employed as an actor in the city of New York by defendant at the weekly salary of $200, and that he had been engaged for a certain play. (How long this play was to run, or for what period of time plaintiff was under contract at $200 per week, is not alleged.) It is alleged that defendant promised and agreed that, if plaintiff would reduce his salary to $150 per week and remove to Los Angeles, defendant would employ him for a period of one year; that defendant promised to execute a contract in writing employing plaintiff for one year; that plaintiff accepted the agreement, relying wholly upon the representations made, and "refused to accept other employment which had been tendered him, and otherwise injuriously changed his position and removed to the city of Los Angeles." (What the compensation or term of service would have been under the alleged employment offered, or how plaintiff's position was "injuriously changed," does not appear.) There is the further allegation that plaintiff's wife remained in New York, "as was agreed," and disposed of plaintiff's home and household furniture, and that two months after plaintiff came to Los Angeles his wife came also, and that the transportation was furnished to her by defendant; that on the 15th day of March, after plaintiff had been employed in Los Angeles by defendant for 2½ months at $150 per week, defendant discharged plaintiff and refused to accept his offered services, and refused to "complete the execution of the said contract of employment which the said defendant promised and agreed at various times to deliver to the plaintiff, and repudiated his promises and representations made to this plaintiff." It is further alleged that defendant knew that a detrimental change of position and situation on the part of plaintiff would be necessary in the event plaintiff relied on defendant's said promises and representations; that the said promises and representations of the defendant were made with the knowledge and with the intent that they should be relied on by plaintiff and the change in his position thereby induced. A written memorandum, alleged to have been signed by defendant in New York, was set forth. It was in the following words:

> "Mr. Standing:
>
> "I will pay you one hundred and fifty ($150.00) dollars per week in Los Angeles for the length of your engagement there, under the terms of the usual theatrical contract.
>
> "As you have reduced your salary with me, I will be very glad to pay the transportation and sleeper of Mrs. Standing two mo's hence to Los Angeles.
>
> "This will hold good only when we execute regular contract. [Signed] O. M.
>
> "Yours very truly, [Signed] O. Morosco."

The memorandum contains no words fixing the term of service. The compensation was to be paid at a weekly rate; hence the term should be construed as being from week to week. This without reference to section 2010, Civil Code, which imposes that rule of construction upon contracts for the employment of a "servant." A servant is defined in the preceding section to be one employed to render personal service "otherwise than in the pursuit of an independent calling," and one who remains entirely under the direction and control of his master. It is not alleged what "the terms of the usual theatrical contract" were; they may have related wholly to matters of detail. And so the writing does not help the complaint, except to show that the defendant agreed to execute "the usual theatrical contract." This promise would be of no more potency when expressed in writing than by parol.

[4] We cannot conclude that the case alleged is one showing that plaintiff is entitled to enforce his contract, which is admittedly within the statute of frauds. That he suffered detriment because of any action taken by him, and in reliance upon the promises of defendant, the facts alleged do not show. Neither monetary loss nor great personal inconvenience can be presumed to have resulted to him. His property in New York may have been disposed of at a profit; the other employment tendered him may have been undesirable, of short duration, or covered by small prospective compensation. The change of residence from New York to Los Angeles may have been an agreeable one. The contract that plaintiff relinquished under which he was receiving $200 per week, may have been one for weekly employment only. Assuming against the pleader, as we must, all facts reasonably consistent with the facts alleged, but adverse to the plaintiff, it cannot be said the complaint makes out a case entitling the plaintiff to the relief sought.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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43 Cal. App. 261

PRATT v. PRATT. (Civ. 2012.)

(District Court of Appeal, Third District, California. Sept. 15, 1919.)

1. Executors and administrators 🔑305—Payment over of money to only heir.

In an action brought after the lapse of over 30 years to establish a claim against the estate of an administrator for money collected, but not accounted for in the administration, evidence *held* to justify the presumption that if any money was due to the legal heir represented by such administrator, it was paid over.

2. Executors and administrators 🔑305—Presumption of payment to heirs after lapse of time.

The presumption arising from the lapse of time that the administrator of a brother's estate had paid his father, the only heir, is not affected by noncompliance with Code Civ. Proc. §§ 1443, 1622, 1636, and 1665, requiring inventory and other steps in the administration.

3. Executors and administrators 🔑309—Presumption of true settlement after a lapse of time.

It is not illegal for an administrator, collecting money belonging to a decedent who was not indebted, to settle the estate with the heir without the formality of the ordinary administration of estates, and in a proceeding for accounting many years after it will be deemed not improbable he followed the shorter way.

4. Equity 🔑72(1) — What constitutes laches.

Laches, unlike the statute of limitations, is not a mere matter of time, but involves or implies some other circumstances rendering inequitable the enforcement of a claim, such as change of relations of the parties or condition of the property.

5. Executors and administrators 🔑473, 474(1)—Right of heir to compel settlement within statutory time.

On the administrator's failure to take the statutory steps in the administration, the heir may ask the aid of the court to compel him to settle the estate within the statutory time.

6. Trial 🔑82—Specific objection to evidence.

The certificate of authenticity and conformity to law contemplated by Civ. Code, § 1189, is not required to be attached to an acknowledgment to afford prima facie evidence of proper acknowledgment of an instrument executed in a foreign country, but in its absence other proof of compliance with the foreign law may be offered as provided by Code Civ. Proc. §§ 1901 or 1902, and if not acknowledged according to the foreign law such specific objection should be made to put one to such proof upon its introduction in evidence.

7. Executors and administrators 🔑305—Evidence of payment of heir's claim after lapse of time.

In an action against the estate of a deceased administrator for accounting, evidence that the only parties that could have positive knowledge of the facts were dead, in connection with the circumstance that slight evidence was offered on both sides, *held* to justify the court's finding that, owing to the great lapse of time, evidence of nonpayment to the heir was not available.

8. Appeal and error 🔑949—Executors and administrators 🔑470—Lapse of time barring action against administrator in discretion of judge.

The length of time that will bar an action against a deceased administrator's estate on a claim based on nonpayment to heir depends upon the peculiar circumstances of the case, and a large discretion is confided to the trial judge, whose determination is binding on the appellate court, unless manifestly an injustice has been done.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by William H. Pratt, as administrator of the estate of George Pratt, deceased, against Jennie S. Pratt, as administratrix of the estate of Samuel Pratt, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

Hawkins & Hawkins, of Modesto, for appellant.

J. M. Walthall, of Modesto, for respondent.

BURNETT, J. George Pratt died on the 12th day of June, 1876. On the first day of

July following, his brother, Samuel Pratt, was appointed the administrator of his estate by the probate court of the county of Stanislaus. Samuel Pratt thereupon qualified as such administrator, and immediately collected from two certain banks the sum of $850, which the said George Pratt, deceased, had deposited therein, but he took no further steps in the administration of, nor did he account to, said estate for the moneys he received. On the 14th day of January, 1915, the said Samuel Pratt died, and on the 5th day of February, 1915, letters of administration of his estate were issued to respondent. On the 25th day of October, 1915, plaintiff was appointed administrator of the estate of said George Pratt, deceased, and he thereupon presented a claim against the estate of Samuel Pratt in favor of the estate of George Pratt for said money, with compound interest, the total amount of the claim being over $11,000. It was rejected by the said administratrix, and suit was immediately brought thereon. The said George Pratt left as his sole heir at law, his father, Samuel Pratt, Sr., who was and always remained a resident of England. He also left several brothers and sisters in that country and one brother, the plaintiff herein, who, after the death of George, the exact time not being shown, came to California. There is no positive evidence that said Samuel Pratt ever made any accounting or paid any money to his father, the only showing as to any money transactions between him and the other members of the family consisting of his sending a few small sums of money to his sisters in 1913 and 1914.

The grounds for the trial court's judgment in favor of the defendant are disclosed by the following findings:

> "The court finds that the said Samuel Pratt collected certain sums of money belonging to the estate of George Pratt, deceased, to wit, said sum of $850. That he never accounted to the said estate therefor, but that he received and held a power of attorney from his father, Samuel Pratt, Sr., who was the sole heir of said George Pratt, deceased, to collect said money and pay the same to his father, and the court finds that the presumption is that said Samuel Pratt accounted to said father for said money collected, and from said presumption the court finds that said money was paid by Samuel Pratt to his father, Samuel Pratt, Sr. That the said Samuel Pratt, Sr., deceased, did not die for 23 years after the death of said George Pratt, deceased, and that during said time had knowledge of the death of said George Pratt, deceased, and the appointment of said Samuel Pratt as administrator of his estate during all of said years. That almost immediately after the death of said George Pratt, deceased, the said father executed and forwarded to the said Samuel Pratt said power of attorney. That during no time during said time of said 38 years did said plaintiff make any demand upon said Samuel Pratt for an accounting as administrator of the estate of George Pratt, deceased. That no demand was made upon said Samuel Pratt for an accounting as such administrator during his lifetime. That there is on file in the estate of said George Pratt, deceased, no demand or request for an accounting by the said plaintiff, or any one else, filed during the lifetime of said Samuel Pratt.
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> "That after the said letters were issued to the said Samuel Pratt, he took no further steps to settle said estate, and that no further steps have been taken in said estate, and that none were taken any time prior to the 14th day of January, 1915, at which date the said Samuel Pratt died, and that no inventory and appraisement were ever filed in said estate from the time of the appointment of the said Samuel Pratt as such administrator until his death, and that no claims have been filed against said estate.
>
> "That the evidence is insufficient to show that no money out of the money of said estate of George Pratt, deceased, was paid out for sickness or burial. That evidence cannot be obtained by reason of the long lapse of time between the death of said George Pratt, deceased, and the institution of this action to establish any allegation in the pleadings, for the reason that the said Samuel Pratt, the person having full knowledge of the matters, and all other persons from whom information can be had, are dead. That the evidence is insufficient to establish what disposition was made of any moneys or property belonging to said estate of George Pratt, deceased, which might have or did come into the hands of said Samuel Pratt as administrator of said estate. That the evidence is insufficient on account of the great lapse of time since the death of said George Pratt, deceased, and the appointment of Samuel Pratt as his administrator, and the death of all those possessed of the knowledge of such fact, to establish the allegation in the complaint that the money alleged to have been collected by said Samuel Pratt for or on account of the estate of George Pratt, deceased, was never paid to any of the heirs of the said George Pratt, nor expended for the benefit of the estate of George Pratt, nor paid to any other person in interest for the estate of George Pratt or otherwise, or that it was never paid out to any one else, or that it was used for the benefit of said Samuel Pratt.
>
> "The court, therefore, finds from the foregoing facts that said Samuel Pratt accounted to and paid over to said Samuel Pratt, Sr., the father of said George Pratt, deceased, and the sole heir of said George Pratt, deceased, all sums of money to which he, the said Samuel Pratt, Sr., would have become entitled to, or was entitled to from said estate."

As conclusions of law the court made the additional findings:

> "That said action is barred on account of the laches of the plaintiff, and each and all of the heirs of Samuel Pratt, Sr., in demanding an accounting of the said Samuel Pratt as administrator of the estate of George Pratt, deceased.
>
> "That the said claim of the plaintiff as administrator of the estate of George Pratt, deceased, against the estate of Samuel Pratt, deceased, is a stale claim, and not enforceable against the estate of Samuel Pratt, deceased.
>
> "That on account of the great lapse of time

since the appointment of said Samuel Pratt as administrator of the estate of George Pratt, deceased, the said Samuel Pratt is presumed to have duly accounted to the heirs of said George Pratt and to have paid their distributive shares in said estate."

It thus appears that four considerations entered into the decision of the lower court, namely, the failure of proof on the part of plaintiff, the presumption of payment by Samuel Pratt to his father, the staleness of the claim, and the laches of said plaintiff and the other heirs of Samuel Pratt, Sr.

[1] As to the first, it may be said that the record herein furnishes a striking demonstration of the difficulty of proving a fact after the lapse of so many years. And in considering this phase of the case, it must be deemed a fair inference that the parties presented all the evidence that was available. We cannot say that there is an entire absence of evidence of the failure of Samuel Pratt to properly account with his father. However, it is meager, and, in view of the exclusive province of the trial judge, acting in place of a jury to determine the probative force of the testimony, we think no appellate court would be justified in holding that a fair consideration of the evidence should have led the lower court necessarily to the conclusion that Samuel Pratt had not paid his father all that the latter was entitled to. In regarding the point we must remember that, while it was shown, and the court found that Samuel Pratt had collected $850, there is no evidence whatsoever as to the expense of the last illness of George Pratt or of his funeral, or of the administrator's, or the attorney's fee in the administration of the estate. Respondent claims $350 to be a reasonable amount for these items. Ordinarily, such expenses would be equal to that amount. Of course, it is impossible to say positively how much, if anything, was paid out for any or all these matters, and in the absence of any evidence whatever as to this consideration, the trial court would necessarily be in doubt as to the amount left in the hands of Samuel Pratt to be paid over to his father.

But, assuming that the burden of proof was upon respondent to show how much, if anything, was paid for these purposes, and in the absence of any showing to that effect, the court was bound to charge the estate of Samuel Pratt, deceased, with the full amount, which was collected, the inquiry then arises whether the evidence was such that the court should have found that it was not paid to Samuel Pratt, Sr.

The testimony on this point in behalf of appellant was brief, and we may herein set it out. John Radley testified:

> That he had known Samuel Pratt since 1875. That they were working together in June, 1876. "Samuel Pratt's brother, George Pratt, got hurt, and Samuel Pratt got a message to come up, and he went. He returned the next day. He then told me that his brother was hurt very bad, and he didn't think he would live very long. Samuel Pratt was running the header for Mr. Wardrobe, and he said he came back to keep his job, and he said that he had hired a man to take care of his brother. His brother soon hereafter died."

After stating that Samuel told him that he collected over $700 from the Stockton and Merced banks belonging to his brother, George, the witness proceeded:

> "I once asked him if he had sent the money to his father, and he told me no, but he was going to. We had several conversations in regard to it. The last time I asked him about it he said he had put that money to interest so it would draw more money, and he would send it later on to his father. He told me he knew where he could buy 160 acres of land, and he asked my opinion. Afterwards he bought the land."

He also stated that Samuel Pratt never told him anything as to whether his father had made a demand for the money. Plaintiff offered in evidence a mortgage on certain lands in Stanislaus county, dated November 3, 1876, made by James Berry to Samuel Pratt to secure the sum of $1,850 and a satisfaction thereof on October 24, 1879. A deed from one Emeline Daggett to Samuel Pratt, reciting a consideration of $1,000 and dated October 12, 1878, was also introduced in evidence.

George Squire then testified:

> "I knew Samuel Pratt for 10 years, from 1873 to 1883. He told me that George Pratt asked him to collect certain moneys, $950 or $960, and send it to his father. The money was in the savings bank at Stockton and Merced. What I know about the matter was what I learned from being his nearest neighbor and what he told me himself. I know he had the money. He bought with it three quarter sections of the town of Oakdale. One of the quarters was purchased from me."

The trial court might well hesitate to find from the foregoing that Samuel Pratt violated his trust and withheld from his father any money to which he was entitled. The incidents concerning which the witnesses testified were held in the uncertain grasp of memory, reaching back nearly 40 years, and this circumstance was, of course, significant in the determination of their credibility. That after such a period of time they could state with accuracy what was said and done concerning a matter in which they had no personal interest might well challenge credulity. It is well to remember in this connection that the substitution or elimination of a single word of the conversation, or the addition of a slight incident, might present the consideration in an entirely erroneous light. Moreover, it is admitted that Samuel Pratt did not conceal from these witnesses the fact that he had money in his possession belonging to his father, and he expressed his intention of sending it to him. This, at least, tends in some degree under the circumstances to negative the theory of a dishonest purpose. In fact, the only incident detailed by the witnesses lending any support to the claim that Samuel Pratt failed to settle with his father was the purchase of land to which they testified. But as to this, in the first place, it may be said there is nothing to show that he did not have money of his own. That he had some is quite apparent, indeed, from the amount invested. That he also purchased the land with his own money would be presumed, were it not for the said testimony of George Squire that Samuel Pratt "bought with the money three quarter sections in the town of Oakdale." But this testimony is quite unsatisfactory in the absence of any further explanation, and it is more significant for its omissions than for what was stated. When the land was bought does not appear, the deed not being offered in evidence, nor how much was paid for it, nor how long it was retained by Samuel Pratt. Furthermore, the statement of the witness undoubtedly involved his mere opinion from what was told him by said Pratt and his neighbors. Again, his credibility was for the trial judge, and we cannot say that he was not justified in attaching little, if any, importance to this testimony.

But according it full credit, would the lower court be required to find from this circumstance that the money was not paid to Samuel Pratt, Sr.? We think not. A more just and reasonable inference would be that the son was moved by an honest and filial purpose to increase his father's possessions, that he was successful in his endeavor, and that in due time he transferred the money with its increase to its rightful owner. We repeat, the record contains some evidence, though slight, as we view it, of the dereliction of Samuel Pratt, Jr., in the premises, but not of sufficient probative force for us to hold that the lower court was bound to find that there was no payment. How would the case then stand, and, particularly, what presumption should be indulged? Clearly, we think, that Samuel Pratt, Jr., performed his official duty, and that he acted honestly and in good faith. A contrary presumption would impute to him, not only a violation of the obligations of his trust but an utter indifference to the compelling impulses that usually characterize such relation of kinship, and, more than that, the actual commission of a crime. This is not to be permitted, especially in view of the great number of years that had elapsed. The whole record, we are persuaded, justifies the presumption and the conclusion that, if any money was due, it was paid.

Many cases of similar import are found in the books, and some of them determine that the presumption of settlement should be indulged where it is not overcome by satisfactory evidence to the contrary. In Jones v. Jones, 91 Ind. 378, the right to a settlement had existed for about 20 years, and the court said:

> "This was a stale demand. In the absence of evidence to the contrary, the presumption would be it had been paid. Even in cases of chancery jurisdiction, to which the statute of limitation is not a bar, a court of equity will presume that a stale demand has been paid. Parker v. Ash, 1 Vern. 256; Sturt v. Mellish, 2 Atk. 610; Higgins v. Crawford, 2 Versey, Jr., 571; Smith v. Calloway, 7 Blackf. 86; Stehman v. Crull, 26 Ind. 436."

[2] Nor do we think this presumption is affected by the provisions of the statute in relation to the administration of estates. It is true that the Code of Civil Procedure provides that an administrator must make and return to the court a true inventory and appraisement of the estate (section 1443); when required by the court or upon application of any person interested he must render an account (section 1622); upon the hearing of the accounts, the heirs may contest all matters included therein (section 1636); and final distribution of the estate can be had only upon final settlement of the accounts of the administrator, at which time the court ascertains who are the persons entitled to the estate (section 1665).

In view of the failure of Samuel Pratt, Jr., to comply with these various provisions of the statute it is contended that he had no right or authority to pay out any money to his father, and hence the presumption would be that he acted accordingly. But it must be remembered that the only parties interested in the regularity of the proceedings are the administrator himself, the creditors and the heirs, and each case must be considered in the light of its own peculiar facts. Herein there was no real estate, and we must take it for granted that there were no creditors, unless perhaps on account of the last illness and funeral expenses of the brother; that there was no controversy as to the heirs; that a relation of trust and confidence existed between the administrator and his father; that the son believed and had reason to believe that no question would ever arise as to the integrity of his conduct; that he knew how much his father was entitled to, and believed that he could, with safety, settle with him without incurring any further expenses of administration.

[3] It can hardly be said that it was his duty in any event to pursue the course indicated by said provisions of the Code. That would have been the more regular procedure, and it would have afforded him greater security, but if the facts existed as we have supposed, there was nothing unreasonable or illegal in his settling with his father without the formality of the ordinary administra-

tion of estates, and we deem it not improbable that he followed the shorter way. His determination was, of course, subject to review by the court at the instance of any interested party, but we must suppose that he felt amply protected, and that the heir was satisfied.

In the Estate of Willey, 140 Cal. 238, 73 Pac. 998, the executors, in an account rendered by them, sought to have themselves credited with certain advance payments made by them to certain beneficiaries named in the will, without obtaining an order of court, and it was held that the trial court properly retired those items from the account to be considered when the petition for distribution was heard. Therein was involved the construction of the terms of a will, and a controversy existed between the interested parties, which the court was called upon to review in the regular course of the administration of the estate. The executors could not by their action preclude the court from determining the controversy at the proper time and, manifestly, as it was stated:

> "When an executor undertakes to construe the provisions of a will or to make payments thereunder in anticipation of the decree of distribution he does so at his peril."

While the facts herein distinguish this case from that, still it may be conceded that, if said Samuel Pratt made a settlement with his father without an order of court, he did so "at his peril," and that he could not thereby forestall an accounting in court, yet under the circumstances of this case we deem it not an unreasonable inference that he did make such settlement, believing that he was justified in so doing, and we think it cannot be said that thereby he violated his duty or transgressed any provision of the law.

[4] The findings as to the staleness of the claim and the laches of plaintiff may be considered together, as they are closely related. Appellant is clearly right in the contention that laches, unlike the statute of limitations, is not a mere matter of time. It involves and implies some other circumstance, or circumstances that would render inequitable the enforcement of the claim. This may be a change in the relations of the parties or the condition of the property that is deemed a justification for the denial of any relief. It may be added, though, that the great lapse of time, especially if the claimant has knowledge of the existence of his right, is often held sufficient to create the presumption or implication of another fact of an equitable nature, and thus to justify a decision against the claimant. As to the character of this defense and the reasons for its recognition and enforcement, it is sufficient to refer to the carefully considered opinion written by Justice Hart and adopted by the Supreme Court in the case of Miller v. Ash, 156 Cal. 544, 105 Pac. 600.

To illustrate, however, the peculiar views of various courts concerning situations similar to the one before us, we may cite some instances of the application of the doctrine of "staleness" and "laches."

In Perkins v. Cartmell, 4 Har. 270, 42 Am. Dec. 753, a legacy was involved for which no demand had been made for 30 years, and the court said:

> "This suit is barred by lapse of time independently of the statute of limitations upon the presumption of payment and satisfaction, which presumption is not rebutted. The defense founded upon mere lapse of time and the staleness of the claim, in cases where no statute of limitation directly governs the case, is said by Judge Story (2 Com. on Eq. Jur. § 1520, p. 904) to be a defense peculiar to courts of equity. Upon general principles of their own, independently of the statutes of limitation, they have always discountenanced laches and neglect, and refused their aid to stale demands where the party has slept upon his right, or acquiesced for a great length of time. After a considerable lapse of time, they refuse to interfere, from considerations of public policy, and the difficulty of doing entire justice when the original transactions have become obscure by time and the evidence may be lost."

There was something like 20 years' delay in demanding an accounting in the case of Osborne v. O'Reilly, 43 N. J. Eq. 647, 12 Atl. 377, and the court said:

> "This great delay might have justified the court in dismissing the complainant's bill without looking at the merits. It certainly requires of the court to take care that the dangers of injustice, which always attend the investigation of facts long since transpired, are not overlooked, and that, before disturbing the status acquiesced in by both parties for so many years, very convincing evidence of the propriety of a change shall be adduced."

In Le Roy v. Bayard, 3 Bradf. Sur. (N. Y.) 228, it was held that the lapse of 29 years since the administration of the estate commenced is sufficient to excuse a formal inventory and account.

In Calhoun's Appeal, 39 Pa. 218, the court determined that since the devisee and her heirs knew for 25 years of the mismanagement of the estate, but required no accounting nor sought any relief, they were not entitled to the aid of a court of equity, after having so slept on their rights, the court saying, however:

> "Had there been ignorance of facts or legal disabilities to account for the extraordinary neglect of legal remedies on the part of the appellants, their inaction might have been excused, but nothing is shown or suggested by way of excuse."

In Gatewood v. Gatewood Adm'x, 70 S. W. 284, 10 years after the death of an administrator, suit was brought against his estate for a sum claimed to have been retained by him belonging to plaintiff, the claim being 30 years old, and it was held that the claim was stale and not enforceable in equity.

In Hill v. Hill, 70 N. J. Eq. 107, 62 Atl. 385, the court of chancery held that the lapse of 17 years was sufficient to bar an application for an accounting of an administrator. The court declared that—

> The complainants were "chargeable with notice that they were entitled to a prompt accounting, which is precisely the remedy which they are here asking. Not only do they not allege their ignorance in these matters, but it is quite impossible to believe that they were so far indifferent to their pecuniary rights as not to be informed that the time had arrived when they were entitled to receive from their father's estate more than they did actually receive, unless the same was absorbed in the payment of debts. * * * The complainants, then, are chargeable with resting on their rights for about 17 years without the least excuse whatever. In the meantime it is fair, I think, to infer that the vouchers and papers relating to the estate, which must have been in the hands of their uncle, John, have been lost or mislaid, and are not now available to the answering defendant."

In Re Henry's Estate, 198 Pa. 382, 48 Atl. 274, it was held that an application for an accounting of an administrator was barred by the lapse of 18 years, the court saying that the case was "made much stronger by reason of the death of the person whose liability to account is now asserted." Therein the court cites with approval the case of Gress' Appeal, 14 Pa. 463, wherein an account was refused after the lapse of 18 years, not because of either presumption of payment or settlement, but because it resulted "altogether from the unwarrantable negligence of the party to call for an account, without offering any sufficient reason accounting for the delay."

In Phillips v. Piney Coal Co., 53 W. Va. 543, 44 S. E. 774, 97 Am. St. Rep. 1040, a delay of 10 years was held sufficient to bar an action to reform a deed, and the court declared that a party who seeks to avoid the charge of laches in such case "should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer."

In Preston v. Preston, 95 U. S. 200, 24 L. Ed. 494, the suit was brought 25 years after the right occurred, and the court said:

> "The delay of one to this extent in prosecuting his rights under a contract is, except under special circumstances not existing here, such laches as disentitled him to the aid of a court of equity."

In Pusey v. Gardner, 21 W. Va. 469, it was held that a court of equity will not set aside a deed, made by a daughter to her father immediately before her marriage, conveying her remainder in land, ~~in~~ which the father had a life estate, upon the ground of undue influence after an interval of 35 years and after the death of the father, though the claim of the daughter is not barred by the statute of limitations, where the case is not a clear one and there are no circumstances which sufficiently account for the delay. Therein was quoted the following statement from Kerr on Fraud and Mistake, § 305:

> "Lapse of time, when it does not operate as a positive statutory bar, operates in equity as an evidence of assent, acquiescence or waiver."

Other cases to the same effect are available, but they need not be cited.

Appellant finds comfort in certain other decisions, which he claims to be essentially in conflict with the cases upon which respondent relies. But it can hardly be said that they teach another doctrine, although some of them present a different view of the burden of proof. One of them is the carefully considered case of Depue v. Miller, 65 W. Va. 120, 64 S. E. 740, 23 L. R. A. (N. S.) 775, wherein the West Virginia Supreme Court of Appeals declared it to be a sound doctrine that—

> "Mere forbearance to compel rendition of a just debt or other right, the existence of which is clear beyond doubt, does not prejudice the party from whom it is due, and it is not inequitable to enforce rendition thereof after long delay; but if the length of time be long enough in itself, or with the aid of circumstances and conduct to satisfy the chancellor that the plaintiff had abandoned his right before he brought suit to enforce it, his demand will be regarded as stale and lost by laches."

However, the court held that the claim therein was fully proven by documentary evidence under circumstances not in any way operating to the prejudice of the defendants and tending to negative the inference of intent on the part of plaintiff to abandon or relinquish his right, and concluded that the delay in the assertion of the right for a period of less than 20 years would not bar relief.

In Glen v. Kimbrough, 58 N. C. 173, the action was held not to be barred by the lapse of 34 years, but the decision was based upon the ground that there was no representative of the estate against which the action could be brought. The court, however, recognized the rule to be that after the lapse of a long period of time a presumption will arise "of payment or satisfaction or abandonment; * * * but this presumption is one of fact, and is rebuttable, and where it appears it has not been settled, or where it appears there was no one with the legal power to make a settlement, the presumption is rebutted."

In the Estate of Fischer, 189 Pa. 179, 42 Atl. 8, the main question was as to the validity of a certain release, and it was justly held that the lapse of 17 years did not bar the claimant from seeking to avoid the effect of said release on the ground that she imperfectly understood English, did not comprehend the meaning of the terms employed, and was induced to execute it by reason of certain threats which were made. It was in view of these circumstances that the court said:

> "There is nothing therefore left to sustain the plea of laches but mere lapse of time; and that is clearly insufficient."

In Wilson v. McCarty, 55 Md. 277, it was held that the orphans' court had jurisdiction to compel a surviving executor to return assets of the estate or recover them where they could be recovered even where an account called final had been allowed and some 14 years had elapsed since such account. The court said this could be done within a reasonable time and "what is reasonable time depends upon the peculiar circumstances of each case, and the character of the correction to be made."

In Werborn v. Austin, 82 Ala. 498, 8 South. 280, the court recognized the presumption of payment from the lapse of 20 years in the case of a trust, but held that it was overcome by evidence to the contrary.

In Branch v. Hanrick, 70 Tex. 731, 8 S. W. 539, suit was brought August 11, 1885, against one who had been appointed administrator of an estate in 1867. The action was by one claiming a distributive share of the estate, who sought to compel an accounting by the administrator. The latter contended that by virtue of a certain statute of Texas the administration of the estate was conclusively presumed to have been closed, but the Supreme Court held that said statute had been repealed, and that it was proper to show that such settlement had not been made.

The important question in Re Sanderson, 74 Cal. 199, 15 Pac. 753, was whether the executor had been negligent as to the collection of a certain note, he having made no excuse for his failure. The matter was covered by section 1615 of the Code of Civil Procedure, providing that—

> "No executor or administrator is accountable for any debts due to the decedent, if it appears that they remain uncollected without his fault."

The Supreme Court properly held that the statute of limitations did not run against the continuing trust of the executor, and that in case the debt was not collected the statute imposed upon him the burden of showing that it was without his fault.

In Bemmerly v. Woodward, 124 Cal. 568, 57 Pac. 561, the action was brought for an accounting about 11 years after the last account had been rendered. It is plain, though, that no final accounting could have been enforced against Woodward during the disability of the minors, the will containing this provision:

> "Whenever one of my children becomes of age or it shall be entitled to his or her share of the estate then remaining in the hands of my executors, and they are hereby directed and authorized to deliver up such child's portion by a fair division made of the lands then belonging to the estate."

It seems that the youngest minor reached his majority only about 1 year before the suit was brought. So, the case is hardly in point here. It is true that the court said:

> "To show an honest execution of the trust it was incumbent upon Woodward to show what he did with the money. In the absence of such showing, I think we must conclude that he did not use them for the estate."

That was a proper rule to apply under the peculiar circumstances of the case. Besides, the evidence and pleadings of the parties were such that the lower court could hardly have concluded otherwise than in favor of plaintiff, the serious question on appeal being as to the sufficiency of the finding of Woodward's neglect to invest the trust money and as to the amount of interest that should be charged against him.

[5] But appellant claims that the lower court without warrant assumed or found certain circumstances to exist which are essential to the support of the conclusion that plaintiff and the other heirs were chargeable with laches. One of these, namely, in relation to the fact that no inventory was filed nor other step taken in the administration of the estate, we have already noticed. We may add that it was undoubtedly the right of the heir to invoke the aid of the court to compel the administrator to settle the estate within the statutory ime.

[6] Again, it is claimed that the evidence does not show that the heirs had knowledge of the death of George Pratt and of the condition of his estate. The only heir, as we have seen, for 23 years was his father, and power of attorney from him to Samuel Pratt, Jr., dated July 11, 1876, was received in evidence, in which he referred to "my late son George Pratt, deceased." It is true that an objection was made by appellant to the introduction of this instrument on the ground that—

> "The deed and certificate are not in conformity with our statute, and that the execution is insufficient, and that the acknowledgment is not in the form required to prove the signature of a signer to a document, and that it is not duly

authenticated as required by the laws of the state of California, and it does not show that it has ever been acted upon as genuine, and its custody has not been explained, and it does not appear that it has ever been treated as a genuine document."

The power of attorney purported to be executed in England and acknowledged before Cad. E. Palmer, a notary public of Barnstaple in the county of Devon, and had the seal of his office attached. This notary certified that Samuel Pratt appeared before him "and acknowledged the said letter of attorney to be his act." To this with the seal of his office was annexed the certificate of the United States consul at Bristol, England, "that the foregoing signature and seal are the true and genuine signature and seal of Cadwaloder Edwards Palmer, a notary public, residing at Barnstaple, in the county of Devon, England." Section 1189 of our Civil Code specifies the general form of the certificate of acknowledgment, but adds:

> "Provided, however, that any acknowledgment taken without this state in accordance with the laws of the place where the acknowledgment is made, shall be sufficient in this state; and provided further, that the certificate of the clerk of a court of record of the county or district where such acknowledgment is taken, that the officer certifying to the same is authorized by law so to do, and that the signature of said officer to such certificate is his true and genuine signature, and that such acknowledgment is taken in accordance with the laws of the place where the same is made, shall be prima facie evidence of the facts stated in the certificate of said clerk."

Since the instrument was executed in England it was therefore necessary that it be acknowledged according to the law of that country. But if it was not so acknowledged, or there was any claim to that effect, such specific objection should have been made. The only objection in that respect was that it was not acknowledged as required by the laws of this state. We may add that the certificate contemplated by said proviso is not required to be attached to the acknowledgment. If attached, it affords prima facie evidence of the proper acknowledgment of the instrument, but, in its absence, other evidence of compliance with the requirement of the foreign law may be offered as provided by sections 1901 or 1902 of the Code of Civil Procedure. Appellant should have made the specific objection to put the respondent to such proof.

But, regardless of this instrument, it is not to be supposed that the father for over 20 years was ignorant of the death of his son. The presumption that "things have happened according to the ordinary habits of life" would justify the inference that he made inquiry and ascertained from his son, Samuel, that George had passed away. As to William, the plaintiff, the evidence shows that he lived for some years in the county of Stanislaus, wherein the latter was appointed administrator of the estate of his brother, George, and it would be quite unreasonable to assume that he was ignorant of the situation. If he had not known of the death of George or of the father, of course, he would have so testified when he was on the stand. The fact that he was not interrogated concerning it is quite sufficient, under the peculiar circumstances of the case, to lead to the conclusion that he had such knowledge. We may add that his failure to excuse his delay of 15 years after the death of his father and nearly a year after the death of his brother, Samuel, before instituting this action is equally significant.

[7] It is also claimed that there is no sufficient support for the finding that, owing to the great lapse of time, evidence could not be secured as to the payment or nonpayment of the claim. It is true that counsel on both sides seemed somewhat reluctant to question the witnesses, the examination having been apparently very brief; but the evidence showed without doubt that the only parties who could have positive knowledge of the fact were dead, and this, considered with the circumstance that such slight evidence was offered on both sides, would appear to justify the court's conclusion that the evidence was not available.

[8] Speaking generally, we think it must be said that there is no hard and fast rule as to the length of time that would bar such an action as this, that much depends upon the peculiar circumstances of the case; that a large discretion is confided to the trial judge, and the disposition of an appellate court is and should be to respect that discretion and not to interfere with his conclusion unless manifestly an injustice has been done. When we recall all the circumstances to which we have adverted, we cannot say that the decision was wrong. The responsibility for determining the question rested with the court below, and we think we are bound by the findings. The judgment is, therefore, affirmed.

We concur: CHIPMAN, P. J.; HART, J.

43 Cal. App. 307

In re KING'S GUARDIANSHIP. (Civ. 2910.)

(District Court of Appeal, First District, Division 2, California. Sept. 18, 1919.)

1. Insane persons ⚿33(2)—Affirmance of judgment on conflicting evidence.

Where the evidence was conflicting, and enough appeared to support the findings that the alleged incompetent was not incompetent and that no fraud had been practiced upon her by the son, with whom she was living, the judgment refusing to appoint guardian for her will be affirmed.

2. Appeal and error ⚿333 — Dismissal when case rendered moot.

Where the person for whom a guardian is sought to be appointed dies pending appeal from judgment refusing to appoint, the ordinary course would be to dismiss the appeal as moot.

3. Appeal and error ⚿803—Dismissal of same effect as affirmance.

The effect of dismissal of appeal from judgment refusing to appoint guardian for an alleged incompetent person, because she has died pending appeal, would be the same as an affirmance of the judgment.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

In the matter of the guardianship of the person and estate of Phebe R. King, incompetent. From a judgment refusing to appoint a guardian for the alleged incompetent, there is an appeal. Affirmed.

N. Lindsay South and Everts & Ewing, all of Fresno, for appellant.

Harris & Harris, of Fresno, and C. W. Trabing, of Kingsburg, for respondent.

BRITTAIN, J. [1] While Phebe R. King, aged 83, was living with one of her sons, other children petitioned for the appointment of a guardian, alleging she was incompetent and subject to fraud, which they further alleged was being practiced upon her. The petition was denied. The appeal was based wholly on the claimed insufficiency of the evidence to support the findings that she was not incompetent and that no fraud had been practiced. The evidence was conflicting, and enough appeared to support the findings. In such a case the judgment will be affirmed. Matter of Daniels, 140 Cal. 335-337, 73 Pac. 1053.

[2, 3] When the matter was called for argument, a letter from counsel for the appellants was presented. It contained a statement that Mrs. King had died pending the appeal, and asked that the matter be submitted. If the statement in the letter was sufficient as a suggestion of death, the ordinary course would be to dismiss the appeal. The effect of such a dismissal would be the same as an affirmance of the judgment.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

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43 Cal. App. 162

COMMERCIAL SECURITY CO. v. MODESTO DRUG CO. (Civ. 1956.)

(District Court of Appeal, Third District, California. Sept. 5, 1919.)

1. Corporations ⚿414(2)—Notes by president, without approval of directors, enforceable.

Where president and general manager of corporation entered into contract, the sole purpose of which was to increase the volume of business of the corporation, which received the benefits of contract in consideration of which notes were given, and M., who with the president owned all but one share of stock, was informed of the contract on the day following, and made no protest, *held*, notes were enforceable against corporation by innocent purchaser for value before maturity, though there was no compliance with by-law requiring contracts to be approved by board of directors before president could sign.

2. Corporations ⚿405—Power of president of commercial corporation.

Where a corporation is organized for commercial purposes, its president or general manager, given immediate direction or control of its affairs, is its agent empowered, unless expressly restricted to the performance of certain specific acts, to do anything which naturally and ordinarily has to be done to carry out its paramount purposes.

3. Corporations ⚿400—Cannot deny liability on ground that officer had no authority.

Where officer of corporation is held out by such corporation to be possessed of power to perform all acts involved in its ordinary or usual business, the law will not permit third parties to suffer from such acts of such officer by plea of corporation that ostensible authority of such officer was not in fact conferred upon him.

4. Corporations ⚿425(4) — Estopped by accepting benefits of agreement by president.

Act of defendant corporation in accepting benefits of agreement made by its president and general manager amounted to a consent to all obligations thereof, and if it was not a ratification (Civ. Code, § 1589) defendant is nevertheless estopped from denying the binding force of the agreement.

5. Corporations ⚿465 — Consideration for note given by president.

Where president and general manager of corporation entered into contract, sole purpose of which was to increase volume of business of corporation, which received benefits of contract in consideration of which notes were given, and

M., who with the president owned all but one share of stock, was informed of the contract on the day following, and made no protest, and later purchased stock of the president, agreed to pay the note, and so informed payee, it cannot be contended that the notes were not supported by a consideration.

6. BILLS AND NOTES 🔑370—WANT OF CONSIDERATION DOES NOT AFFECT INNOCENT PURCHASER.

That notes were not supported by a consideration would be of no consequence, where plaintiff purchased them for value before maturity without knowledge of want of consideration; a written instrument itself being presumptive evidence of a consideration (Civ. Code, § 1614).

7. BILLS AND NOTES 🔑370—ENFORCEMENT OF PAYMENT BY INNOCENT PURCHASER.

Where purchaser of promissory note has no knowledge of any infirmity in the paper on the score of consideration, or of facts which, when followed with reasonable diligence, would lead to a discovery of such infirmity, and no fraud in the transaction resulting in the execution of the note is shown or claimed, the purchaser, if he has exchanged value for the note, will be protected as an innocent purchaser for a consideration, and may enforce payment (Civ. Code, § 3122).

8. BILLS AND NOTES 🔑342—CORPORATIONS 🔑432(12) — WANT OF CONSIDERATION NOT SHOWN BY ABSENCE OF SEAL.

That seal of defendant corporation was not affixed to notes is not conclusive evidence of a want of authority for the execution of the notes, nor a circumstance sufficient to create a suspicion that the notes were not wanting in consideration, or that their consideration had failed at the time of their transfer to plaintiff.

9. CORPORATIONS 🔑403 — NECESSITY FOR USE OF SEALS.

The seal of a corporation performs no further or greater function than to import prima facie verity of the due execution by the corporation of the written obligation.

10. EVIDENCE 🔑22(2) — COMMON KNOWLEDGE OF ABSENCE OF SEAL TO CONTRACTS OF CORPORATION.

It is a matter of common knowledge that many contracts made by corporations and unattested by their seals are enforced.

11. CORPORATIONS 🔑432(6) — PAROL EVIDENCE OF AUTHORITY TO MAKE CONTRACT.

The fact that an unsealed contract was duly authorized by a corporation may be shown by parol.

12. BILLS AND NOTES 🔑345—PURCHASER'S KNOWLEDGE OF INFIRMITY.

That plaintiff took a bill of sale of notes, with a guaranty from the payee that they would be paid, in lieu of the customary indorsement, does not constitute a circumstance sufficiently significant to justify a suspicion that the notes were not all that they on their face purported to be.

13. BILLS AND NOTES 🔑497(2)—BURDEN OF PROOF ON INNOCENT PURCHASER.

It is only where fraud or irregularity in the inception of a note is shown that burden is on purchaser to prove that he purchased before maturity, in good faith, for value, in the usual course of business; the rule not applying where there has been a valid consideration, which has failed.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by the Commercial Security Company against the Modesto Drug Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Scott Rex, of Stockton, for appellant.

Hawkins & Hawkins, of Modesto, for respondent.

HART, J. Plaintiff, an Illinois corporation, brought the action against defendant, a California corporation, to recover judgment on two promissory notes, each for $400, dated December 4, 1915, payable to the Partin Manufacturing Company, and alleged to have been duly indorsed and delivered by the payee to plaintiff prior to maturity. Judgment was in favor of defendant, from which judgment plaintiff prosecutes this appeal.

The Modesto Drug Company was engaged in the retail drug business in the city of Modesto. The capital stock of the corporation, with the exception of one share, was owned equally by J. T. Skow and D. W. Morris. Mr. Skow was a pharmacist, and was president of the defendant corporation. He was called as a witness for plaintiff, and testified that he was manager of the business, discharged the general duties pertaining to the conduct of the business, bought and sold goods, and had charge of the advertising. In the fall of 1915 Skow had some negotiations with a representative of the Partin Manufacturing Company, of Memphis, Tenn., and on the 4th of December, 1915, a contract, in the form of a letter addressed to the Partin Manufacturing Company, was signed "Modesto Drug Co., Purchaser, by J. T. Skow," and also contained the signature of the salesman of the Partin Company. Portions of said contract are as follows:

"Please ship to us at your earliest convenience by freight f. o. b. factory the following goods as described below:

"Capital prize, 2 passenger roadster. The purchaser is to deliver to the winner in this trade campaign the winner's choice of the following automobiles: Partin-Palmer, Monroe, Chevrolet. * * *

"Second prize, one lady's bracelet watch. * * * Third prize, one three piece French Ivory toilet set." Fourth and fifth prizes were named and ten dinner sets. Advertising matter to be furnished by the Partin Company was specified.

"(1) The undersigned purchaser warrants that his sales for the past 12 months were $20,000. On this warranty of sales, Partin Manufacturing Company hereby agrees to increase the purchaser's sales and collections not less than $12,500 in the next 12 months. Partin Manufacturing Company agrees to refund 6 cents on every dollar the purchaser falls short of the $12,500 increase and agrees to send their bond to purchaser's bank in the sum of $800 to guarantee this agreement, guaranteed by some surety company or bank satisfactory to company. Partin Manufacturing Company reserves the right to increase the number of premiums, without cost to the purchaser, if in their opinion it is necessary to bring about the above guaranteed increase. Partin Manufacturing Company agrees to send a bank certificate of deposit to purchaser's bank for $400, to be held by purchaser's bank as a guaranty that Partin Manufacturing Company will deliver the automobile chosen by the winner in this campaign. Partin Manufacturing Company agrees to send a personal representative to assist in getting candidates and helping start this trade campaign."

There followed stipulations on the part of the purchaser as to the receipt of goods, making reports, etc. "The attached notes are executed and tendered in settlement of this order, and Partin Manufacturing Company is authorized to detach the same on acceptance of this order."

The notes in suit, attached to the above instrument, had been cut therefrom prior to the commencement of the action. The first note reads as follows:

"P. O. Modesto, Calif.
"$400.00. December 4, 1915.

"Five months after date for value received we promise to pay to the order of Partin Manufacturing Company, Incorporated, four hundred dollars —— Union Savings Bank, Modesto, California.

Modesto Drug Co.,
"By J. T. Skow."

[Eight cents revenue stamps attached.]

The second note was identical with the first, except that it was payable six months after date. Witness Skow testified that the representative of the Partin Company explained to him the methods by which the defendant's business was to be increased, consisting of advertising, voting contests for prizes, etc.

The court found that the defendant did not execute or deliver to the Partin Manufacturing Company the notes in question, or any promissory notes; that J. T. Skow made and delivered the notes in suit, but was not authorized by the Modesto Drug Company so to do, and had no power or authority to execute them; that the Modesto Drug Company never at any time ratified the execution of said notes, "and is not estopped from denying the execution of said written instruments by J. T. Skow"; that the consideration for said promissory notes and the contract above referred to has failed; that the Partin Manufacturing Company did not ship at any time to the Modesto Drug Company any automobile, or any of the other articles mentioned in said contract; "that the consideration for said obligation has fully failed"; that at the time plaintiff acquired said promissory notes "it had knowledge of facts sufficient to put it on guard, and to require it to make inquiry as to the authority of J. T. Skow to execute said written instruments, and as to the consideration given therefor."

Appellant contends that the notes were the notes of the defendant corporation; that, if they were executed without authority, the execution and delivery of the notes was ratified by defendant; and that appellant is a bona fide purchaser of the notes.

The by-laws of the defendant corporation were introduced in evidence. Article IV thereof provided:

"The directors shall have power * * * to incur indebtedness. * * * The terms and amount of such indebtedness shall be entered on the minutes of the board, and the note or obligation given for the same, signed officially by the president and secretary, shall be binding on the corporation. * * * The president * * * shall sign * * * all contracts and other instruments of writing which have been first approved by the board of directors."

On April 7, 1916, while the advertising and voting contest was still being carried on, Skow sold all his shares of the capital stock of the defendant corporation to Morris, who signed an instrument stating:

"I do hereby agree to pay all of the outstanding bills and accounts of the Modesto Drug Company, and to save and hold harmless the said J. T. Skow from all indebtedness now due or owing, including current bills, notes, and notes for advertising."

Witness Skow testified that the words "notes for advertising" in said instrument referred to the notes in suit. On the same day Morris wrote the Partin Manufacturing Company the following letter:

"I have purchased all the interest of J. T. Skow in the Modesto Drug Company, from which company you hold two notes. I have agreed with Mr. Skow to pay all notes due from the corporation, and he desires me to let you know of this fact, and I hereby notify you that I will pay said notes."

Skow testified that before he signed the notes he discussed the matter with Morris and that the latter said:

"Well, if you think it is a good thing, go ahead."

Morris denied having made this statement.

The deposition of Roland A. Crandall, president of the plaintiff corporation, was read in evidence. He deposed that, in the month of January, 1916, he purchased for the plaintiff, from the Partin Manufacturing Company, certain notes, including those in suit, paying therefor 92.71 per cent. of their face value.

D. W. Morris, called as a witness for the defendant, testified that he and Skow owned, in an equal amount, all the shares of the stock of the defendant, except one share, which was in the name of a lawyer by the name of J. M. Walthall; that Skow, who was president of defendant, was a pharmacist by profession, and had at all times active management of the business of the corporation, buying the goods and making all contracts for and on behalf of the defendant; that he (Morris) spent practically all of his time in and about the store of the defendant, and acted with Skow in an advisory capacity with respect to the business. Morris denied the statement of Skow that the latter, before the making of the contract with the Partin Company, discussed with him the proposition involving said contract, but admitted that Skow did tell him of the making of said contract the next day after it was entered into and executed. He further testified that the board of directors of defendant never held a meeting for the purpose of authorizing Skow to sign the notes; that the Partin Manufacturing Company did not furnish to the winner of the contest an automobile, and that he (witness) gave the winner a check for $545 in lieu thereof; that one of the prizes, an ivory set, was so inferior that witness replaced it with another set taken from the stock in the store; that some of the sets of dishes were sent to the defendant; that the certificate of deposit and bond mentioned in the contract were never furnished by the Partin Company. On cross-examination Morris testified that he thought there was some delay on the part of the Partin Company in getting the advertising scheme started, but—

> "the matter was in his [Skow's] hands. He had signed the contract with them, and I paid very little attention to it. Q. In your conversation with Mr. Skow, when this subject was under discussion, did he state to you or inform you in any way of the extent of the financial obligation that the company had incurred or was supposed to have incurred—that is, the amount of it? A. Yes, sir. Q. And so you knew that there was outstanding what was or what might be a financial obligation to this Partin Manufacturing Company to the extent of $800? A. Yes; he told me that at the time he signed the contract. * * * Q. He did give you to understand that payment would have to be made in the course of a few months? A. I suppose he did. He told me he had the time extended. He had had the contract changed. Q. Yes; the printed contract, he gave you to understand, had been changed at his instance? A. Yes. Q. Did he state to you or inform you at that time that the obligation was evidenced in the form of a note or notes? A. He told me that he had signed the notes."

Morris testified that he addressed the following letter to the Partin Manufacturing Company, at Memphis, Tenn., under date of January 12, 1916, and mailed the same on said date:

> "Dear Sirs: We have not heard anything from you regarding the starting the contest. We wish to get action on it as soon as possible, as some of our competitors have heard of what we are going to do. We have a tentative list of candidates ready for you."

The said letter was signed, "Modesto Drug Co., by D. W. Morris." The witness said that the Partin Company forwarded to defendant some of the prizes they agreed to provide it with, but that in quality they did not measure up to the agreement. He also testified that the company had sent one of its employés (a woman) to Modesto to assist Skow in prosecuting the contest; that that party accompanied Skow through the country about Modesto and assisted him in "stirring up" an enthusiastic interest among the people in the contest; that later a man by the name of Prindville was sent to Modesto by the Partin Company to assist in making the contest a success, but that he remained in Modesto but a few hours. On the 25th day of April, 1916, a letter signed "Modesto Drug Co., by D. W. Morris," was addressed and mailed by Morris to the Partin Company, and in that letter Morris stated that "we have not had a word from you regarding the contest for a long time," and further said that—

> "Mr. Skow, who is no longer connected with the Modesto Drug Company, and who has been actively engaged in the conduct of the campaign, informs us that he wrote you some three weeks ago that some action would be necessary to put some life into the campaign. The time is now getting short and some quick action is necessary. * * * Expecting to hear from you at once, we are," etc.

To that letter the Partin Company replied, by letter under date of May 14, 1916, and after therein acknowledging receipt of Morris' letter of April 25th and stating that "we note that you state that Mr. Skow is no longer connected with your firm," the letter proceeded, in part:

> "We would be glad to have you send the names and addresses of your candidates who are in the campaign, and also let us know about how active each candidate is, and we will be glad to write them a special letter. We would be glad to have you do a little personal work with your candidates, and explain to them that the close of the campaign is drawing near and that some one must get busy and win this car. If you think that by offering a vacuum cleaner to the public at large—to the one estimating the nearest correct amount of the votes cast the last month in your campaign, would help the campaign, we will be glad to express you one of these vacuum cleaners immediately. In the meantime, we hope your campaign will show a great improvement, and we would like to hear from you by return mail."

On further cross-examination, Morris repeated that, at the time, he purchased Skow's stock in the defendant, he and Skow discussed between them the notes executed and delivered to the Partin Company by the defendant or Skow. "Q. And it was in view of the existence of those two outstanding notes," counsel for the plaintiff asked Morris, "that at that time you executed and delivered to Mr. Skow those two papers which have been offered in evidence here this morning by me, marked Plaintiff's Exhibits 1 and 2, which your counsel showed you here? A. Yes." (The exhibits, 1 and 2, referred to, were the agreement between Skow and Morris setting forth the consideration and conditions for the sale of the former's stock to the latter, and the letter written by Morris to the Partin Company, after said sale, informing said company that he had assumed liability for the payment of the notes in question.)

The above statement of the testimony and of the undisputed facts, to which may be added the further statement that it appears in the evidence that the increase of sales during the time the contest was in progress amounted to about $2,500, is sufficient for the purposes of the consideration and decision of the points involved in this appeal.

The learned trial judge, in deciding the case, filed a written opinion, which has been incorporated in the record here. Therein he based the decision of the controversy upon the grounds: (1) That the notes were not those of the defendant; (2) that there was a failure of consideration for the notes; and in this particular connection it is argued both in the judge's opinion and in the respondent's brief that the plaintiff, at the time of purchasing the notes, had knowledge of facts sufficient to put it upon inquiry as to the consideration.

[1] The argument advanced in support of the proposition first above stated is that, since the notes were made and delivered by Skow without any formal action of the board of directors of the defendant authorizing the notes to be issued and delivered, or the contract upon which they were made and delivered to be executed, the notes cannot be held to be legal obligations of the defendant. The evidence shows—indeed, it is admitted—that at the time the transaction constituting the basis of this litigation took place Skow and Morris were practically the defendant—that is, the corporation itself. They owned all the stock but one single share, which, as is often so with so-called "close corporations," was put in the name of attorney Walthall, undoubtedly for the sole working purposes of the corporation. There can be absolutely no doubt that, when making the contract and the notes in question, Skow was not acting for himself individually, except in so far as he was interested in the defendant as a stockholder, but was acting as agent of the defendant in his capacity as its president and manager. The sole purpose of the contract was, obviously, to build up or increase the volume of the business of the defendant, and not to benefit a business in which he was interested other than as a stockholder in the defendant corporation. As a matter of fact, and to all practical intents and purposes, Skow and Morris were partners in the business of the defendant, although in legal contemplation they were, under the name of the defendant, a corporation; and the situation, in its legal aspect, was in no way changed by the act of Morris in purchasing the stock of Skow, except in the fact that Morris thus himself practically became the corporation. The corporation was a mere instrumentality adopted originally by Skow and Morris, and perpetuated by the latter when he became the sole owner of all the stock therein, through which they could the more conveniently transact their business.

The defendant, as we have shown, received the benefits, whatever they were, flowing from the agreement in consideration of which the notes were given, and Morris was informed by Skow of the making of the agreement and of the terms thereof, according to his own testimony, the day following that upon which the agreement was made. He made no protest or objection against the agreement, or the making thereof by Skow, and thus he approved and ratified the act of Skow, the president and manager of the defendant, in making the agreement. Here, then, we have a case where a party, serving in the dual capacity of president and manager of what well may be termed a "one-man" corporation, has made an agreement for and in behalf and in the name of the corporation, undoubtedly believing in good faith that in so doing he was acting as the agent of said corporation, duly authorized to make such an agreement, and where said agreement or the act of making it has been tacitly, or by quiescence, acquiesced in by a party who, with said president and manager, owns practically all the stock of the corporation, after he has been put in possession by said manager of knowledge of the making of the agreement and of its terms and object, and where the corporation has received certain of the benefits flowing from said agreement.

The question may be asked: May a corporation, whose capital stock is entirely owned, practically, by two persons, one of whom, being in the active management of the business of such corporation, has made an agreement for the benefit of the corporation, and the other of whom has virtually indorsed or by conduct ratified it, refuse performance of its obligations under the agreement? Having received the benefits, or some of them, of an agreement obviously made for it and for its benefit (and ostensibly by it), with the consent and concurrence of the owners of substantially all its capital stock, will a corporation be permitted to dodge or escape liability for obligations arising upon such agreement by the plea that the contract was made without observance of the formal requisites or prerequisites prescribed by its charter or by-laws with respect to the making of contracts? The answer to these questions may be found in the principles of equity and justice applicable to such a case as we have here. Indeed, it would be deemed a hard rule, or one of more than mere unsubstantial technical texture, if the courts could not consistently break through it and so hold that a corporation is bound by contract made under such circumstances as characterized the making of the contract in the present case.

But the books are replete with cases holding that, where it appears that a corporation is but the instrumentality through which an individual for convenience transacts a particular kind of business, "not only equity, looking through form to substance, but the law itself, would hold such a corporation bound [where contracts are made under its name under circumstances similar to those here] as the owner of the corporation might be bound, or, conversely, hold the owner bound by acts which bound his corporation." Llewellyn Iron Works v. Abbott Kinney Co., 172 Cal. 210, 214, 155 Pac. 986, 987, and the many cases cited therein. It is hardly necessary to do more herein than to refer to the Llewellyn-Abbott Case and the many cases cited therein as supporting that proposition. It will suffice to say that in those cases it is held that, where an obligation is created by the duly authorized agent of a corporation for such corporation, where most, if not all, of its capital stock is held and owned by one person, and the obligation is one the making of which is within the corporate powers of the corporation, and the act of making it is therefore not ultra vires, the corporation will be held bound to and liable for the proper execution of the terms of the obligation, notwithstanding that it may be shown that the act of making the agreement was not in strict accord with the adopted rules or the by-laws of the corporation with respect to such matters.

[2, 3] But there is another rule, applicable to all corporations, and which we think has application to the present case, which is stated in Stevens v. Selma Fruit Co., Inc., 18 Cal. App. 242, 250, 123 Pac. 212, 215, as follows:

> "There is in the record before us no evidence from which it appears that any particular officer of the defendant was specifically authorized by the board of directors to execute promissory notes for and on its behalf. The very nature of commercial corporations, of which the defendant is a type, requires that the authority to transact their usual or ordinary business affairs shall be vested in some one or more persons. A corporation is an artificial person, and, where it is organized for commercial purposes, its president or general manager, or whoever may be given immediate direction or control of its affairs, is its agent, empowered, unless expressly restricted to the performance of certain specified acts, to do anything which naturally and ordinarily has to be done to carry out its paramount purposes; and where authority to do some particular act, which is included in the ordinary affairs of such a corporation, is not specifically given to any particular officer, and the performance of which is not specifically inhibited to the person authorized to manage its affairs generally, the intention of the board of directors to confer upon the person or officer in whom is vested the immediate direction or control or management of the affairs of such corporation to perform such particular act will be inferred from the general authority so given. And where, as was clearly the case here, an officer of a corporation is held out by such corporation to be possessed of power to perform all acts involved in its ordinary or usual business, the law will not permit third parties to suffer from such acts of such officer by the plea of the corporation that the ostensible authority of such officer was not in fact conferred upon him. McKiernan v. Lenzen, 56 Cal. 61; Phillips v. Campbell, 43 N. Y. 271; Seeley v. San Jose Independent Mill & Lumber Co., 59 Cal. 22, 24; Bank of Healdsburg v. Bailhache, 65 Cal. 327, 332, 4 Pac. 106; Jennings v. Bank of California, 79 Cal. 323, 328, 12 Am. St. Rep. 145, 5 L. R. A. 233, 21 Pac. 852; Greig v. Riordan, 99 Cal. 316, 323, 33 Pac. 913; Bates v. Coronado Beach Co., 109 Cal. 160, 162, 41 Pac. 855; Wells Fargo & Co. v. Enright, 127 Cal. 669, 672, 49 L. R. A. 647, 60 Pac. 439; Siebe v. Hendy Machine Works, 86 Cal. 390, 392, 25 Pac. 14."

In Brown v. Crown Gold Milling Co., 150 Cal. 376, 387, 89 Pac. 87, 91, it is said:

> "The majority of the board having knowledge of the facts, it was not necessary, to conclude the company defendant in favor of plaintiff, that his employment should be ratified at a regular meeting of the board. It was sufficient that the majority of the board individually were advised of the terms of the employment of plaintiff by Mr. Doe, and took no measures to disaffirm as directors that employment. Pixley v. Western Pacific R. R. Co., 33 Cal. 184, 186, 91 Am. Dec. 623; Crowley v. Genesee Mining Co., 55 Cal. 273, 275; Gribble v. Columbus Brewing Co., 100 Cal. 69, 72, 73, 34 Pac. 527; Scott v. Superior Sunset Oil Co., 144 Cal. 140, 77 Pac. 817."

See, also, Cyclops I. Works v. Chico Ice, etc., Co., 34 Cal. App. 10, 14 et seq., 166 Pac. 821.

In Doerr v. Fandango Lumber Co., 31 Cal. App. 318, 325, 160 Pac. 406, 409, this court said:

> "Indeed, the proposition that ratification of a contract, the making of which is unauthorized by one of the principals, may be effectuated by a recognition, howsoever informally, of the agreement and the obligations arising by virtue thereof, is elementary. A familiar and common application of this doctrine is to be found in those cases where an agent, in making a contract for his principal, transcends the scope of his authority as such, and the principal, after the contract has been made, although not at that time legally bound by its terms, does some act recognizing the validity of the agreement—as, for instance, accepting some of the benefits or assuming some of the burdens thereof. In such case, quite obviously, the principal will be deem-

ed from his acquiescence in the contract to have ratified the unauthorized act of his agent, and will be held to its terms and conditions, notwithstanding that he has not in express language or in a formal manner ratified the contract. The case here comes within the principle thus referred to. The giving of the mortgage was not an ultra vires act, and there is no claim that it was. If the act involved the making of an invalid contract, it was, as shown, merely because of the manner in which it was attempted to perform the act or make the contract, and, like any other contract, it is capable of being ratified by conduct or a recognition in some manner of the obligation."

Morris himself testified, as seen, that Skow was the president of the corporation and the manager of it and its business, that he (Morris) knew nothing of the drug business, or of the profession of pharmacist, and that the entire management of the concern in all its aspects was in the hands of Skow, although he (Morris) was about the establishment much of the time and acted with Skow in an advisory capacity. Thus it is clear that the corporation was not only under the immediate control and management of Skow, but that he was held out as such to the public, with authority to transact for the corporation all the usual and ordinary business matters coming within its purposes and objects. Certainly it will not be denied that Skow possessed general authority to transact and carry out such business matters of the defendant as in his judgment would tend to increase the volume of the business of the corporation and thereby augment its income and profits.

[4] It is not material to inquire whether the acceptance of benefits arising from an obligation the making of which was in excess of the authority of the party receiving and accepting such benefits amounts to a ratification or has the effect merely of creating an estoppel whereby the acceptor will be precluded from setting up the plea of want of authority to make the obligation to relieve himself of the burden imposed upon him by the obligation. The legal effect of either ratification or estoppel in such a case is precisely the same. Our Civil Code (section 1589) declares in effect that in such case there is a ratification. But, be that as it may, if we were to be driven from the position in this case to which the facts firmly affix us, viz.: That the transaction culminating in the execution of the agreement and the notes concerned here represents practically the corporate act of the defendants, it being, admittedly, a transaction within the scope of its corporate powers—we would, nevertheless, find ourselves buttressed by unimpeachable reason in holding that the act of the defendant in accepting the benefits of the agreement amounted to a consent to all the obligations thereof, and if, therefore, there was not thereby in law a ratification of the transaction, the defendant is, by its act of accepting the benefits of the obligation, estopped from denying the binding force thereof upon it. In other words, an estoppel by conduct, or in pais by reason of the conduct of the defendant in accepting the benefits of the agreement for which the notes were given, was raised against the right of the defendant to object to the enforcement of the notes on the ground that their execution and delivery had not been duly authorized by the defendant. Curtin v. Salmon River, etc., Co., 141 Cal. 308, 312, 74 Pac. 851, 99 Am. St. Rep. 75, and cases cited therein; and, also, Doerr v. Fandango Lumber Co., 31 Cal. App. 318, 324, et seq., 160 Pac. 406, supra; McQuaide v. Enterprise Brewing Co., 14 Cal. App. 315, 318, 111 Pac. 927; Standard Oil Co. v. Slye, 164 Cal. 435, 446, 129 Pac. 589.

We should now pay brief attention to the conduct of Morris with respect to the transaction involved herein at and after the time he purchased the stock of Skow and thus practically became the sole owner of the corporation. We have shown that Morris admitted that Skow told him of the fact of entering into the agreement and of the terms thereof the day following that upon which the transaction was completed, and that Morris made no objection or protest of any kind against the transaction, being evidently accustomed to defer, as to such matters, to the judgment of Skow, who was the active manager of the defendant. We now again call attention to the conditions as set forth in their agreement, upon which the sale of Skow's stock to Morris was made. In that agreement, Morris expressly assumed liability for all the outstanding debts and obligations of the defendant, including the notes in question. Not only that, but he later addressed to the Partin Company a letter in which he stated that he had purchased Skow's stock and that he had assumed liability for the payment of the notes in suit. When that letter was written he was, as stated, the sole owner of practically all the stock of the defendant. Can it for a moment be doubted from all this that Morris expressly affirmed and confirmed, not alone for himself, but for his corporation, the agreement made by Skow, for the corporation, and all its terms? He not only expressly recognized the agreement as a valid and legal one in all respects, but likewise assumed the obligations created thereby; and it would amount to a mere play upon words to construe the expressions contained in his letter to the Partin Company as evidencing an intention to recognize and confirm the agreement as anything other than what it purports to be, viz.: The agreement of the defendant, made for and on its behalf for the sole benefit of its business.

[5-7] The foregoing is a sufficient reply to the contention that the notes in suit were not supported by a consideration, although, so far as the plaintiff is concerned, it would be a matter of no consequence whether there

was in point of fact a consideration supporting the notes, if it purchased the notes for value without knowledge of such want of consideration at the time of such purchase. A written instrument is itself presumptive evidence of a consideration (Civil Code, § 1614), and where there is not in the possession of a purchaser of a promissory note knowledge of any infirmity in the paper on the score of consideration, or of facts, which, when followed with reasonable diligence, would lead to the discovery of such infirmity, and no fraud in the transaction resulting in the execution of the note is shown or claimed, the purchaser, if he has exchanged value for the note, will be protected as an innocent purchaser for a consideration, and so may enforce payment thereof. Civil Code, § 3122; Kunz v. Cal. Trona Co., 169 Cal. 348, 146 Pac. 883; Pac. Portland Cement Co. v. Reinecke, 30 Cal. App. 501, 158 Pac. 1041; Henry v. Sutro, 28 Cal. App. 698, 153 Pac. 972; Jones v. Evans, 6 Cal. App. 88, 91 Pac. 532; Eames v. Crosier, 101 Cal. 260, 35 Pac. 873.

But there is really no claim made that the notes in question were not executed and delivered to the Partin Company for a sufficient consideration. It is the contention, though, and the court so found, that there was a failure of consideration, and that, when the plaintiff purchased the notes, it had knowledge of facts sufficient to put it on inquiry as to the consideration, and thus have had disclosed to it, not only that the consideration for the notes had failed, but that the obligations were not those of the defendant corporation. The facts referred to are that the notes in question did not bear the corporate seal of the defendant, that Skow did not sign the contract by or under his official designation, and that the plaintiff, instead of taking the notes by the usual or customary indorsement in the case of the transfer of title to negotiable instruments required a bill of sale of them, with a guaranty that they would be paid. The fact of the absence of the seal, it is contended, was sufficient to inspire in the plaintiff distrust as to the legal integrity of the obligations, and the circumstance last mentioned, it is said, negatives the theory that the plaintiff took the notes in good faith. These propositions, for reasons to be given, are not important to the decision of this case, but they are vigorously pressed, and we will briefly notice them.

[8] We attach no significance to the fact that to the notes the seal of the defendant was not affixed. The fact is neither conclusive evidence of a want of authority for the execution of the notes for the corporation, nor a circumstance sufficient to create even a suspicion that the notes were not wanting in a consideration, or that their consideration had failed at the time of their transfer to the plaintiff.

[9-11] It is now the rule, generally if not universally, recognized and followed throughout the American states as well as in England, that corporations of all kinds may be bound by their contracts, not under their seals. The rule in former times was (as the cases show) that a corporation could not express its will, or enter into a contract, except through an instrument under seal, executed by a duly constituted agent. Thompson on Corporations (2d Ed.) § 1920. The modern and by far the more sensible rule is, however, that the seal of a corporation itself performs no further or greater function than to import prima facie verity of the due execution by the corporation of written obligations—that is, it merely stands as prima facie evidence that the contracts made by corporations were executed by their authority—and no longer is a seal held to be indispensable to the execution of valid contracts by corporations. It is a matter of common knowledge that many contracts made by corporations and unattested by their seals are enforced. The books are full of such cases. The fact that such a contract was duly authorized by a corporation may be shown by parol. There is, therefore, nothing in the fact that a contract purporting to be that of a corporation is not authenticated or attested by its seal which would necessarily justify even a suspicion that it was not executed by authority of the corporation.

[12] Nor, in our opinion, does the fact that the plaintiff took a bill of sale of the notes, with a guaranty from the Partin Company that they would be paid, in lieu of the customary indorsement in such a case, constitute a circumstance sufficiently significant to justify a suspicion that the notes were not all that they on their face purported to be. We therefore do not concur in the view of the trial judge that that fact negatives the theory that the plaintiff took the notes "in due course of business, before maturity, for value, and without notice." The plaintiff, it appears, is in the business of buying negotiable paper, and it may be that it is its uniform custom and policy to require a bill of sale of notes purchased by it, with a guaranty that the obligations are valid and will be paid. Indeed, one might acquire the ownership of such obligations without knowledge of whether the makers thereof were solvent and able to meet them, and in such case it would only be good business judgment to demand a guaranty, or some protection, against loss in case they proved worthless obligations for any reason. We do not know what actuated the plaintiff in thus fortifying itself against loss in the transaction, but we think it clear that that circumstance itself was not such as to indicate that the plaintiff was not an innocent purchaser of the notes for value.

But, as above stated, the matter just considered we do not deem of any particular consequence, so far as the decision here is concerned. The proposition that the notes were not those of the defendant we disposed of in the outset of this discussion, and nothing further need be said of it, although we may well add to what we have already said on that question that, even if the plaintiff had made an inquiry into the question of the validity of the notes, the result would only have been to discover that Skow was the president and the manager of the defendant; that, acting as such, he made the agreement and the notes for defendant, and for the sole benefit of its business, and that the agreement, and the obligations arising thereupon against the defendant, were approved by Morris, who, with Skow, owned practically the entire capital stock of the defendant; that the defendant's business increased to some extent in volume as a result of the action of the Partin Company under the agreement. Knowledge of these facts by the plaintiff, when it bought the notes, would not, of course, have made it any the less an innocent purchaser for value.

With regard to the matter of the alleged failure of consideration, as to which it is claimed that the plaintiff, when it bought the notes, had knowledge of facts sufficient to put it upon inquiry to ascertain whether the consideration had then failed, it is to be said that there is no evidence in the record showing or tending to show that there was such failure.

The evidence, without conflict, shows that the plaintiff purchased and became the owner of the notes before their maturity, and before the contract between the defendant and the Partin Company had been completed. In other words, the plaintiff bought the notes before the purpose of the agreement was accomplished, and while the steps essential to the accomplishment of that purpose were still in progress. If, then, there was a failure of consideration for the notes, it was, of course, in the failure of the Partin Company to comply with the terms of the contract between it and the defendant, and therefore such failure of consideration occurred, if at all, long after the plaintiff became the owner of the notes. The correspondence between Morris and the Partin Company, in which the former complained to the latter of its inertness in the matter of prosecuting the prize contest, took place subsequently to the time at which the plaintiff bought the notes. In brief, as above stated, the contract, in consideration of which the notes were issued, was still in process of execution on the part of the Partin Company at the time the plaintiff purchased the notes, and there was not then, nor could there have been, either a total or even partial failure of consideration. Of this fact it may be that the plaintiff was aware at the time it bought the notes; but if it was without knowledge of the fact, and for any reason had prosecuted an investigation to determine the legal status of the notes, it would thus have readily learned that fact, and still have learned no valid reason why it should not have purchased the notes and acquired title thereto by the transfer free from any infirmity, so far as consideration was concerned.

The cases cited by respondent, of which there are many, we have examined and found to be very different from this case as to the facts. For instance, in the case of Burns v. Bauer, 174 Pac. 346, fraud was charged, proved, and found as characterizing the very transaction eventuating in the execution and delivery of the note sued on therein; and not only was that true, but the court found upon ample evidence that the plaintiff, a lawyer, who was the assignee of the note, was familiar with facts extrinsic to the note itself, which were of a most suspicious character, and which, if followed up with reasonable diligence, would have disclosed that the note was procured by the corporation to which it was given through false and fraudulent representations. In fact, it was found that the attorney for the plaintiff was the secretary of the corporation in whose favor the note was executed at the time the note was procured, and it was further found that plaintiff, while making inquiry as to the ability of the maker to pay the note (and it was also found by the court that the maker was amply able to pay it), made no inquiry as to whether said note was valid.

[13] And, in this connection, we may add, though we conceive it to be of no special importance in view of the views of the transaction involved herein we have expressed, that it is only where fraud or illegality in the inception of a promissory note is shown that the burden is upon the purchaser of such an obligation to prove that he purchased the note before maturity, in good faith, for value, in the usual course of business. The rule, indeed, applies to a case only where there has been an illegal consideration, and not where there has been a valid consideration, and it has failed. This is clearly shown by the reason upon which the rule proceeds, as it is formulated by the authorities, viz.:

> "The presumption is (in case of fraud or duress, etc., in the procurement of the note) that he who has been guilty will part with the note for the purpose of enabling some third party to recover upon it for his benefit; and such presumption operates against the holder, and it devolves upon him to show that he gave value for it. So where the note was given for a distinctly illegal consideration." Parsons on Notes and Bills, 188, 189; Graham v. Larimer, 83 Cal. 173, 178, 23 Pac. 286; Jordan v. Grover, 99 Cal. 194, 195, 33 Pac. 889; Bailey v. Bidwell, 13 Mees. & W. 73; 32 English Law and Equity, 134.

It is, of course, clear that this case does not come within the above-considered rule. Here, as the evidence indisputably shows, and, indeed, as is in effect conceded to be the fact, the notes involved were not procured by fraud or duress, or without a valid consideration. It is also clear, as we have pointed out, that the plaintiff acquired ownership of the notes for value, before their maturity, and before there could have been a failure of the consideration for which they were given.

We conclude, upon the record before us, that to deny the right of plaintiff to recover upon these notes would mean a failure of justice.

The judgment is therefore reversed, and the cause remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

43 Cal. App. 479

PEOPLE v. MACY et al. (Civ. 1962.)

(District Court of Appeal, Third District, California. Oct. 8, 1919.)

1. Nuisance 🔑84—Reputation of house as evidence under Red Light Abatement Act.

In view of Red Light Abatement Act, § 5, general reputation of the place involved may alone be sufficient to prove the character of such place in a proceeding under such act to abate a nuisance.

2. Nuisance 🔑84—Sufficiency of evidence under Red Light Abatement Act.

In a proceeding by the state under the Red Light Abatement Act for the purpose of abating a nuisance existing in a house, evidence *held* sufficient to show the character of the house to be immoral.

3. Nuisance 🔑77—Proceeding under Red Light Abatement Act civil action.

A proceeding by the state under the Red Light Abatement Act for the purpose of abating a nuisance existing in a house is not a criminal proceeding, but is a civil action.

4. Nuisance 🔑81—Law of entrapment not applicable to Red Light Abatement Act.

Since a proceeding by the state under the Red Light Abatement Act to abate a nuisance existing in a house is a civil action, witnesses who induced immoral women in the presence of employés of the house to go to such house with them for immoral purposes can testify as to such fact, for the purpose of showing that the house was at the time in question used for the purposes alleged, and that the persons in charge of it were allowing such use; the law of entrapments not applying.

5. Evidence 🔑67(1)—House shown disorderly at certain date presumed to continue a nuisance.

Where it is proved, in a proceeding under the Red Light Abatement Act to abate a nuisance, that the house was used for immoral purposes up to a certain date, there is a presumption, in view of Code Civ. Proc. § 1963, subd. 32, that the immoral condition continued to exist so long as is usual for things or conditions of such nature, in the absence of satisfactory evidence to the contrary.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Proceeding by the People of the State of California against L. D. Macy and others under the Red Light Abatement Act. Judgment for plaintiff, and defendants appeal. Affirmed.

Martin I. Welsh and V. L. Hatfield, both of Sacramento, for appellants.

John R. Robinson, Dist. Atty., of Chico, for the People.

BURNETT, J. The action was brought under the Red Light Abatement Act (St. 1913, p. 20) for the purpose of abating a nuisance existing in the Johnson House, a hotel in Chico, and of causing the same to be closed as provided by the provisions of said act. The judgment was in favor of the plaintiff, from which the owner of the premises has appealed. Three points are made by appellant, as follows:

(1) He insists that the evidence is insufficient to sustain the judgment, for the reason

that it consists solely of evidence of the general reputation of said house in the community.

(2) It is claimed that the testimony of the two investigators or detectives, who testified in the case, cannot be considered by reason of the application of the doctrine of the "law of entrapments."

(3) The further claim is made that the evidence is insufficient to show that at the time of the filing of the complaint on the 14th of September, 1918, or at the time of the trial, one month later, the house was being used for said unlawful purposes, assuming that the evidence was sufficient to show such use on August 12, 1918, the date on which the last act of illicit intercourse and the reputation of the house were shown.

[1, 2] From reading and an examination of the record we are satisfied that there is no merit whatever in any of these contentions. As to the first point there was a strong showing of the bad reputation of the house in said community. The witnesses who so testified were persons of long residence there, or persons engaged in business in Chico, or persons whose calling would tend to make them familiar with the general reputation of any hotel in the community. They comprised business men, ministers, peace officers, and also women who were interested in the social conditions and welfare of the community. Their testimony was direct, clear, and unequivocal that the house had a bad reputation in the respects indicated. As an example of the general character of the testimony of these various witnesses, we may quote from the record of the testimony of Galen L. Rose as follows:

> "Q. Do you know the general reputation of the Johnson House for lewdness, prostitution, or assignation? A. I do. Q. What it is, good or bad? A. Bad.
>
> "Cross-examination: Q. With whom did you discuss the reputation of the Johnson House, Mr. Rose? A. I have discussed it. It came up in a general way in a conversation with a considerable number of people. I do not know as I recollect the individuals; but is a topic that comes up frequently in a conversation in a general way. And in all of my conversations I never heard a good word for the Johnson House, and I heard a good many speak and they were that it was bad."

It is to be observed that section 5 of said act provides:

> "In such action, evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of said nuisance."

This would seem to imply that such evidence may be of itself sufficient to prove the character of the house, and upon this point it may be said that seldom is such a strong showing made as appears in the present instance. But beyond that, there was strong evidence that the character of several inmates or frequenters of the hotel was morally bad, and this is a circumstance of great importance in the determination of the character of the house. De Martini v. Anderson, 127 Cal. 33, 59 Pac. 207. As an example of this line of evidence we may quote from the record of the testimony of William Alexander, formerly chief of police, as follows:

> "Q. Do you know of your own personal knowledge, Mr. Alexander, while you were acting chief of police of the city of Chico, of any woman of a lewd or immoral character going to the Johnson House? A. I do. I know of one Myrtle McNeal, who was, at one time an inmate of the house of prostitution known to the house as such, having lived in the Johnson House for some time. A. Do you know of any other such person? A. Of my own knowledge I do not know of any such person, except that I have seen women, whose reputation was known to be bad, go into the Johnson House at all hours of the day."

There was other evidence of similar character and import. In addition to the foregoing, there was the positive testimony of the two investigators or detectives of acts of improper relations with a certain woman known as Hazel Howard in said house on August 10 and August 12, 1918. It appears further that said woman had a notorious reputation for immorality in the community and was in conversation with the clerk of the house in front of the desk in the office of said premises when one of said detectives came up and the agreement was made between him and her in the presence and hearing of said clerk to occupy together a room in said house. In fact, the evidence seems as strong and conclusive of the truth of the charge against the house as has appeared in any case of this class that this court has been called upon to consider.

[3, 4] As to the second point, it is sufficient to say that the record contains no evidence that said detectives or either of them offered any inducement to or enticed or allured or urged or persuaded in any manner the said Hazel Howard to commit any crime or to go to the Johnson House for any immoral purpose whatever. Moreover, this is not a criminal proceeding, but is a civil action for the purpose of abating a nuisance, and if such inducement had been offered the evidence would be admissible for the purpose of showing that said Johnson House was at the time in question used for the purposes alleged in said complaint and that the persons in charge of it were allowing such use. In this connection it may be proper to quote from Corpus Juris, vol. 16, p. 88, on the doctrine of entrapments, as follows:

> "While it has been said that the practice of entrapping persons into crime for the purpose of instituting criminal prosecutions is to be deplored, and while investigation, as distinguished from mere entrapment, has often been

condemned and has sometimes been held to prevent the act from being criminal or punishable, the general rule is that it is no defense to the perpetrator of a crime that facilities for its commission were purposely placed in his way, or that the criminal act was done at the 'decoy solicitation' of persons seeking to expose the criminal, or that detectives feigning complicity in the act were present and apparently assisting in its commission. Especially is this true in that class of cases where the offense is one of a kind habitually committed, and the solicitation merely furnishes evidence of a course of conduct."

It will be observed that in nearly all of those cases where such evidence has been held inadmissible it has been upon the ground that no crime has been actually committed, as in the case where the owner induces a person to steal his property. In such case there could be no commission of the crime, if the property is taken with the owner's consent, since it is an essential factor of the crime of larceny that it be against the will of the owner. It may be further said that the cases distinguish clearly between measures used to entrap a person into crime and artifice used to detect persons suspected of being engaged in criminal practices, particularly as such criminal practices vitally affect the public welfare rather than individuals. People v. Liphardt, 105 Mich. 80, 62 N. W. 1022. This distinction is illustrated in the case of People v. Haselman, 76 Cal. 460, 18 Pac. 425, 9 Am. St. Rep. 238, which was a criminal prosecution for larceny. The complaining witness was a constable, who, for the purpose of detecting persons in theft, placed money in his pockets and pretended to be drunk in order to catch some one in the act of taking money from his pocket, and the defendant was caught in this way. It was held that these acts of the complaining witness, by way of inducement, did not amount to a consent to the taking, and were no defense to the criminal charge. The most that could be said in the present instance as to the conduct of said investigators was that they resorted to artifice and strategy and placed themselves in an attitude of willingness to participate in the commission of an immoral and illegal act in order to obtain evidence of the character of said house. Of course, it is to be regretted that it should seem necessary or expedient or proper for reputable citizens to so conduct themselves, but that is not sufficient reason for rejecting their testimony as altogether unworthy of credence. Manifestly in this class of cases it is usually quite difficult to secure evidence of the true character of the house, and therefore there is some excuse and justification in the interests of the public welfare, for the questionable method adopted by said investigators.

[5] As to the third point, it is sufficient to say that it was proved that the Johnson House was used for said immoral purposes as late as August 12, 1918, and that there was a course of such conduct up to that time. From this proof the presumption would follow that said condition continued to exist as long as is usual for things or conditions of such nature. Code Civ. Proc. § 1963, subd. 32. Of course, if there were satisfactory evidence that the condition had changed, it might be said that the presumption was overcome. There was indeed the testimony of the owner of the premises that no immoral acts of the character charged had been committed in the house since said date of August 12, 1918. He even went further and declared that no such acts had ever been committed therein. The lower court, undoubtedly, was not greatly impressed with the truthfulness of his statements. We cannot say that he was entitled to any more credit than was accorded him by the trial judge. As bearing upon this consideration we may cite People v. Dillman, 174 Pac. 951; White v. White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799; Hohenshell v. South Riverside, etc., Co., 128 Cal. 627, 61 Pac. 371; Judge v. Kribs, 71 Iowa, 183, 32 N. W. 324; Halfman v. Spreen, 75 Iowa, 309, 39 N. W. 512.

We think it must be held that the case was fairly tried and justly decided, and that no error whatever appears in the record.

The judgment is therefore affirmed.

We concur: ELLISON, Presiding Judge pro tem.; HART, J.

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43 Cal. App. 448

EHRHART et al. v. MAHONY et al.
(Civ. 1990.)

(District Court of Appeal, Third District, California. Oct. 4, 1919.)

1. SPECIFIC PERFORMANCE ⚷114(2)—NECESSITY OF PLEADING ESSENTIALS OF CAUSE OF ACTION.

To obtain relief by way of specific performance, it is necessary to plead that defendant has received an adequate consideration for the contract, and that it is as to him just and reasonable, as required by Civ. Code, § 3391.

2. SPECIFIC PERFORMANCE ⚷114(2)—SUFFICIENCY OF ALLEGATIONS AS TO REASONABLENESS AND FAIRNESS.

In a suit for specific performance of a contract for the purchase of mining claims, allegations that the purchase price was fair and reasonable, and that the contract was as to defendants just, reasonable, air, and equitable, while to some extent involving conclusions, *held* sufficient as against general demurrer, in view of Civ. Code, § 3391.

3. **APPEAL AND ERROR** ⊂=1099(3)—**DECISION ON PRIOR APPEAL AS TO TENDER LAW OF CASE.**

A decision by the Supreme Court on appeal in a suit for specific performance that a defective tender was immaterial where a conveyance would have been refused in any event constitutes the law of the case on a subsequent appeal, where the facts presented are the same.

Appeal from Superior Court, Calaveras County; N. D. Arnot, Judge.

Action by Thomas J. Ehrhart and another against D. R. Mahony and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

W. A. Dower, of San Andreas, for appellants.

Snyder & Snyder and Nutter & Hancock, all of Stockton, for respondents.

HART, J. On September 27, 1910, the parties to the action entered into a written agreement denominated "Contract for Deed," whereby the plaintiffs agreed to sell and the defendants agreed to purchase three certain quartz mining claims in Calaveras county for the sum of $3,000, payable in installments, and defendants agreed to do all assessment work on said claims from the date of said contract. Defendants paid the first installment of $50, but made no further payments, and they notified plaintiffs that they refused to carry out said contract or to pay any further installments. On the 19th of December, 1910, plaintiffs executed a deed of said mining property, conveying the same to defendants, and offered to deliver the same to defendants upon the payment of the balance of the purchase price, which defendants refused to do. This action was brought to recover the balance of the purchase price, $2,950, and the sum of $300, which plaintiffs alleged they had expended for assessment work upon the claims. Judgment was in favor of plaintiffs for the amount sued for, and this appeal is prosecuted by defendants from said judgment upon the judgment roll alone.

The action was before the Supreme Court upon an appeal from a former judgment for the same amount. Ehrhart v. Mahony et al., 170 Cal. 148, 148 Pac. 934. That court held, upon the authority of White v. Sage, 149 Cal. 613, 87 Pac. 193, and Sparks v. Hess, 15 Cal. 186, that the action here is in effect one for the specific performance of a contract, and reversed the judgment for the reason that—

> "The complaint does not allege, nor does the court find, facts showing that there was an adequate consideration for the obligation sought to be enforced, or that the contract was just or reasonable as to the defendants."

Upon the case being returned to the superior court of Calaveras county the complaint was amended as follows:

> "That said defendants have received an adequate consideration for said contract; that the price for which the defendants so agreed to purchase said property and the plaintiffs so agreed to sell the same is a fair and reasonable price for said property and a fair valuation thereof, and that said contract is, as to the defendants, just, reasonable, fair, and equitable, and was fairly entered into between the plaintiffs and defendants"

—and a finding was made accordingly. To the amended complaint the defendants submitted a general demurrer, which was overruled, whereupon they filed an answer thereto.

Two points are made by appellants for a reversal of the present judgment: First. That the complaint fails to disclose that the contract, as to the defendants is just and reasonable, and that they have received an adequate consideration for the contract. Civ. Code § 3391. Second. That the findings do not support the theory that "defendants served notice that they refused to perform their part of the contract prior to the time that respondents made tender and demand."

Section 3391 of the Civil Code declares that specific performance cannot be enforced as to the party against whom that remedy is invoked, "if he has not received an adequate consideration for the contract," or "if it is not, as to him, just and reasonable."

[1] The above requisites in an action for relief by way of specific performance, as all the authorities say, must be pleaded and proved to justify the awarding of such relief.

[2] The amended complaint in this action, as we have seen, alleges that the price at which the defendants agreed to purchase the property in question "is fair and reasonable and a fair valuation thereof, and that said contract is, as to the defendants, just, reasonable, fair, and equitable," etc. While these allegations in a measure involve conclusions of the pleader and of law, they also involve a statement of the fact. At any rate, they are sufficient to resist the effect of a general demurrer. The amended answer specifically denies these allegations, and thus tendered an issue upon the question of the fairness and reasonableness of the consideration; and, the appeal not being supported by a transcript of the testimony or a bill of exceptions, we may presume, in support of the judgment, that the action was tried upon the theory that the allegations were sufficient, and that testimony was received without objection in support thereof.

The remaining point of those urged for a reversal involves an attack upon the findings that the defendants notified the plaintiffs of their refusal to perform their part of the contract, and that plaintiffs made a tender of a conveyance to defendants, and demanded of them the performance of the contract.

The complaint, the answer, and the findings upon the question of tender and the refusal of the defendants to stand up to the contract are precisely the same here as they were in the record on the former appeal, which, like the appeal here, was from the judgment on the judgment roll alone. The question of tender was presented to the Supreme Court on the former appeal, and in the opinion in that case (Ehrhart et al. v. Mahony et al., 170 Cal. 148, 148 Pac. 934, supra) was disposed of as follows:

> "The appellants criticise the allegation of tender, but since their answer showed that a conveyance would have been refused in any event, technical defects in the tender, or even a want of any tender, would be of no importance. Civ. Code, § 1440."

[3] The facts presented on both appeals upon the point now under review being the same, the above is the law of the case as to said point, and is decisive thereof against the position of the appellants.

No other points are presented.

The judgment is affirmed.

We concur: ELLISON, Presiding Judge, pro tem.; BURNETT, J.

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43 Cal. App. 411

TORMEY v. McINTOSH et al. (Civ. 2635.)

(District Court of Appeal, First District, Division 2, California. Oct. 2, 1919. Rehearing Denied by Supreme Court Dec. 1, 1919.)

ESTOPPEL ⚷22(3)—RECITALS IN ATTACHMENT BOND.

Where sureties caused attachment bond to be drawn which purported to be authorized by defendant in attachment suit, and which in form complied with Code Civ. Proc. § 540, and the property was released in reliance upon representations therein, sureties were estopped by recitals in bond from proving that it was not given by defendant but by persons having no right to give such bond.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Ben E. Tormey against Belinda P. McIntosh and others. From judgment denying relief, plaintiff appeals. Reversed.

Milton Newmark and Clarence A. Shuey, both of San Francisco, for appellant.

J. Oscar Goldstein, of Chico, for respondents.

LANGDON, P. J. This is an appeal from a judgment for the defendants in an action brought against them as sureties upon a bond given pursuant to the provisions of section 540, Code of Civil Procedure. In 1912, plaintiff began an action in the superior court for Butte county against one Frank N. Miller, seeking to recover $1,200 for merchandise sold and delivered to him. At the time of the commencement of the suit, a writ of attachment was issued and placed in the hands of the sheriff for execution. The sheriff levied upon a stock of merchandise in a store in Chico, which was the property of the defendant in that action. The defendants in the present action executed a bond meeting the requirements of section 540, Code of Civil Procedure, which is the bond sued upon in the present action. Upon receipt of the bond, the sheriff released the property which he had seized. Subsequently, Miller was adjudged a bankrupt, and, in the course of the administration of his property in the bankruptcy court, plaintiff received a dividend of something over $300, which amount was credited on Miller's account. Thereafter, the defendant in the attachment suit filed a supplemental answer setting up his discharge in bankruptcy. Plaintiff asked for a judgment against the defendant for the balance due, in order that he might be enabled to enforce his rights against the sureties on the bond. He asked that judgment be entered in his favor with a perpetual stay of execution against the property of Miller. The superior court gave judgment for the defendant, from which judgment an appeal was prosecuted, and said judgment reversed. The superior court then rendered its judgment in favor of the plaintiff in the sum of $875.30 with a perpetual stay of execution against the property of Miller. Demand was made upon the sureties, who refused to pay, and the present action was brought against them, in which action judgment was rendered in their favor.

The appellant argues at some length, and cites numerous cases in support of the proposition, that the subsequent bankruptcy of the attachment defendant did not relieve the bondsmen from their liability. It is unnecessary for us to discuss this point here, because it is conceded by respondents in their brief that the subsequent bankruptcy of Miller would not in itself release the defendants in the present action, if there were no other valid defenses to the bond.

There are several points made in the briefs under different subdivisions, but they are all included in the main question presented. The record presents a conflict in the evidence on certain matters, arising by reason of the fact that the defendant Hazel Miller testified in direct contradiction to some of the recitals of the bond she had executed. The findings of the trial court on such matters are in direct conflict with the recitals of the attachment bond given by the defendants. The inquiry must then be whether, under the facts of this case, the defendants may contradict by their testimony the positive recitals of the bond, which recitals they represented to the plaintiff to be true, and upon the strength of which the plaintiff relinquished what was at the time a very valuable right.

At the time the bond was given, the defendant McIntosh was the mother-in-law of Miller, and the defendant Hazel P. Miller was his wife. It appears that Mrs. Miller had loaned her husband about $2,500, which had been used by him in purchasing the store, and that he had promised to repay this amount to her. She testified that at the time the attachment was threatened she and her husband were having domestic troubles; that her husband had gone to San Francisco, and she did not know where he was; that, when she received notice of the contemplated attachment, she was ill at her mother's home; that she and her mother signed the bond of their own motion, upon the advice of their attorney and without any request from Miller so to do; that said bond was signed for the purpose of protecting the interest that she (Mrs. Miller) had in the store; that the property was attached, and later released by the sheriff after he received the bond; and that she was in the store when the sheriff released it from the attachment. Upon this testimony, as against the positive recitals of the bond, as found by the court, the defendants base their argument that the bond was not given by the defendant in the attachment suit for his benefit, but was given by persons having no right under the statute to give such a bond, and for the benefit of such persons alone. The trial court accepted this view and found in accordance therewith. The bond itself is signed, not only by the sureties, but by Frank N. Miller himself. It recites that whereas the said defendant, Frank N. Miller, is desirous of giving the undertaking mentioned in the writ, now, therefore, the undersigned, etc. There is in the record the testimony of Guy R. Kennedy, identifying the signature of Frank Miller upon the bond, and this witness also stated that he saw Miller in Chico between the time the writ was issued and the bond was given. Mrs. Miller herself admits that the signature upon the bond looks like the signature of her former husband. The decisions of this state are to the effect that the recitals of such a bond are conclusive as between the parties thereto. Pierce v. Whiting, 63 Cal. 540; Smith v. Fargo, 57 Cal. 159; Bailey v. Ætna Indemnity Co., 5 Cal. App. 744, 91 Pac. 416; McMillan v. Dana, 18 Cal. 346. The facts of this case are such as to call strongly for the application of the principle announced in the foregoing cases. Taking defendants' view of the evidence, we have a case where Mrs. Miller was seeking an advantage to herself—seeking to protect her interest in the property. She claims now that she had no right to protect this interest by furnishing an attachment bond of her own motion. Let us assume that she had not, and that the only right of this kind was in the defendant in the attachment suit, Frank Miller. If, then, this is assumed to be the law, we must also assume that such facts were known to her and her attorney. But she nevertheless caused a bond to be drawn by her attorney which purported to be authorized by Miller, and in form complied with the statutory bond which he might have furnished. She signed this bond; it was given to the sheriff. The record is silent as to who actually gave the bond to the sheriff, but we will assume that it was regularly given to him by a person authorized to do so. The bond was signed by Frank Miller; the property was released under said bond. The plaintiff in the attachment suit relied upon the representations made in the bond. Mrs. Miller accepted the release of the property; she knew it had been released in reliance upon the bond. Later, when called upon to respond upon the bond, she attempted to contradict the very allegations upon which she secured the release of the attached property. We must conclude that, though the facts be as found by the trial court, these defendants are nevertheless estopped by the recitals of the bond to prove such facts in contradiction of such recitals. The findings of the trial court upon which the judgment is based are findings which have no support except in this testimony on behalf of the defendants. The plaintiff objected to the introduction of such evidence, and his objections were overruled. This ruling was error; the testimony should not have been admitted, and, if it is ignored, there is no evidence in the record to sustain the findings upon which the judgment was based.

The case of Thayer v. Braden, 27 Cal. App. 435, 150 Pac. 653, relied upon by respondents, is not inconsistent with the views herein announced. The question involved here does not arise in that case.

As to the contention that the bond was given to prevent an attachment and not to release one, the case of Preston v. Hood, 64 Cal. 405, 1 Pac. 487, disposes of that contention.

The judgment is reversed.

We concur: BRITTAIN, J.; NOURSE, J.

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